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Folder Title:
[Bork Nomination] (2 of 3)
Box: Box 5

Saving Bork From Both Friends and Enemies

By Lloyd N. Cutler

WASHINGTON — The nomination of Judge Robert H. Bork to the United States Supreme Court has drawn predictable reactions from both extremes of the political spectrum. One can fairly say that the confirmation is as much endangered by one extreme as the other.

The liberal left's characterization of Judge Bork as a right-wing ideologue is being reinforced by the enthusiastic embrace of his neo-conservative supporters. His confirmation may well depend on whether he can persuade the Senate that this characterization is a false one.

In my view, Judge Bork is neither an ideologue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues. I base this assessment on a post-nomination review of Judge Bork's published articles and opinions, and on 20 years of personal association as a professional colleague or adversary. I make it as a liberal Democrat and as an advocate of civil rights before the Supreme Court. Let's look at several categories of concern.

Judicial philosophy. The essence of Judge Bork's judicial philosophy is self-restraint. He believes that judges should interpret the Constitution and the laws according to neutral principles, without reference to their personal views as to desirable social or legislative policy, insofar as this is humanly practicable.

All Justices subscribe at least nominally to this philosophy, but few rigorously observe it. Justices Oliver Wendell Holmes, Louis D. Brandeis, Felix Frankfurter, Potter Stewart and Lewis F. Powell Jr were among those few, and Judge Bork's articles and opinions confirm that he would be another. He has criticized the right-wing activism of the pre-1937 court majorities that struck down social legislation on due process and equal protection grounds. He is likely to be a strong vote against any similar tendencies that might arise during his own tenure.

Freedom of speech. As a judge, Judge Bork has supported broad constitutional protection for political speech but has questioned whether the First Amendment also protects literary and scientific speech. However, he has since agreed that these forms of speech are also covered by the amendment. And as a judge, he has voted to extend the constitutional protection of the press against libel judgments well beyond the previous state of the law. In his view, "It is the task of the judge in this generation to discern how the Framers' values, defined in the context of the world they knew, apply to the world we know." Over Justice (then Judge) Antonin Scalia's objections, he was willing to apply "the First Amendment's guarantee .. to frame new doctrine to cope with changes in libel law [huge damage awards] that threaten the functions of a free press."

Civil rights. While Judge Bork adheres to the "original intent" school of constitutional interpretation, he plainly includes the intent of the Framers of the post-Civil War amendments outlawing slavery and racial discrimination. In this spirit, he welcomed the 1955 decision in Brown v. Board of Education proclaiming public school segregation unconstitutional as "surely correct," and as one of "the Court's most splendid vindications of human freedom."

> He is neither an ideologue nor an extreme rightist.

In 1963, he did in fact oppose the public accommodations title of the Civil Rights Act as an undesirable legislative interference with private business behavior. But in his 1973 confirmation hearing as Solicitor General he acknowledged he had been wrong and agreed that the statute "has worked very well." At least when compared to the Reagan Justice Department, Judge Bork as Solicitor General was almost a paragon of civil rights advocacy.

Judge Bork was later a severe critic of Justice Powell's decisive concurring opinion in the University of California v. Bakke case, leaving state universities free to take racial diversity into account in their admissions policies, so long as they did not employ numerical quotas. But this criticism was limited to the constitutional theory of the opinion. Judge Bork expressly conceded that the limited degree of affirmative action it permitted might well be a desirable social policy.

Abortion. Judge Bork has been a leading critic of Roe v. Wade, particularly its holding that the Bill of Rights implies a constitutional right of privacy that some state abortion laws invade. But this does not mean that he is a sure vote to overrule Roe v. Wade; his writings reflect a respect for precedent that would require him to weigh the cost as well as the benefits of reversing a decision deeply imbedded in our legal and social systems. (Justice Stewart, who had dissented from the 1965 decision in Griswold v. Connecticut, on which Roe v. Wade is based, accepted Griswold as binding in 1973 and joined the Roe v. Wade majority.).

Judge Bork has also testified against legislative efforts to reverse the court by defining life to begin at conception or by removing abortion cases from Federal court jurisdiction. If the extreme right is embracing him as a convinced right-to-lifer who would strike down the many state laws now permitting abortions, it is probably mistaken.

Presidential powers. I thought in October 1973 that Judge Bork should have resigned along with Elliot L. Richardson and William S. Ruckelshaus rather than carry out President Richard M. Nixon's instruction to fire Archibald Cox as Watergate special prosecutor.

But, as Mr. Richardson has recently observed, it was inevitable that the President would eventually find someone in the Justice Department to fire Mr. Cox, and, if all three top officers resigned, the department's morale and the pursuit of the Watergate investigation might have been irrreparably crippled.

Mr. Bork allowed the Cox staff to carry on and continue pressing for the President's tapes — the very issue over which Mr. Cox had been fired. He appointed Leon Jaworski as the new special prosecutor, and the investigations continued to their successful conclusion. Indeed, it is my understanding that Mr. Nixon later asked, "Why did I go to the trouble of firing Cox?"

Lloyd N. Cutler, a lawyer who was counsel to President Jimmy Carter, was a founder of the Lawyers Committee for Civil Rights Under Law.

I do not share Judge Bork's constitutional and policy doubts about the statute institutionalizing the special prosecutor function. But if the constitutional issue reaches the Supreme Court, he will most likely recuse himself, as he has apparently already done in withdrawing from a motions panel about to consider this issue in the Court of Appeals. Moreover, as he testified in 1973, he accepts the need for independent special prosecutors in cases involving the President and his close associates.

Balance-the-budget amendment. While this proposed amendment is not a near-term Supreme Court issue, Judge Bork's position on it is significant because support for that amendment is a litmus test of right-wing ideology. He has publicly opposed the amendment on several grounds, including its unenforceability except by judges who are singularly ill-equipped to weigh the economic policy considerations that judicial enforcement would entail. This reasoning is far from the ritual cant of a right-wing ideologue.

Experience shows that it is risky to pinpoint Supreme Court Justices along the ideological spectrum, and in the great majority of cases that reach the Court ideology has little effect on the outcome.

The conventional wisdom today places two Justices on the liberal side, three in the middle and three on the conservative side. I predict that if Judge Bork is confirmed, the conventional wisdom of 1993 will place him closer to the middle than to the right, and not far from the Justice whose chair he has been nominated to fill.

Every new appointment creates some change in the "balance" of the Court, but of those on the list the President reportedly considered, Judge Bork is one of the least to create a decisive one.

The New York Times

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The Battle Over Bork

Senate Liberals Will Try to Block Nominee On Ideological Grounds

By STUART TAYLOR Jr.

WASHINGTON

WITH the direction of the Supreme Court, the Reagan legacy and the Democratic Presidential nomination all in play, the nomination of Judge Robert H. Bork portends the biggest ideological battle of President Reagan's second term. It will also be the major test of modern times on an issue as old as the Republic: Is the Senate's "advice and consent" role a mandate to reject a Presidential nominee to the Court because it dislikes his ideology?

The recent tradition, which the Administration says is rooted in the Constitution, has been Senate acquiescence on judicial nominees who share the President's philosophy. But liberals say the framers of the Constitution intended the Senate to play a coequal role; otherwise, they maintain, it would be rubber-stamping a President's effort to remake the law of the land — and to roll back constitutional protection of abortion rights — through appointments to the Court.

The liberals are citing experience going back to the debates at the Constitutional Convention and the Senate's rejection in 1795 of John Rutledge, President Washington's nominee to be Chief Justice, largely because of the nominee's opposition to the Jay Treaty with England. In the two centuries following, the Senate has rejected or forced the withdrawal of nearly 20 percent of presidential nominees to the Court.

Recent confirmation battles, even the liberals' attack on Justice William H. Rehnquist's elevation to Chief Justice, have focused on allegations of personal misconduct and veracity. But ideology was one key issue when President Johnson was forced to withdraw his nomination of Justice Abe Fortas to be Chief Justice in 1968. The senators opposing him included Strom Thurmond of South Carolina, now senior Republican on the Judiciary Committee, who took the occasion to filibuster against the liberal jurisprudence of the Warren Court and Howard H. Baker Jr., now White House Chief of Staff.

Ideology has assumed such prominence in the battle over Judge Bork because his vote and intellectually muscular conservatism seem so likely to tilt the Court sharply to the right on such politically and emotionally charged issues as free speech, affirmative action, religion and, most conspicuously, abortion. In many 5-to-4 decisions on these issues, the man he would replace, the moderate-to-conservative Justice Lewis F. Powell Jr., had voted with the liberals.

Judge Bork's eventual confirmation, even by a Democratic-controlled Senate, seems probable, though not assured. But with Senate hearings unlikely before

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Labor Day and a final vote unlikely before the Court's new term begins, the process promises to be one of long duration and unparalleled ferocity.

Liberal groups say their crusade to stop Judge Bork will be their major priority of the Reagan era. They will be pressing senators who are seeking the Presidency, especially Joseph R. Biden Jr., who as Judiciary Committee chairman will run the hearings.

President Reagan and his supporters on the right will push back with equal passion. The Bork nomination represents a last, best chance to advance Mr. Reagan's social agenda.

Genial and Tough

At the center of the storm stands a big, bearded, genial man, long a prominent critic of the "judicial imperialism" he ascribes to the "modern, activist, liberal Supreme Court." Most conspicuously, Judge Bork has denounced the 1973 decision identifying a constitutional right to abortion, and it seems clear he would provide the fifth vote to narrow, and perhaps overrule, that decision.

Liberal as well as conservative friends and associates praise Judge Bork as a deep thinker whose hard-edged theories are devoid of bigotry and tempered by a ready wit, who can enjoy a martini or a friendly debate with strong ideological adversaries. He won the American Bar Association's highest rating when nominated for the United States Court of Appeals for the District of Columbia, and the hunt for clouds on his integrity has been unavailing.

To his chagrin, the 60-year-old former Yale law professor has been known to the public chiefly as the Acting Attorney General who followed President Nixon's order to dismiss Archibald Cox as the first Watergate special prosecutor in the 1973 "Saturday Night Massacre." While opponents have deplored his role in that episode, some key participants say he acted honorably. Bork supporters question why the Senate should be any more troubled now than it was when it confirmed him unanimously in 1982.

His writings both as a scholar and as a judge clearly put him very far to the right on the spectrum of respectable legal thought. The law of the land would be very different today if Judge Bork had been in charge over the last few decades. He has denounced, for example, the "one person, one vote" rulings of the 1960's and decisions striking down poll taxes and protecting the advocacy of overthrowing the government.

While public controversy has centered on Judge Bork's denunciation of the abortion decision, his position on that issue is far closer to the mainstream of legal scholarship than some of his other views. He is assailed for what he terms "deference to democratic choice": his view that the judiciary should not override the social policy choices of elected officials by "creating" rights with no specific basis in the Constitution's language.

It is a measure of how deeply the institution of judicial review has taken root in America that elected senators are feeling so much pressure to reject a nominee whose philosophy rests on the premise that legislators should make the laws.

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ichael Barone

rk: The Liberals Have It Wrong

berals who have jumped so enthusically into the battle to deny confirmation to ge Robert Bork don't seem to realize it, but y are fighting yesterday's battles. And if y are so unfortunate as to win, they risk ing tomorrow's legal-political wars.

Bork, I think it is fair to say, is the closest ng we have to a principled believer in judicial straint—the idea that courts should overturn ws passed by legislatures only when the law olates an absolutely clear constitutional provion. His attackers do not really contest this oposition. Liberals don't like him because ey fear he would refuse to overturn laws they n't like, notably anti-abortion laws; they don't aim he would overturn laws they favor.

If that's so, then Bork is exactly the kind of stice liberals should want. Right now, and obably for as long as the 60-year-old Justice ork can be expected to serve, judicial reraint works for the liberals on most issues. merican courts are mostly conservative. merican legislatures are mostly liberal. Once was the other way around, and it was in berals' interest to make courts more powerful id legislatures less powerful. But today liberals have no reason to look for justices or octrines to overturn what legislatures do. hould be looking for justices and doctnat will let legislatures' acts stand.

y not be obvious that legislatures are ogtiv, especially to those in the warbackrooms of Washington liberal lobbies no imagine American legislatures are peopled ushy with Schlafly and Jerry Falwells. But percent of legislators are Democrats, and ney usually choose liberal leaders. Here in Congress, Jim Wright—a committed liberal on economics, the only national politician gutsy nough to speak out for a tax increase, and alert o civil liberties as well—succeeded Tip O'Neill s House speaker. In California, Willie Brown, a rilliantly skillful black from San Francisco, is peaker; New York's speaker is a liberal Jew rom Brooklyn, Melvyn Miller; Pennsylvania's is eroy Irvis, a black from Pittsburgh. Speakers George Keverian of Massachusetts, Vern Riffe f Ohio, Gary Owen of Michigan, Michael Madian of Illinois, Tom Loftus of Wisconsin, and Jon Mills of Florida are all Democrats, liberals on most issues, and sharp political operators to oot. Bill Hobby, who runs the Texas senate, is he main force there for spending more on ducation and welfare. And so on in smaller tates; but we've already covered the states where most Americans live.

Compare these legislatures with the courts. Most federal judges now are Reagan appointees, and while the balance would be changed if nocrat won in 1988, that's not a sure The recall by a 2-1 vote of Chief Justice Bird has left the California courts in the l of political conservatives for the first in 50 years. Mario Cuomo in New York has followed a policy of not appointing judges to further any liberal ideology. In the law schools the backers of liberal judicial theories are on the defensive, and much of the new debate is on the right. The argument there is whether judges should overturn laws passed by the legislatures as violations of economic liberty. On that argument Judge Bork is clearly identified as one who wouldn't overturn such laws.

But the liberals who are arguing against Bork aren't thinking about the cases seeking to overthrow the liberal laws of tomorrow. They're talking about decisions overthrowing the conservative laws of yesterday. (Most ludicrous is the argument, advanced even by The New York Times, that Bork might reverse the 1965 decision overturning the Connecticut law that banned contraceptives. That's a danger only if you think that some legislature is about to pass a law banning condoms—not terribly likely at a time when many think condoms are our front-line protection against AIDS.)

Foremost among liberals' concerns is abortion. It was the pro-choice groups which first loudly attacked Bork and whipped the Democrats into line; the National Abortion Rights Action League snapped its fingers and Joe Biden, doing what he said he'd never do, jumped. The pro-choice crowd fears, realistically, that Bork would vote to overrule *Roe v. Wade*, the 1973 decision that overturned all state anti-abortion laws. We would be back, Edward Kennedy says, to the days of back-alley abortions.

This is nonsense. The voters don't want abortion outlawed, and the mostly liberal legislatures are not going to vote to outlaw it. About a dozen states today pay for Medicaid abortions for the poor; they're not likely to turn around and ban abortion for everyone. Even in the supposedly dark ages before *Roe v. Wade*, legislatures were moving rapidly toward legalization. In the five years before the decision, legislatures in 18 states with 41 percent of the nation's population liberalized their abortion laws, often to the point of allowing abortion on demand. On the day the decision came down, about 75 percent of Americans lived within 100 miles of a place where abortions were legal. Other legislatures would surely have liberalized their abortion laws in the legislative sessions just beginning as the Supreme Court spoke. (Bob Woodward and Scott Armstrong in their book, "The Brethren," report that Justice Potter Stewart, influenced by his daughter, felt that few legislatures seemed likely to amend their abortion laws. On this political judgment he couldn't have been wronger; the legislatures were acting more rapidly on this issue than they have on almost any issue in 200 years of American history.)

Today the liberals who suppose that legislatures will put abortionists in leg irons are just as wrong—as the right-to-lifers are beginning to realize, with a sinking heart. A decision overruling *Roe v. Wade* would make pro-choice lobbyists work harder in state legislatures, which is where Justice Brandeis used to say liberal reformers should be busy working, and would force a lot of state politicians to take a stand on an issue they'd prefer to straddle. But that's what lobbyists and politicians are paid for.

Bork is not going to vote to overturn the Civil Rights Act (though he may say it means what it says and what Hubert Humphrey said it meant: that it forbids racial quotas), he is not going to overturn laws that can't be justified by free-market economics (as Judge Richard Posner would), and he is not going to overturn the graduated income tax or welfare programs (as University of Chicago professor Richard Epstein might). He is not going to write opinions that give thousands of conservative and sometimes just plain stupid state and local judges a warrant to overturn laws they don't like. The liberals are not likely to be granted another Reagan appointee who would be better for them than Bork. They should hope they're lucky enough to lose their fight to block his confirmation.

The writer is a member of the editorial page staff.

The New York Times

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Bork's Evolving Views: Far From the New Deal

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, July 7 — Judge Robert H. Bork, whose nomination to the Supreme Court has spawned a bitter ideological battle between President Reagan and Senate liberals, said today that he was not asked his views or asked to make commitments on specific issues before Mr. Reagan chose him last week.

"Nobody has ever on this job or any other jobs asked for any commitments," Judge Bork said in an hour-long interview today. "I was never interviewed as to where I stood on anything."

Judge Bork, whose positions on many legal issues are widely known from his years as a judge and scholar, otherwise limited himself to questions about his personal background and the evolution of his views. He brushed away with a laugh a question about whether if confirmed, he might have some surprises in store for the President who appointed him, or might even surprise himself. Such has been the case for some previous Supreme Court nominees, including Earl Warren.

Chewing Nicotine Gum

"Now, now," he said, in his first detailed newspaper interview since his nomination. "I really don't know and I'm not going to speculate about it."

The 60-year-old jurist answered questions today at his desk, in rolled-up shirtsleeves, occasionally popping a piece of nicotine gum in his mouth, an ashtray littered with cigarette butts in front of him. His once-red Brillo-pad hair and beard were flecked with gray. Two secretaries bustled in and out of his office bearing telephone messages and judicial business.

Judge Bork declined repeatedly, but with a smile, to answer questions that flirted with the boundaries of the condition he had placed upon the interview: that he would not discuss his current views, current issues or his nomination, and that that his discussion of his past views should be understood only as personal history, not as an index to his current positions.

He did recount some significant changes in his views over the past 35 years:

¶While in law school he converted from a mix of New Deal liberalism and Eugene V. Debs socialism to a more conservative point of view.

¶As a Yale law professor he abandoned an effort to develop a comprehensive "theory of when governmental regulation of humans is permissible."

¶He initially opposed but later supported a key civil rights law.

¶He reversed his position on some issues in cases pending before the United States Court of Appeals for the District of Columbia, on which he has sat since 1982.

Lengthy Evolution

"I may have given the impression in the past that I was pretty confident of my views and still changed them," said Judge Bork, known more for the philosophical consistency and rigor of his conservative views than for flexibility. "Your intellectual evolution, one hopes, will last as long as you do."

"In 1952, I was out on a street corner with my wife, passing out leaflets for Adlai Stevenson," he recalled. "It was the years '52 to '54 when I had this experience that changed my mind."

The experience, he said, was an exposure to "serious economics," largely at the hands of Aaron Director, an economist on the University of Chicago Law School faculty. It was "a little bit like a conversion experience," he said, one that made him see the world "altogether differently." The central lesson: "A free economy, within obvious limits, produces greater wealth for people in general than a planned economy does."

His Nickname: Red

Judge Bork recounted personal details ranging from his childhood nickname (Red) to how he nearly became a journalist instead of a lawyer and how he had to argue his first case before the Supreme Court as Solicitor General with less than a day to prepare.

Judge Bork chafed a bit at the label "conservative" that has been freely applied to him. "I think things are a little more complex than that," he said. "Just in general, you will find among liberals, you will find among conservatives, people in each camp who disagree with each other about a lot of things, some of them quite important things."

He said at one point, "My present politics are really not important to anybody."

He has often expressed the view that judges should rigorously avoid allowing personal political views to influence their decisions, and should, rather, confine themselves to interpreting the intentions of the framers of the Constitution and of the legislators and executive branch officials responsible for setting social policy.

Visit to Senators

The Judge paid courtesy calls on top Senate Republicans today. The nominee visited Senator Bob Dole, the Republican leader; Strom Thurmond of South Carolina, ranking Republican on the Judiciary Committee, and Alan K. Simpson of Wyoming, the Republican whip.

Both Senators Dole and Thurmond spoke later on the Senate floor, urging Democrats to complete the confirmation proceedings in time for the opening of the next Supreme Court term Oct. 5. "The country will suffer if the Court is not at full strength," Mr. Thurmond said. But there is a chance that the process will not even begin until September. Senator Joseph R. Biden Jr., the Delaware Democrat who heads the Judiciary Committee, is to meet with Democratic members of the committee Wednesday to discuss the schedule.

Judge Bork was born March 1, 1927, in Pittsburgh, the only child of what he described as a middle-class family. He grew up there and in the nearby suburb of Ben Avon. His father was a purchasing agent for a large steel company, and his mother, before her marriage, a schoolteacher.

He attended public schools, ranking at the top of his class, joined the debating team and gave up football as a 140-pound sophomore because, he said, he knew what he was best at. He was "editor-in-chief of the school paper and class president, that sort of thing."

He spent his senior year at Hotchkiss, a New England preparatory school, as the quality of his public school declined because many of the best teachers were drafted for service in World War II.

He joined the Marine Corps out of "youthful vainglory," he said. He was training for overseas duty when the atomic bombing of Japan ended the war, and he ended up in China for a few months guarding the Nationalist Chinese supply lines.

> 'Your intellectual evolution, one hopes, will last as long as you do.'

After the war, he graduated from the University of Chicago in less than two years and sent for an application to attend Columbia Journalism School.

"They said that if I'd go someplace else to college for a while, they'd send me an application blank," he recalled. "That didn't cheer me up, so I went to law school."

Cont.

He entered the University of Chicago Law School still "somewhere between a follower of Eugene V. Debs and Franklin Roosevelt, I don't know, New Deal." But in his third year, under the influence of economists including Mr. Director, his viewpoint began to change.

A Different View

"I think a lot of people in the law and economics movement have had that kind of an experience," Judge Bork said. "They hit a social science which suddenly begins to give them an organizing way of looking at the world, that they'd never had before, and it does make a deep impression, and it does have the effect of making you see the world just differently, altogether differently."

Judge Bork stressed, however, that he was not among those theorists who saw economic analysis as the solution to every legal problem.

After law school, Mr. Bork went to work for Kirkland & Ellis, a prominent Chicago law firm, working on complex litigation especially antitrust cases. He stayed from 1955 to 1962, becoming a partner.

In a decision written by Judge Robert H. Bork, a Federal court backed the right of banks to offer investment advice to the wealthy. *Page D1.*

"I realized I was going to be doing the same kind of thing over and over again, in different contexts, but roughly the same kind of thing," he said, "and I really hadn't gone into law with that sort of thing in mind. I had gone into it with a rather more intellectual interest in it."

After seriously considering an offer to be a writer for Fortune magazine, he took a teaching job at Yale Law School. He stayed there until 1981 except for a stint as Solicitor General of the United States and Acting Attorney General from 1973 to 1977.

It was at Yale, Judge Bork said, that he "had time to try to get my ideas in order," stimulated by "endless disagreements" with his best friend, Prof. Alexander Bickel, one of the nation's foremost constitutional scholars.

He Was Right

"I thought it was possible to work out a theory of when governmental regulation of humans is permissible, and on the other hand when individual freedom is required," Judge Bork said. "Alex thought that was wrong, that such a theory could never be worked out, and after a period of years of teaching it with him, I became convinced he was right."

Instead, he said, "I came to agree with his article on Edmund Burke's as the proper approach to politics." Judge Bork described this as "a non-abstract approach to government and politics, a prudential, balanced approach, the value of community, the value of tradition, a dislike for sweeping abstractions as characterized the French Revolution, a desire for a more humane society than that kind of abstraction produces."

Judge Bork noted a 1963 magazine article he wrote assailing a proposed Federal civil rights law that would have barred owners of restaurants, hotels and other public accomodations from excluding blacks. In his article he called it an unjustifiable limitation on the freedom of whites to choose with whom they would do business. Today, he called that view a manifestation of his then-exaggerated commitment to individual autonomy against the state.

Judge Bork declined to discuss the act that made him famous, his dismissal in 1973 of Archibald Cox as Watergate special prosecutor, on orders from President Nixon. He was Acting Attorney General at the time because two superiors had resigned.

"I've testified about it and I guess I'll testify about it again," he said. "I'd rather not run through it now."

Judge Bork denied a report in Time Magazine that he was "agnostic" on religion. "That's wrong," he said. "It's a very complex subject about which I think sometimes. I am not really an agnostic. On the other hand, I haven't got a simple position I can lay out for you. Nor do I want to. It's a fairly intimate thing."

Chicago Tribune

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Right and wrong ways to combat the Reagan court

Upon hearing the news of Robert Bork's nomination to the Supreme Court, Sen. Edward Kennedy was not shy about his reaction. "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution," Kennedy reported. He might have added that a resemblance between this fictional character and any person, living or dead, is purely coincidental.

Bork is a legal thinker of intellectual distinction and scholarly renown. The disadvantage of being

Stephen Chapman

selected for a position equal to his talents is having to be judged by people who are not.

Democratic Sen. Paul Simon of Illinois, an unapologetic ideologue of settled convictions, had his own doubts about Bork: "Is he too rigidly ideological? Is he open-minded?" Simon should be consoled by the knowledge that Bork won't prove any more ideological or closed-minded than Thurgood Marshall or William Brennan, though his views will be less congenial to the Left.

Three arguments have been made by those who oppose Bork's elevation to the Supreme Court. The first is that he is an extremist. The second is that he disgraced himself by firing special prosecutor Archibald Cox during the Watergate scandal. The third is that, as a member of the court, he will vote in a way that most Democrats won't like. This last, unlike the first two, has the virtue of honesty, but it rests on a novel idea about the Senate's role.

Bork is undoubtedly conservative in his views about the Constitution. This inclination shows itself in his overall philosophy, which holds that the courts should overrule legislative and executive decisions only when they have clear textual authority to do so.

It is also reflected in his conclusions about specific issues. He disagrees with the 1973 Supreme Court decision legalizing abortion, thinks evidence illegally obtained by police shouldn't always be barred as trial evidence, proposes to narrow the 1st Amendment's free speech protections and sees no constitutional protection for homosexual acts.

But Bork separates his political preferences from his constitutional judgments. The Bork who says sexually explicit material isn't protected by the 1st Amendment is the same one who as solicitor general dropped several obscenity prosecutions. Although he has endured much press abuse, he is distrustful of libel actions. Despite his fervent defense of the free market, he thinks the Constitution allows extensive regulation of commerce.

But Bork is no more an extremist than Ronald Reagan, who has been twice elected President by large margins—unless Kennedy wants to argue that the American people are right-wing nuts. Even by the more liberal standards of law school faculties, Bork is well within the boundaries of respectable thinking. His views on the 1973 abortion ruling, for example, are shared by many liberal scholars who don't want abortion banned.

The Saturday Night Massacre is an equally empty issue. Only a lunatic could believe that Bork fired Cox to help himself or to frustrate the investigation of President Nixon. Bork had to be talked out of resigning himself by Elliot Richardson, who had resigned rather than fire Cox, and he successfully pressed Nixon to appoint another special prosecutor. Richardson now praises Bork for his handling of the matter.

That leaves the argument that Bork should be rejected because he will render verdicts that Ted Kennedy and Paul Simon won't like. Granted, the Senate has the right to use any grounds it wants in evaluating judicial nominees, but it has a clear tradition of letting the president have his way on their judicial philosophy.

Kennedy's fondness for ideological criteria is newly acquired. Back in 1981, he and other liberal senators scolded conservatives who regarded Sandra Day O'Connor's past support of abortion as grounds for voting against her.

Besides, unless the Democrats despair of ever regaining the White House, they should think twice about overturning tradition. When President Dukakis names his replacement for Justice Marshall, Democrats will prefer a deferential Senate. If they reject a qualified nominee to the court because he holds unwelcome beliefs, they may find the decision coming back to haunt them.

By all established criteria, Bork ought to be approved. If the Democrats don't like the court's makeup, they should work to change it just as Reagan changed it. The right tool for that job is not the confirmation power but the ballot box.

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:k Believes in the Words

(eliance on the Constitution Doesn't Make Him an Ideologue

By BERNARD DOBRANSKI and LEON LYSAGHT

There is an unfortunate trend these days) further erode the distinction between iw and politics. The formation and en- rcement of laws is, of course, connected nth the political process. On the other and, the interpretation of the law should e divorced from the political process as uch as possible. The problem is that the Constitution has, more and more, become n arena for carrying on political contests. Where proponents see little hope of legis- ative success, they have sought to cast heir claims in constitutional molds. As a esult, there are those who are more con- erned with a judge's politics than with his r her view of the law and the role of the udiciary in our form of government. What s even more alarming is the growing endency to interpret judicial decisions in olitical terms that only take account of esult

izard of commentary surround- nomination of Judge Robert H. or the vacancy on the Supreme Court obscured the legitimate issues and erved to focus attention on the irrelevant and unknowable. We do not and cannot know whether Bork's heart was pure on the day he fired Archibald Cox. What we can determine is whether his conduct was within, and indeed required by, the law. We cannot know precisely how Bork, now on the U.S. Court of Appeals, will vote on a variety of issues that will eventually appear before the Supreme Court. What we can reasonably expect to understand is Bork's opinion as to the nature of the U.S. Constitution and his approach to interpret- ing it.

In a 1986 article in the San Diego Law Review, Bork sets forth his views on the proper role of the judiciary and the ap- proach that it ought to take to constitu- tional interpretation. He discusses the problems created by the use of a concept like the "right of privacy" as the criterion for determining the result in Griswold vs. Connecticut. "My point," Bork says, "is simply that the level of abstraction chosen makes the application of a generalized right of privacy unpredictable." What concerned P s the trend toward generalization l decisions even when the Consti- is silent on an issue, and what this ght lead to as a source of unstructured judicial power.

The whole tenor of Bork's article is strongly reminiscent of the late Supreme Court Justice Hugo Black's dissent in the Griswold case. "Privacy," Black said, "is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things . . . ." Black's view of the manner in which the Supreme Court ought to interpret the Constitution has much in common with Bork's as expressed in the San Diego Law Review article.

Both jurists take the position that the function of the Supreme Court is to inter- pret the Constitution by reference to the words that appear in it. Both believe that the words can and ought to be limiting factors on the discretion that judges have in making their decisions. Yet there is a growing group of law professors who think otherwise. And there appear to be a num- ber of senators who believe that political ideology is the determining factor in judi- cial decision-making.

But political beliefs held before appoint- ment to the Supreme Court have not been reliable predictors of judicial behavior. Hugo Black's political background (which included membership in the Ku Klux Klan) would hardly have predicted a judicial record of preserving individual rights. Earl Warren's performance surprised more than a few people.

More is known about candidates who have had judicial experience than those who have been selected from the political arena. But what is it that we know about current or former judges?

What we know is whether they view the law as a rational enterprise and whether, as judges, they are of the opinion that they must give good reasons for the decisions that they make. We can discover whether they believe that a judge is morally su- perior and, therefore, morally justified in substituting his or her opinion for the opinions of legislators or the general popu- lation. In short, what we can find out, and what we should want to know, is the deg- ree to which the candidate for judicial office is committed to the rule of law.

It is appropriate to ask a political candi- date what his or her opinions are in respect to abortion, prayer in schools, gay rights or any other matter within the political domain. What we should ask the candidate for judicial office is his or her opinion with regard to the law on these matters, and whether the candidate is prepared to faith- fully apply the law. It is important to de- termine whether the judicial candidate differentiates between his preferences on matters of social policy and his view of the law on these same issues.

Bork has articulated his views on these matters in numerous law-review articles and judicial opinions. What he has said is neither unique nor radical. As previously noted, his position on constitutional inter- pretation bears striking resemblance to Hugo Black's. The view that a judge must justify his decisions by reference to the established meaning of the words does not justify calling him a right-wing ideologue. The nomination, and confirmation, of Judge Bork will not mean substantial change in life as we know it, no matter who "we" are.

Bernard Dobranski is the dean and Leon Lysaght is an associate professor of law at the University of Detroit School of Law.

NEW YORK TIMES
December 10, 1981
p. A30

Echoes of Watergate

Historical news quiz: What do Robert Bork and Maurice Stans have in common? One answer is Watergate, and now there is another one. In the last few days President Reagan has nominated both men for Federal office, Mr. Bork as an appellate judge in Washington, Mr. Stans as a director of a Federal investment corporation. At this point the parallels abruptly stop.

Mr. Bork is the man who carried out President Nixon's command that the Watergate special prosecutor be fired, in the famous Saturday Night Massacre of October 1973. He was bitterly assailed at the time ("Nixon's Bork is worse than his bite," read one poster), but he had a principled rationale. He might not agree with a particular Presidential order, he said, according to one account, but nonetheless felt a duty to carry it out.

Mr. Bork, moreover, is a legal scholar of distinction and principle. For instance, he opposes the various court-stripping bills that have been introduced in Congress, a braver position than any so far taken by his Justice Department sponsors. One may differ heatedly with him on specific issues like abortion, but those are differences of philosophy, not principle. Differences of philosophy are what the 1980 election was about; Robert Bork is, given President Reagan's philosophy, a natural choice for an important judicial vacancy.

The same cannot be said about the appointment of Maurice Stans to the Overseas Private Investment Corporation. It is a much less important job, a part-time, two-year term on a 15-member board concerned with foreign economic policy. Still, the nomination probably makes him the first person with a criminal record from Watergate to be nominated to Federal office.

It is true that he was acquitted of obstructing justice and other charges related to Robert Vesco, the fugitive financier. But he also pleaded guilty to five misdemeanor charges of campaign contribution violations in the 1972 Nixon campaign. As finance chairman, the former Commerce Secretary squeezed a record $60 million out of contributors.

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Circumstances suggest that the White House wanted to hide the nomination. It was announced at the most sluggish time, on a Friday afternoon, embedded among a dozen other appointments, and without explanation.

Camouflage notwithstanding, the nomination conveys dismaying signals. One is that the President, wary of formal Watergate clemency, is willing to give a back-door pardon. More troubling, it implies White House indifference to the campaign finance law. Why, inviting these inferences, did Mr. Reagan make this nomination? It requires confirmation hearings; perhaps the Senate can find out.

Chicago Tribune

DATE: July 2, 1987
PAGE: 9

The inevitability of Robert Bork

Ever since he went onto the federal appeals court during Ronald Reagan's first term, Judge Robert Bork has been thought of as a Supreme Court justice-in-waiting. That is simply because he is so clearly right for the job.

Though he has taken public positions and written judicial opinions that have upset political conservatives from time to time, his legal philosophy fits with what President Reagan has always said he wanted: Judge Bork has been consistently skeptical about using judicial power to set social policy.

He does not shy away from enforcing the provisions of the Constitution against political incursions; he has been vigorous in protecting political debate against government regulation, for example. But he has no taste for extending the reach of the Constitution beyond the values it announces in the text. This is why he has been critical of extending the judge-made right of privacy.

A former professor at Yale Law School, he has the intellectual strength to be a formidable spokesman for this point of view on the court. His scholarship both on and off the bench commands great respect even among those in the legal profession who do not share his views. And he has a witty, direct and often eloquent writing style that give his opinions special force.

Judge Bork also has had practical experience in government. As solicitor general in the Nixon and Ford administrations, he ran the office that argues the government's positions in the Supreme Court. He also served as acting attorney general during the Watergate tempest, and during Edward Levi's term as attorney general he was a close adviser on a wide range of issues.

His record during Watergate surely will be examined during his confirmation hearings because he gained notoriety as the man who fired the first special prosecutor, Archibald Cox. Opponents already are lining up to try to discredit him in this way because they are afraid he would swing the court to the right. And partisans will do anything to make the confirmation of a strong conservative difficult. But a fair appraisal of Judge Bork's service during Watergate will conclude that he acted with integrity and honor throughout.

When President Nixon ordered Atty. Gen. Elliot Richardson to fire Mr. Cox, Mr. Richardson resigned because of a commitment he had made to Congress not to impede the special prosecutor's work. William Ruckelshaus, deputy attorney general, also refused and left office. Judge Bork had made no commitment and recognized that the president had the authority to remove Mr. Cox if he chose. He planned to do the firing and then resign. But Mr. Richardson talked him out of resigning for fear that President Nixon would appoint an acting attorney general from the White House staff.

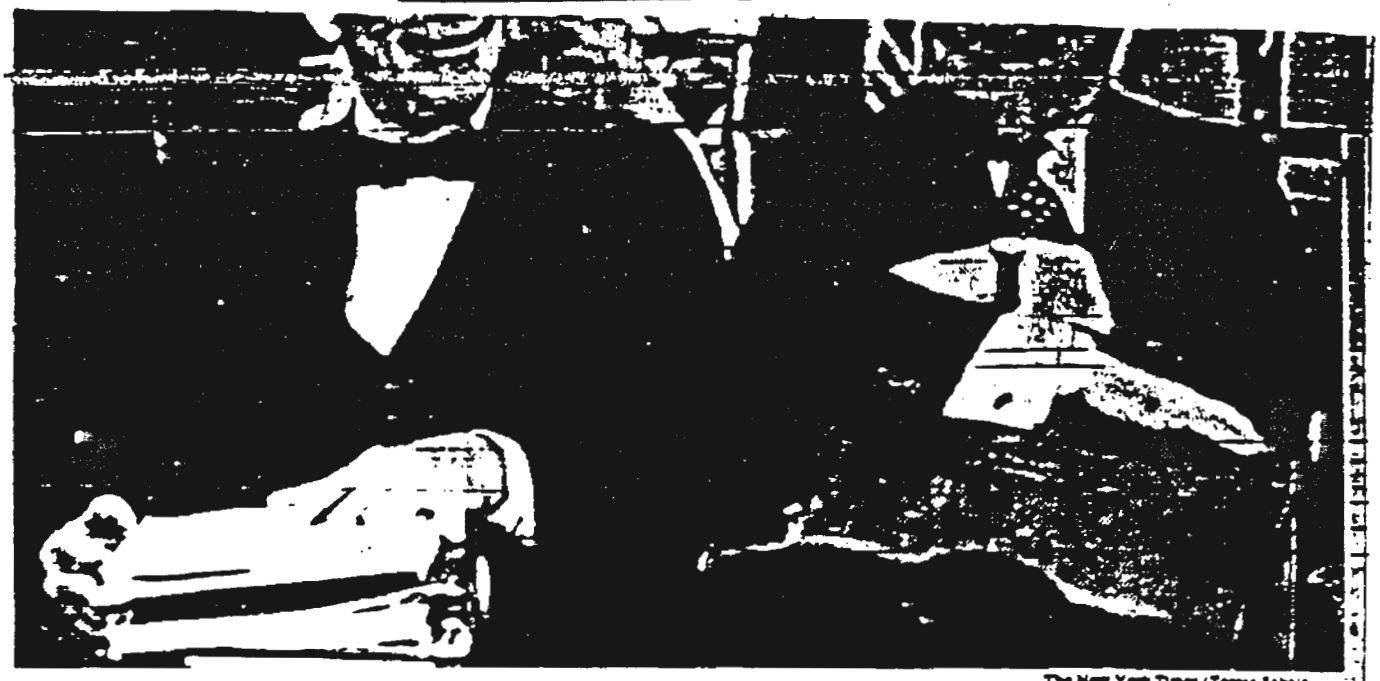
Judge Bork took quite a beating at the time, but his actions left a strong individual at the Justice Department to hold it and the special prosecutor's staff together and to push President Nixon to replace Mr. Cox with someone of equivalent integrity and skill. Judge Bork has nothing to apologize for.

Though liberals are gearing up for a fight and a number of Democratic presidential candidates, including Illinois Sen. Paul Simon, will have key roles in the process, it will be difficult for anyone to find a reason for the Senate not to confirm Judge Bork. The principal objection to him is that he is a judicial conservative, which is not an appropriate reason. His views are well within the mainstream of American jurisprudence; in fact, as a scholar and judge he has helped shape legal thinking in many fields, including constitutional law.

Senate Majority Leader Robert Byrd has threatened to stall the confirmation because he does not believe he has been getting cooperation from the White House on other matters. That is irresponsible. The Senate Judiciary Committee hearings should be thorough, but they should not be used for grandstanding or delay. There is no reason today why the court should have to begin its fall term short-handed.

If the members of the United States Senate are as intellectually honest as Judge Bork, they will have no choice but to consent to placing him on the court that he has seemed destined to join.

The New York Times, June 2, 1981



The New York Times/Teresa Zabala

Former Solicitors General Archibald Cox, left, and Robert H. Bork yesterday at a Senate subcommittee hearing

2 Ex-Solicitors General Oppose Bill to Curb Abortions

By BERNARD WEINRAUB

WASHINGTON, June 1 — Two former Solicitors General, Archibald Cox and Robert H. Bork, told a Senate panel today that proposed legislation seeking to make abortion illegal was unconstitutional, a view met by strong disagreement from other legal experts.

Appearing before the Judiciary Subcommittee on the Separation of Powers, whose chairman, Senator John P. East, strongly opposes abortions, Mr. Cox and Mr. Bork said in essence that it was improper for Congress to tamper with the ultimate authority of the Supreme Court, which upheld a right to abortions in 1973.

Mr. Bork, the Alexander M. Bickel Professor of Public Law at Yale University and a conservative law scholar, said: "Only if we are prepared to say that the Court has become intolerable in a fundamentally democratic society and that there is no prospect whatever for getting it to behave properly, should we adopt a principle which contains within it the seeds of the destruction of the Court's entire constitutional role."

Mr. Cox, a Harvard Law School professor, said that the current anti-abortion measure before Congress "should be rejected as a radical and dangerously unprincipled attack upon the foundations of our constitutionalism."

At issue is a bill sponsored by Senator Jesse Helms, Republican of North Carolina, and Representative Henry J. Hyde, Republican of Illinois, declaring that human life "shall be deemed to exist from conception," thereby allowing states, if they choose, to prosecute abortion as murder. The bill, which is supported by Senator East, a North Carolina Republican, is based on a clause of the 14th Amendment that empowers Congress to enforce guarantees of due process and equal protection.

Enactment of the Helms-Hyde bill, said Mr. Cox, "would undermine the basic balance of our institutions."

The appearance of Mr. Bork and Mr. Cox at the crowded hearing stirred considerable interest. It was Mr. Bork, as Solicitor General in 1973, who carried out President Nixon's order and dismissed Mr. Cox as special Watergate prosecutor in the "Saturday night massacre." The two men chatted and smiled for photographers before the start of today's hearing.

Six other witnesses appeared at the hearings, which are scheduled to resume in the middle of June. These were Profs. Robert Nagel of the Cornell University Law School, and Basile Uddo of the Loyola University Law School, and four historians, Profs. Carl Degler of Stanford, James Mohr of the University of Maryland in Baltimore, William Marshner of Christendom College in Front Royal, Va., and Victor Rosenblum of Northwestern University.

Criticism for Bill's Opponents

Professor Uddo said it was within Congress's power, "as a co-equal branch" of the American Government, to "decide a question not answered by an applicable Supreme Court decision." Professor Uddo was especially caustic about legal experts opposing the bill.

He singled out Prof. Laurence H. Tribe, a Harvard University constitutional law specialist, who recently told the panel that there was a "unison of voices" among "virtually all careful students of the Constitution" opposing the bill.

Professor Uddo said: "The only way that one can accept that such a unison of careful scholars exists is if one believes that the entire universe of careful constitutional scholars is coterminus with those who teach at certain institutions and hold certain political-and-legal views." He termed those views "self-serving."

The New York Times

3/16/81

The Congress Vs. the Courts

New Challenge Focuses Upon Jurisdiction Issue

By STUART TAYLOR Jr.

Special to The New York Times

WASHINGTON, March 15 — An effort by conservatives in Congress to strip the Supreme Court and lower Federal Courts of jurisdiction in cases involving school prayer, busing and abortion could lead to a fundamental shift in Government checks and balances, in the view of concerned legal experts.

News Analysis

If the bills pass and are upheld by the Supreme Court against constitutional challenges, they would also apparently lead to enforcement by state courts of conflicting interpretations of the same provisions of the Federal Constitution. For the first time since it was established, the Supreme Court would be powerless to review and resolve conflicting state court rulings.

A proposal by Senator Jesse Helms, Republican of North Carolina, to take away Federal court jurisdiction over state plans for school prayer passed the Senate in 1979 but died in a House subcommittee last year. Opponents fear that it may be difficult in this year's more conservative Congress to stop this proposal and others that would take away Federal court jurisdiction over busing of school children for desegregation and abortion.

Subcommittee hearings in the House and Senate Judiciary Committees may begin next month on more than a dozen bills to impose restrictions on Federal court jurisdiction.

The constitutionality of these and similar proposals has been debated by scholars as well as members of Congress for decades. There is no definitive precedent. Although Congress has broad powers to regulate the kinds of cases that may be decided by the Federal courts, it has refrained for more than a century from enacting legislation designed to prevent them from enforcing constitutional rights declared by the Supreme Court.

As the checks and balances system evolved, Chief Justice John Marshall, in the early 1800's, asserted the supremacy of the Federal judiciary over Congress and the states in matters of constitutional interpretation.

This year, according to Carl Anderson, an aide to Senator Helms, "there will be a serious effort" by conservatives to enact legislation restricting Federal court jurisdiction over school prayer and busing, areas in which he said the Supreme Court had "usurped powers not granted to it by the Constitution."

"We're a lot stronger this year" on these issues, Mr. Anderson said. He said that Senator Helms and other conservative leaders would probably not push so hard for jurisdictional restrictions with respect to abortion because they are concentrating on a bill that would ban abortion.

The impetus for the bills restricting Federal court jurisdiction comes from many conservatives' outrage over Supreme Court decisions over 20 years. The Justices have prohibited prayer in public schools as an unconstitutional "establishment of religion," have required busing to desegregate public schools, and have struck down state laws restricting the right to abortions.

Unlike pending proposals for constitutional amendments, legislation restricting Federal court jurisdiction would not directly overrule these precedents. But it would remove the authority of the Federal Courts to enforce them.

Would Leave It to State Courts

This would leave it to state courts to enforce their own interpretations of the Constitution in these areas, applying previous Supreme Court precedents or ignoring them.

The primary attraction of these bills to conservatives is that they would be easier to enact than constitutional amendments, which must be approved by a two-thirds vote in each House of Congress and ratified by 38 states.

The court jurisdiction bills would become law if passed by a simple majority of each House and signed by the President, subject to judicial review of their constitutionality.

Although Congress has no power to overrule by legislation Supreme Court interpretations, the Constitution states that the Supreme Court's jurisdiction over most cases is subject to "such exceptions, and under such regulations, as the Congress shall make." The lower Federal courts were established by Congress, not by the Constitution itself, and Congress has traditionally determined what kinds of cases may be brought before them.

Conservative legislators and scholars such as Prof. Charles E. Rice of Notre Dame Law School read these provisions as giving Congress power to strip the Federal courts of jurisdiction over just about any constitutional issue.

View of Yale Professor

Opponents of the bills consider them unwise and probably unconstitutional," as Prof. Robert H. Bork of Yale Law School put it.

Professor Bork, a conservative who served as Solicitor General under Presidents Nixon and Ford, criticized the Supreme Court for "exceeding its mandate" in its decisions on abortion and busing. But he opposed congressional attacks on jurisdiction as a "cure that may set a precedent more damaging than the wrong Supreme Court decisions."

Liberals who applaud the Supreme Court's decisions on school prayer, busing and abortion are all the more alarmed at what John Shattuck, a Washington lobbyist for the American Civil Liberties Union, calls the "attacks on the independence of the Federal courts" by conservatives in Congress.

If Congress does pass laws attempting to strip the Federal courts of their power to enforce specific constitutional rights, Mr. Shattuck said, the Supreme Court should strike them down as violating both the constitutional provisions on which those rights are based and the provision making the Constitution the "supreme law of the land."

1ST STORY of Level 1 printed in FULL format.

July 6, 1981

SECTION: Washington Whispers; Pg. 9

LENGTH: 60 words

BODY:

Republican Senate conservatives are signaling Reagan not to send up the name of Robert Bork for the impending vacancy on the Supreme Court. The right-wingers vow to fight nomination of Nixon's former solicitor general because he testified against an anti-abortion bill decreeing that life begins at conception.

Washington Post Editorial

December 29, 1984

Posters in Metro

"TIRED OF THE Jelly Bean Republic?" asks artist Michael Lebron on an anti-Reagan poster he sought to display in Metro subway stations. The photomontage under this headline shows the president and a number of administration officials seated at a table laden with food and drink. The men are laughing, and the president is pointing to the right side of the poster where another picture of poor people and racial minorities is displayed.

Metro officials, who sell advertising to political and advocacy groups, refused to rent space for this poster on the grounds that it was deceptive. The other day, the U.S. Court of Appeals ruled that Metro had violated Mr. Lebron's right to free speech.

This country, the Supreme Court said 20 years ago, has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." Public agencies allocating public space for the expression of political views have a special obligation to protect these rights.

In this case, Judge Robert Bork wrote, it was easy to see why the censorship was unwarranted. The poster was not deceptive at all; it was a straightforward anti-Reagan statement that made no pretext of objectivity. No reasonable person would have thought the scene portrayed was a single photograph: the lighting was different in the two halves of the picture, the figures were not in proportional sizes and the artist even offered to add a disclaimer stating that the scene was a composite of photographs.

But Judge Bork and Judge Antonin Scalia—two of the court's conservative members—would have reversed Metro's action on even broader grounds if it had been necessary. Both believe that an agency of a political branch of government cannot impose prior restraint on the publication of a political message even if that message is false. Nothing compels Metro to accept political advertising for subway displays, but once the decision is made to accept some of these statements, public officials cannot pick and choose what messages are acceptable on the basis of subjective judgments of what is "derisive, exaggerated, distorted, disceptive or offensive," as the Metro regulation allowed. That is an interference by the government with a citizen's right to engage in free political discourse. The court's message is clear and it is right.

ABROAD AT HOME | Anthony Lewis

Freedom, Not Comfort

The Founders and the First Amendment

BOSTON

The Mobil Corporation has for some time been running message advertisements critical of the press. The latest, pegged to the trial of Gen. William Westmoreland's libel suit against CBS, was headed "A lie is a lie is a lie." It showed something that I doubt Mobil intended: how hard it is to accept the nature of American freedom.

The Mobil ad and other angry comments on the press evoked by the Westmoreland case have in common a number of premises: High public officials have a right to be protected by the law from press abuse. No one should be able to print lies about officials without punishment. An irresponsible press — critics often call it the liberal press — is trying to change American tradition in these matters.

As a matter of history, these propositions are false. As a matter of freedom, they are dangerous. And it is not the press that says they are. Jefferson said so. Madison said so.

Congress once passed a law punishing "false, scandalous and malicious writing" against the President and other high officials. That was the Sedition Act of 1798 signed by our last Federalist President, John Adams. It covered only damaging lies, yet Jefferson and Madison thought it was a fundamental affront to the whole new constitutional system. Why?

In the United States, citizens were to make the ultimate political decisions. To perform that role, Madison said, they must have "the right of freely discussing public characters and measures" — and freedom included the right to make mistakes, even offensive and deliberate ones. If Sedition Acts had stopped the press from attacking the Crown, Madison said, America might still be "groaning under a foreign yoke."

The Madison-Jefferson view carried the day. The Sedition Act expired after two years without a definitive court test, but since then most commentators have regarded it as unconstitutional — and so has the Supreme Court.

All this was not just a legal abstraction. American society operated on the premise that anything goes in political debate. British and other foreign commentators were often shocked at the verbal abuse in our public life, but that was the system.

George Washington and Abraham Lincoln suffered attacks far worse than anything encountered by General Westmoreland or his contemporaries. And they did not sue. Through most of American history high officials dealt with abuse by answering back, not by going to court.

That is why it is so odd to hear charges that the press is trying to change the rules of the game now. To the contrary, it is offended officials who are trying to make a radical change. They are suing in large numbers — generals, governments, senators, judges — and for enormous sums. When a Westmoreland claims $120 million, no one can doubt that the intended effect is to intimidate.

In short, the libel suit has become something quite different in 1984. It is being used as a political weapon, to stifle criticism and debate. It is in that context, that reality, that some in the press and the law have begun thinking about new ways of protecting the Madisonian premise of our democracy. One idea — the one that so outrages Mobil — is that high officials should not be able to sue for libel at all.

Last week an extraordinarily thoughtful judicial opinion threw light on the changing nature of libel suits. It was by Judge Robert H. Bork of the U.S. Court of Appeals for the District of Columbia.

The case before the court was an attack by columnists Rowland Evans and Robert Novak on a Marxist professor, Bertell Ollman, who sought $6 million in libel damages. Such "disproportionate" damages, Judge Bork said, could readily "silence political commentators forever." He said the recent surge of large libel actions loomed as "a threat to the central meaning of the First Amendment."

The close issue for a divided court was whether an attack on Professor Ollman was opinion, which is not subject to libel actions, or fact. But Judge Bork put that fine distinction aside. Someone who goes into "the public political arena" as the professor had, he said, must expect that "the debate will sometimes be rough and personal." It was a rich opinion, impossible to summarize adequately, but at the heart was the idea of uninhibited debate in the political arena.

"Perhaps it would be better if disputation were conducted in measured phrases and calibrated assessments," Judge Bork said. "But that is not the world in which we live, ever have lived or are ever likely to know, and the law of the First Amendment must not try to make public dispute safe and comfortable." □

The Washington Post
July 12, 1987

Judge Bork on the Bench

AMONG THE MANY documents that will be considered by the Senate during the debate on Judge Robert Bork's nomination to the Supreme Court are the opinions he has written during the past five years on the U.S. Court of Appeals for the District of Columbia Circuit. There are 138 of them. In themselves they do not give a complete picture, since a judge's work product is determined by the kind of cases he is assigned. In addition, an appellate court judge is bound to follow precedents set by the Supreme Court even when he disagrees with them, so his own personal views may not come through. Still, amid the many dozens of cases that are of very little general interest—and occasionally stunningly boring—some consistent patterns are discernible, and a couple of cases are especially interesting. There is much more to be explored on the subject of Judge Bork, but today we take up some aspects of his Court of Appeals record.

It has been said that despite some sharp philosophical divisions on the Court of Appeals, Judge Bork is personally popular among his colleagues. He has also agreed with the more liberal members of the court on many occasions, usually in cases on appeal from federal agency rulings. He has generally been supportive of agency decisions, and in criminal cases he most often ruled in favor of the government. His opinions reflect his view that not every problem in the world should be resolved in court, and he has ruled often to dismiss suits for lack of standing. These views are most strongly reflected in quasi-political cases involving such questions as committee assignments in the House of Representatives and the U.S. role in El Salvador. He ruled that the federal courts were not the place to resolve these problems.

Two areas of judicial philosophy on which Judge Bork has written major opinions are of particular interest. The right of privacy is the principal underpinning of the Supreme Court ruling in *Roe v. Wade*, legalizing abortion. If there is no constitutionally guaranteed right of privacy, state legislatures would be free to prohibit abortion. In *Dronenburg v. Zech*, a 1984 case in which Judge Bork wrote the opinion, a discharged Navy petty officer challenged his dismissal for homosexual conduct on grounds that such activity was protected by a constitutional right to privacy. In ruling that this activity was not protected by the Constitution, Judge Bork wrote extensively on the right to privacy and added in a footnote the comment that in academic life he had "expressed the view that no court should create new constitutional rights" (like privacy) but conceded that these views are "completely irrelevant to the function of a circuit judge." The Senate will want to ask him how these views will be reflected if he becomes a Supreme Court justice with the power to overturn earlier rulings of the high court. His attitude toward overturning settled cases is one of the main subjects that needs exploring.

In another 1984 case, *Ollman v. Evans*, Judge Bork wrote a concurring opinion setting out his views on the First Amendment. In dismissing a libel action brought against the columnists Evans and Novak, he wrote a vigorous defense of a free press threatened by "a freshening stream of libel actions," which may "threaten the public and constitutional interest in free, and frequently rough, discussion." He also made these observations on the role of the courts in protecting rights that *are* clearly guaranteed in the Constitution: "There would be little need for judges . . . if the boundaries of every constitutional provision were self-evident. They are not. In a case like this, it is the task of the judge in this generation to discern how the Framers' values, defined in the context of the world they knew, apply to the world we know. . . . To say that such matters must be left to the legislature is to say that changes in circumstance must be permitted to render constitutional guarantees meaningless. . . . A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty."

This defense of flexibility is quite contrary to what has been widely described as Judge Bork's rigidity on questions of "original intent." What does it mean? That's another key question that should be put to Judge Bork by those senators—surely there are some?—who are not going into the inquiry with minds made up. How does Judge Bork see the role of judges who seek to apply the original intent of the Framers of the Constitution? Where does the *Ollman* decision fit into that?

The Washington Post

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?

The Washington Post

July 11, 1987

Mark Shields

Will Democrats Self-Destruct on Bork?

Because she is Democratic National committeewoman from New York, Hazel Dukes undoubtedly knows that in four of the last five presidential elections her party has been badly beaten. She also undoubtedly knows the recurring doubts American voters have expressed during those years about the Democrats' national leadership: inability to define an overriding national interest distinct from the narrow interests of special constituencies; lack of tough, independent leadership; the perception that Democrats were no longer pioneers of change but protectors of the status quo.

Because she is also a board member of the NAACP, Hazel Dukes this week introduced New York Democratic Sen. Daniel Patrick Moynihan to that group's convention as someone who would certainly vote against the nomination of Judge Robert H. Bork to the Supreme Court. When she later learned that Moynihan would not say how he intended to vote on Bork, Hazel Dukes responded: "I have the votes in New York to defeat him. When I get together with his staff in New York, I'll get what I want. It's strictly politics."

Now, think just for a minute of what this means for the current plight of the Republicans. Here they are with an administration everywhere under investigation or suspicion and a president who looks to be the only living American with White House mess privileges who did not know how the contras were meeting their payrolls and loading their muskets. In November of last year the GOP lost the Senate and in November of next year they look to be a good bet to lose the White House. But wait: see if the Senate Democrats genuflect before the organized pressure groups on the nomination of Bork. A return to voter confidence and national leadership for the Democrats does not lie in a Senate filibuster of an able Supreme Court nominee.

In those last five presidential elections, the Democrats have won only 21 percent of the nation's electoral votes. One of the consequences of any party's being that noncompetitive for such an extended period is that the other party gets to nominate the members of the federal judiciary. And, except for when they are audible and palpable turkeys, those nominees are usually confirmed.

During the past 10 years, a lot of Democrats have revealed themselves as both unquestioning defenders of the status quo and anti-majoritarian snobs. There was a time, not too long ago, when Democrats genuinely welcomed huge Election-Day turnouts, confident that the more people who voted the better the party of the people would do. Now the preference seems to be for law clerks, not voters, to decide questions of public policy. That attitude is fundamentally anti-democratic.

The Bork nomination can surprise no one. In two national elections, Ronald Reagan carried 93 of 100 states while repeatedly amplifying his views on narrow construction and traditional values. Bork's credentials and his record entitle him to a prompt hearing and serious consideration. The arguments against his confirmation do not want for material or for eloquent advocates. But those Democrats who would prefer one day soon to propose nominees and ideas rather than simply to oppose them as they now do have to realize that the political power to initiate lies not in the approving press releases of pressure groups but in the White House.

And what about Sen. Moynihan, with a 100 percent pro-NAACP voting record? Now if he conscientiously studies the record and sincerely opposes the Bork nomination, Moynihan is guaranteed that his 1988 opponent, thanks to Hazel Dukes, will be able to accuse the Democrat of buckling under to interest-group extortion.

To win the White House, the Democrats must nominate a leader with vision who is independent, tough and can effectively define the national interest. To many thoughtful Democrats, Joe Biden of Delaware, the chairman of the Senate Judiciary Committee, looked like he could be that leader. But by seeming in the Bork nomination fight to be the prisoner or the patsy of liberal pressure groups, neither Biden nor anyone else will fill that bill of leadership for change.

Newsweek

July 20, 1987

'The Hottest Fight in a Decade'

Can Biden afford to lose his battle against Bork?

Last November Sen. Joseph Biden told The Philadelphia Inquirer: "Say the administration sends up [Robert] Bork . . . 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." But that was then. Now that the administration actually *has* nominated Bork to the Supreme Court—and now that Biden is a declared presidential candidate—the Delaware senator has appointed himself leader of the battle against Ronald Reagan's nominee. He says it's a "winnable" fight; having put himself on the front line, it's one he probably cannot afford to lose.

A Cast of Thousands—otherwise known as the Democratic presidential contenders—quickly joined Biden at the barricades. Only Sen. Albert Gore Jr. said he "would not pass final judgment" until the confirmation hearings were completed in the fall. More than 75 special-interest and civil-rights groups (including the NAACP, despite a direct appeal from White House chief of staff Howard Baker) are working with Biden, and two major lobbying groups have each pledged $1 million to the cause. "It could be the most hotly contested judicial nomination in a decade," says Sen. Patrick Leahy, a member of the Judiciary Committee. "Maybe it's just as well the hearings won't begin until mid-September. We need time to get this nomination in perspective so our decision is based on merit and not emotion."

Bork's backers see him as the guarantor of the Reagan Revolution's future; his opponents charge he will undo a century of social progress, including abortion rights and affirmative action. But neither side is comfortable using ideology as a test for judicial fitness. Biden hopes to shift the debate away from Bork and questions about his qualifications. He wants instead to focus on what he sees as the administration's attempt to use the Supreme Court to impose social legislation that Congress has been unwilling to enact. Southern Democrats and moderate Republicans may be relatively sympathetic to Bork's conservative views. (Says Alabama Sen. Richard Shelby: "With Senator Kennedy against him, that puts a lot of Southern Democrats in bed with Bork.") But Biden believes those swing voters will reject the White House effort. The conservatives' counterstrategy is to play down the administration's social-issues agenda; play up Bork and his formidable intellect.

One possible pitfall for Biden is his own temperament and style. His harangue of George Shultz in a Capitol Hill hearing about the administration's South Africa policy last July damaged Biden because of its stridency: a snarling picture of the senator has been reprinted many times. "If he fights the nomination in a harsh, demonic way, he loses," says one adviser. By stating his opposition to Bork so unequivocally now, Biden may be trying to establish that his liberal credentials are beyond question. Then, when he chairs the confirmation hearings in the fall, he can appear calm and evenhanded—and win points for statesmanship.

Biden has a lot of work to do before September. Both sides say that if the confirmation vote were held now, Bork would win. The senator must extend the opposition movement "beyond the usual suspects," says one Senate Democratic aide, "or he will look like he's a captive of the interest groups." That would lose him the Bork fight and would batter his presidential chances as well. Still, he seems determined to take the risk. The confirmation hearings will probably make good TV. But is Biden casting himself on the "$1,000,000 Chance of a Lifetime"—or "The Gong Show"?

[illegible] with Ann McDaniel

The Washington Post

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George F. Will

Biden v. Bork

The senator is overmatched.

If Sen. Joseph Biden (D-Del.) had a reputation for seriousness, he forfeited it in the 24 hours after Justice Lewis Powell announced his departure from the Supreme Court. Biden did much to achieve the opposite of his two goals: He strengthened the president's case for nominating Judge Robert Bork and strengthened the Democrats' case for not nominating Biden to be president.

Six months ago, Biden, whose mood swings carry him from Hamlet to hysteria, was given chairmanship of the Judiciary Committee, an example of history handing a man sufficient rope with which to hang himself. Now Biden, the incredible shrinking presidential candidate, has somersaulted over his flamboyantly advertised principles.

Hitherto, Biden has said Bork is the sort of qualified conservative he could support. Biden has said: "Say the administration sends up Bork and, after our investigations, 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 was before Biden heard from liberal groups like the Federation of Women Lawyers, whose director decreed concerning Biden's endorsement of Bork: "He should retract his endorsement." Suddenly Biden was allergic to medicine, and began to position himself to do as bidden. Either Biden changed his tune because groups were jerking his leash or, worse, to prepare for an act of preemptive capitulation.

He said that "in light of Powell's special role" as a swing vote (that often swung toward Biden's policy preferences) he, Biden, wants someone with "an open mind." Proof of openness would be, of course, opinions that coincide with Biden's preferences. Biden says he does not want "someone who has a predisposition on every one of the major issues." Imagine a justice with no predisposition on major issues. And try to imagine Biden objecting to a nominee whose predispositions coincide with Biden's.

Senators who oppose Bork will be breaking fresh ground in the field of partisanship. Opposition to Bork (former professor at Yale Law School, former U.S. solicitor general, judge on the U.S. Court of Appeals) must be on naked political grounds. Opposition must assert the principle that senators owe presidents no deference in the selection of judicial nominees, that jurisprudential differences are always sufficient grounds for opposition, that result-oriented senators need have no compunctions about rejecting nominees whose reasoning might not lead to results the senators desire.

If Biden does oppose Bork, his behavior, and that of any senators who follow him, will mark a new stage in the descent of liberalism into cynicism, an attempt to fill a void of principle with a raw assertion of power. Prof. Laurence Tribe of Harvard offers a patina of principle for such an assertion, arguing that the proper focus of confirmation hearings on an individual "is not fitness as an individual, but balance of the court as a whole."

This new theory of "balance" holds not merely that once the court has achieved a series of liberal results, its disposition should be preserved. Rather, the real theory is that there should never again be a balance to the right of whatever balance exists. Perhaps that expresses Harvard's understanding of history: There is a leftward-working ratchet, so social movement is to the left and is irreversible.

Continuity is a value that has its claims. But many of the court rulings that liberals revere (e.g., school desegregation) were judicial discontinuities, reversing earlier decisions. Even if putting Bork on the bench produces a majority for flat reversal of the 14-year-old abortion ruling, restoring to the states their traditional rights to regulate abortion would reestablish the continuity of an American practice that has a history of many more than 14 years.

Besides, that restoration would result in only slight changes in the status of abortion. The consensus on that subject has moved. Some states might ban second-trimester abortions, or restore rights that the court in its extremism has trampled, such as the right of a parent of a minor to be notified when the child seeks an abortion. But the basic right to an abortion probably would be affirmed by state laws.

Powell's resignation and Biden's performance as president manque have given Reagan two timely benefits. He has an occasion for showing that he still has the will to act on convictions, and that he has an opponent he can beat.

Biden says there should not be "six or seven or eight or even five Borks." The good news for Biden is that there is only one Bork. The bad news for Biden is that the one will be more than a match for Biden in a confirmation process that is going to be easy.

The Democrats' Glass Chin

Bork is a blue whale being attacked by anchovies—loud ones, but even loud ones are little

Judge Robert Bork, with his reddish beard and ample girth, is Falstaffian in appearance. In argument, he has an intellectual's exuberance: he argues for the fun of it. Alas, his adversaries are too distraught to argue. Here, for example, is Ted Kennedy's voice raised in defense of moderation against Bork's "extremism": "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of government . . ."

Gracious. It is amazing that the Senate confirmed Bork, without a single objection, for an appellate court. Kennedy says America is "better" than Bork thinks. No, America is better than liberals like Kennedy think. They think Yahoos make up a majority which, unless restrained by liberal judges, will tolerate or legislate the tyrannical America Kennedy describes.

Sen. Patrick Leahy, a Vermont Democrat, says that if *Roe v. Wade*, the 1973 abortion case, "came up today, [Bork's] vote would determine that we would not have abortions, legal abortions." Leahy assumes, probably wrongly, that the Senate already has confirmed four justices who are ready to reverse the 1973 ruling. Leahy assumes, certainly wrongly, that if it were reversed, restoring to states the traditional right to regulate abortions, legislatures would ban abortions. Opinion polls refute Leahy. There is a broad consensus supporting liberal abortion policies.

Sen. Joe Biden, who has used Bork to establish himself firmly as the flimsiest presidential candidate, is courting liberal interest groups by saying: "I will resist any efforts by this administration to do indirectly what it has failed to do directly in the Congress—and that is to impose an ideological agenda upon our jurisprudence." It is unclear what thought is struggling to get out of Biden's murky sentence. If nominating Bork is "indirect," what is "direct"? The adjective "ideological" is today's all-purpose epithet, a substitute for argument, by which intellectually lazy or insecure people stigmatize rather than refute people with whom they disagree. What Biden is trying to do is preserve liberalism's ability to do in the court what it has failed to do in elections. As liberalism has become politically anemic, it has resorted to end runs around democratic processes, pursuing change through litigation rather than legislation.

The Democratic Party advertises itself as the tribune of "the people," but the party expresses distrust of the people when it opposes Bork, who favors broader discretion for the popular (legislative) branch. Regarding Bork, Democratic presidential aspirants resemble "a herd of independent minds." The party resembles a boxer rising wobbly-kneed from the canvas, his back covered with resin. It has been battered by the public's belief that the party is servile toward imperious interest groups. Now, because of Bork, the party is about to land a left hook on its own glass chin. When Sen. Pat Moynihan, Democrat of New York, who is up in 1988, hesitated to commit against Bork, Hazel Dukes, Democratic national committeewoman from New York, spoke of Moynihan disdainfully: "I have the votes in New York to defeat him. When I get with his staff in New York, I'll get what I want."

Liberalism has embraced Thurmondism. Liberals who claim the Senate is the president's equal in forming the court, and who claim a right to reject a nominee purely on political grounds, cite as justifying precedent the behavior of Strom Thurmond in opposing LBJ's 1968 nomination of Abe Fortas to be chief justice. Were the Senate an equal participant, it would be empowered to nominate its own judicial candidates. (When advising and consenting to treaties, it cannot negotiate its own version of treaties.) With judicial nominees, the proper Senate role is to address threshold questions about moral character, legal skills and judicial temperament. The logic of the liberals' position—the idea that the confirmation process is a straight political power struggle turning on the nominee's anticipated consequences—is that we should cut out the middleman (the Senate) and elect justices after watching them campaign.

Biden, chairman of the Judiciary Committee, is stalling, so hearings will not even begin for two months. Nevertheless, Democratic senator and presidential candidate Paul Simon of Illinois says his mind is all but closed against Bork. Why? Because Bork, although "mentally qualified," is "close-minded." Sen. Bob Packwood, Republican of Oregon, who can be as sanctimonious as the next saint when deploring single-issue politics, is threatening to filibuster against Bork unless satisfied that Bork will affirm all the pro-abortion rulings that Packwood favors.

Politically risky: Forty-one senators can block cloture (a forced end to a filibuster). There are 55 Senate Democrats. A significant number of Democrats will not join Biden's grovel before the interest groups, but Biden may have a few Republican collaborators. Suppose liberals block Bork and then block any similar jurist whom Reagan would nominate next. That would leave the court short-handed through the 1988 election—and through two court terms. That would be politically risky. So, having blocked Bork, they might have to confirm Reagan's next choice, who might be a conservative judicial activist.

Bork, believing in judicial restraint, is conservative about the process. A conservative activist would use judicial power the way liberal activists have, in a result-oriented way. Such an activist might hold that abortion is incompatible with the 14th Amendment's protection of the lives of "persons." An activist might favor striking down zoning laws because they violate the Fifth Amendment by taking property without just compensation. An activist might think minimum-wage laws unconstitutionally impair the obligation of contracts (Article I, Section 10). An activist might decide that the progressive income tax violates the equal-protection component of the Fifth Amendment's due-process clause. He even might reject the "incorporation doctrine" that makes the states, as well as Congress, bound by the Bill of Rights. That is something for Bork's critics to think about when they start to think. Until they do, Bork resembles a blue whale being attacked by anchovies—loud ones, but even loud ones are little.

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 Adlai 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 persuasion 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 judiciarchy—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 consequences. 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 Kennedy's charge that in "Bork's Ameri
rogue police would be unleashed
come crashing through your door
pure moonshine, and especially inappr
priate coming from a senator who vot
for a federal "preventive detentio
provision.

If I were president, Judge Bork
whom I like and admire—would pro
ably not be on my short list. If he
confirmed, I fully expect rulings of h
that I will enjoy roasting.

The favoring difference is—to b
row a Churchillian phrase—that Bo
has "the root of the matter in him." I
understands that constitutional gover
ment is mainly about principled limits
the exercise of power. He has the w
and intellect to seek and enforce thos
limits—to reverence the jostle of democr
cy—no matter whose wish list must
temporarily sidetracked.

7/12/87

THE WALL STREET JOURNAL

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REVIEW & OUTLOOK

Justice Bork or Ukase?

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censured at the whim of government.—Senator Ted Kennedy.

We've been looking forward to a great constitutional debate, now that the Democrats opposing Ronald Reagan's judicial nominees have dropped pretenses about spelling errors and deed restrictions and flatly proclaimed that judicial philosophy's the thing. Just what philosophy, we've wondered, do Robert Bork's critics have to offer?

Ted Kennedy is abundantly clear: The purpose of jurisprudence is to protect one sacred cow for each of the Democratic Party's constituent interest groups. The law is what judges say it is, and the test of nominees is whether they will use this power to advance purposes Senator Kennedy favors. In particular, judges must advance these purposes *irrespective of the democratic outcome in the legislative branch in which the senator sits.*

So far as we remember, in fact, Judge Bork has no position on public policy toward, say, abortion. What he does believe is that judges should read the Constitution, and second-guess legislatures only on the basis of what it says. If the Constitution says nothing about abortion, legislatures can allow it or ban it. Someone who doesn't agree with their choice has every right to campaign for new legislators. If the Constitution doesn't speak, redress lies in the political process.

Judge Bork would never discover in the Constitution a "right" to Star Wars or aid for the Contras. His philosophy of judicial restraint is grounded in the fundamental constitutional principle of separation of powers. Congress makes the laws, the president executes the laws and the courts' only role is to ensure that the laws are consistent with the Constitution. Where the Bill of Rights is clear, such as outlawing racial discrimination, judges must make sure these rights are protected. But the courts are not supposed to invalidate laws simply because judges don't like them, or find new rights that do not appear in the Constitution.

Judge Bork made an elegant statement of this view in a case his enemies are sure to raise as proof of his reactionary ideas. *Dronenburg v. Chief of Naval Personnel* asked whether the courts should overturn the Navy's policy of mandatory discharge for sailors who engage in homosexual acts. Though receiving an honorable discharge, the plaintiff claimed a right to "privacy" that would override the Navy rule. Writing for a unanimous D.C. Circuit panel in 1984, Judge Bork said it would be wrong for judges to replace the judgment of the military by finding a right not mentioned in the Constitution.

"If it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, we think it certain that lower courts should not do so," Judge Bork wrote. "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choice of the people, and their elected representatives, not through the judicial ukase of this court."

Ukase was a well-chosen word. It is derived from the Russian, and defined by Webster's as "in Czarist Russia, an imperial order or decree, having the force of law." Under our system of government, laws made by judges have a similar illegitimacy. The executive branch can change its rule against homosexuality in the military or Congress could pass a law to do so. This might or might not be a good idea, but Judge Bork was on firm democratic ground when he said it was not for judges to decide. The Founders called the courts the "least dangerous branch" because judges were supposed to play a negative role, upsetting legislation only that violates the text of the Constitution.

The distinction is not especially subtle or complex, yet is frequently missed by people who consider themselves intelligent and sophisticated. Conditioned by decades of judicial activism on behalf of liberal causes, they think of court cases in stark terms of who wins, not in terms of what the Constitution says. At stake in this standoff of competing judicial theories is whether the Constitution in its bicentennial year means anything at all.

Senator Kennedy has heard these arguments before. Ronald Reagan campaigned to two landslides on the promise to appoint supremely qualified judges who accept the limited role they were granted under our constitutional system. The Democratic Senate can of course reject Mr. Bork precisely because he is the kind of nominee the president promised; redress for that would lie in the next national election.

Viewpoint

Robert H. Bork

On Constitutional Economics

PROPOSING AMENDMENTS to the Constitution is much in vogue these days. The proposals for change vary greatly, but advocates usually advance one of two lines of argument to explain why the legislative process is defective and why the subject should be assigned to the judicial process instead. The first is simply that policy outcomes would be improved by doing so. That may or may not be true. Certainly we have, to our great benefit, constitutionalized, and thus removed from majority control, a number of policy areas. On the other hand, almost no one supposes that it would be wise to continue the process of shifting policy choices from legislatures to courts indefinitely.

That brings us to the second reason, which is very sophisticated and is rarely heard outside a rather small, largely academic, group. This approach seeks ultimate principles by which we may determine which subjects are best controlled by judges and which by elected representatives. It is a highly abstract enterprise and one is likely to hear arguments about whether the basis for constitutionalism is utilitarian, contractarian, consensualist, or something else. The object, of course, is nothing less than to discover the ultimate principles of government, a noble enterprise but one which promises no quick success and from which I propose to excuse myself.

Those who practice law, unlike those who profess its more philosophical reaches, do not ordinarily have to face the question of the ultimate justification for the regulation of human behavior by law. As a professor, I wrestled with the problem for years in my seminar on constitutional theory. It seemed to me that the legal mind, used to finding general principles to explain a series of particular cases, could reason from the particular provisions of the Bill of Rights to a general theory of the legitimate spheres, respectively, of individual freedom and governmental coercion.

The endeavor led me to deduce from the Bill of Rights a series of very libertarian positions. Indeed, that outcome is virtually guaranteed by the starting point. If you start from instances of guaranteed personal autonomy, the generalizing principle will turn out to be one of autonomy, if not anarchy. Had I started instead from instances of the constitutional powers of government, the principle might have been almost pure majoritarianism. Neither principle, of course, is adequate to the complex governance of our society. In any event, because of where I started and came out, the students loved it. Alexander Bickel, who taught the course with me, hated it. His position was that no overarching theory of freedom and coercion is possible, and I came to think that he was right.

Being a lawyer is hard enough, but at least a lawyer, in his professional work, has the luxury of not dealing with ultimate justifications. He need only try to make things work legitimately and well within the limits of his calling and the context of this particular society. The lawyer deals with principles of limited range that continue to evolve. If they reflect some unknown ultimate or transcendent principle, they are not themselves ultimate but shifting, partial, and incomplete, though nonetheless valuable, indeed indispensable, for that. Working with them, their collisions and compromises,

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has proved to be difficult enough. Experience has taught me to prefer this working lawyer's perspective to arguments about constitutionalism pitched at a very high level of abstraction.

Part of what a working lawyer knows is that any principle or idea, however admirable in the abstract, undergoes changes as it is applied through courts. The changes may be so great that it would have been better not to embody the idea in law at all. I want to deal here with the difficulties that attend the embodiment of economic principles in law, particularly in law that must speak in the generalities appropriate to the Constitution.

THE SUBJECT IS certainly timely. Not only are courts urged to extend existing constitutional provisions to guarantee greater freedom in the marketplace but there are very serious proposals to control national fiscal policy through new provisions. Thirty-two of the required thirty-four states have now called for a convention to propose amendments concerning this subject. This being an unknown area of constitutional procedure, the validity of these applications may be open to question, but there is no question about the seriousness of the movement. It is against this background that I will discuss the problems of economics as a subject for the Constitution.

To begin with, the idea of constitutional economics seems to me entirely a legitimate one. We are all familiar with the argument that economic policy is a matter of prudence and pluralist politics which simply does not belong in the fundamental law of our nation. In my view, that is wrong. It is well to distinguish between two kinds of constitutional economics —the protection of the economic liberties of individuals from state interference and restraints placed upon government monetary and fiscal policy.

As to the first, it has long since been known that there is no principled philosophic difference between individual economic freedoms and individual freedoms of other sorts. Since we protect one set of individual freedoms, it is difficult to say why the other should be without protection. Indeed, the Constitution contains a variety of clauses that were intended to, did, and to some extent still do, protect such freedoms. Since the framers of the Constitution thought that such matters deserved to be included, that in itself is a reason of considerable persuasive power for us to think that, as a matter of principle, such guarantees may still have a place.

Nor is there any case in principle against inclusion in the Constitution of a provision controlling fiscal or monetary matters. The public may reasonably feel that we must somehow stop the seemingly inexorable rise in the share of the public's wealth claimed by the federal government, and so far, nothing short of a constitutional amendment has really worked. It may be that only a constitutional check can cope with the well-known pathology of representative government in the social democratic style, in which intense constituencies press for particular programs that add up to spending levels that nobody really wants.

It is widely recognized that, in the near term, such increasing aggregates are a threat to economic vitality. Over the longer term, inefficiency, inflation, and fights over the division of a shrinking pie may be capable of taking us to a worse and far less free society than any we now would find tolerable—one governed by unaccountable bureaucracies, if not by rulers even less benign. Any systematic malfunctioning of government serious enough to threaten both prosperity and freedom may properly be addressed by the Constitution.

But if there is no objection to the general idea of constitutional economics—no objection to it, that is, as a matter of somewhat abstract principle—there are a number of problems with the implementation of the idea. Problems in implementation are not to be regarded as minor matters that some lawyer adept at conveyancing can deal with. There is a temptation among the philosophers of this subject to walk away from such mundane considerations, muttering that they don't do windows. But lawyers and judges do windows. They know from experience that not all policies can be made into effective law. There is a tendency to think that constitutional rules execute themselves and that they accomplish precisely what was intended, but that is not by any means always the case. Law, to use the terminology many economists have employed, is one gigantic transaction cost. The cost comes in many forms and must be taken into account when we are deciding whether to amend the Constitution and how.

Even as we are learning more about economics, and in particular about the defects of economic policy made through a pluralist political process, so, too, are we learning more about law as a mechanism of social and political control.

There was a time when it was casually assumed that law was capable of dealing with and transforming virtually any social or political reality. Perhaps that belief was engendered by the startling success of the Supreme Court's rulings, beginning with *Brown* v. *Board of Education* in 1954, that official segregation of the races is unconstitutional. William Graham Sumner's dictum that "law ways can't change folkways" seemed to many decisively disproved. But not all of society's ills have proven so amenable to legal cures. We all know of extensive regulatory programs that have added enormous costs without securing any discernible benefits or that have created graver problems than they solved. We should have learned by now that any expectation that law is omnipotent is not merely naive in its theoretical underpinnings but often disastrous in practice. It has brought us what many Americans perceive as not merely an overregulated but a clumsily regulated society. We have learned that law is frequently not a scalpel but a blunt instrument. Legal rules have side effects, and these sometimes come close to outweighing the good that rules do.

I should pause to make it abundantly clear that I do not for a moment doubt that this nation is far better off, freer and more prosperous, because of the Constitution of the United States. I should also make it clear that I am not an anti-constitutionalist in the sense that I oppose amending the Constitution further as the need arises. But I assume most people would agree that the presumption is against amendment so that the need for it must be clearly demonstrated. There is much wisdom in those two constitutional philosophers, one English and one American, who said, respectively, "Unless it is necessary to change, it is necessary not to change," and "If it ain't broke, don't fix it."

BUT LET US SUPPOSE a need for a constitutional provision has been clearly shown, or at least a need has been clearly shown on the assumption that the provision will do precisely what it is intended to do. It is the assumption that is likely to get us into trouble. Many, though not by any means all, constitutional provisions have to be enforced by judges. Constitutional economics would rest, I take it, on judge-enforced amendments to the Constitution.

Milton Friedman argues that a spending limit provision in the Constitution would pose no problem for the courts—that all we have to do is look at the First Amendment to see that courts can handle complex and difficult subjects in ways that preserve our freedoms. Rejecting this argument poses some difficulty for me—not only because of its author. I went to the University of Chicago and so was raised virtually from childhood—you remember the Hutchins plan—to believe that Milton was always right. In this case, however, I do not believe his analogy holds. The First Amendment is almost entirely judge-made law. It has worked well, but I doubt that anybody wants judge-made economics. Moreover, even provisions that work well on the whole might profit from more careful drafting.

The guarantees of freedom of speech and of the press are perhaps the most important guarantees of liberty to be found in the Constitution. We are far better off with them than we would be without them, but there are costs. Those guarantees have been interpreted to permit the destruction of persons' reputations, the spread of pornography, the advocacy of violence and even genocide, and much more of like nature. Communities have lost a good deal of their power democratically to control their own moral environment. Many people count these as substantial costs. Whether they are inseparable from the benefits of the amendments is not the point; the point is that judges have thought they were, and so a constitutional provision has come to have a meaning that may not have been fully apparent to those who framed and ratified it. If the very generally worded First Amendment has on balance produced good social policy, as I think it clearly has, that may be because the subjects of speech and press are ones that judges understand fairly well. They are also subjects that lend themselves to relatively simple rules. It may be doubted that an equally generally worded economic amendment would produce policy as beneficial.

This is not said in criticism of judges. My days of criticizing judges are over. It is simply

a fact that judges are human and that appellate tribunals are committees. The interpretation of words on paper in unanticipated factual circumstances is always a chancy thing. Remember that Chief Justice Charles Evans Hughes said that the Constitution is what the judges say it is. That was not cynicism, but merely a common-sense observation about the application of law. It does, however, raise the question whether we want the economic policy of the United States to be what the judges say it is.

. . . Charles Evans Hughes said that the Constitution is what the judges say it is. That . . . common-sense observation about the application of law [raises] the question whether we want the economic policy of the United States to be what the judges say it is.

That is a real problem with respect to any constitutional provision that attempts to secure the economic liberties of individuals against hostile legislation. Legislation directed at market freedom can take so many forms that a constitutional provision guaranteeing economic freedom might have to be generally worded and subject to interpretation of wide latitude. Indeed, that is the lesson of our history. As Professor Bernard Siegan has shown, we already have clauses that could be used to protect economic freedom—and were so used. They are, however, so open-textured, so general, that judges were free to impose their own economic policies—and they did.

In some of the literature on constitutional economics, there is favorable comment about the Supreme Court's decision in *Lochner* v. *New York* (1905), which struck down a working-hours regulation for bakers. The trouble with *Lochner* was that Justice Rufus Peckham's opinion was unable to provide any reasoning to explain why this particular regulation of markets was an undue infringement of liberty while others were not. The case is correctly perceived as essentially a lawless judicial decision. If judges step into this area, that must be expected. The Constitution provides minimal guidance and it is difficult to imagine an amendment that would be able to provide much more.

IT MAY BE RESPONDED that judges do the same thing today in other fields and their decisions often survive. If that is true, it is not a vindication of *Lochner* but a condemnation of those other decisions. But I wish to make another point. The fate of the *Lochner* decision and many others like it, which defended not only economic liberty but other values such as federalism, illustrates the weakness of constitutional guarantees that are not widely supported, and supported in particular by the constitution-making apparatus of our society. When the mood of the country swung against free markets, the Supreme Court was able to check anti-market legislation only very partially and only very briefly. Franklin Roosevelt's Court-packing campaign was merely the most dramatic episode in a long swing of the courts away from protection of economic freedoms. More important was Roosevelt's series of appointments of new justices, men who read the Constitution the way Holmes did in his *Lochner* dissent. The lesson to be learned is that broad, interpretable constitutional provisions cannot long stand against determined political forces that have gained the ascendancy. Hence, it is difficult to imagine that a constitutional amendment guaranteeing individual economic freedom could remain effective unless it had very strong political and intellectual support. Even then, as I have said, it is difficult to imagine a clause so worded as to guard adequately against judicial subjectivism in its application.

This danger lessens somewhat, though it does not entirely disappear, as a clause becomes more specific. Perhaps a clause intended to control the fiscal policy of the United States could be drawn with enough specificity to prevent subjective interpretation. There are, however, several problems with proposals for fiscal policy amendments that must be considered.

The first, of course, is effectiveness. Even assuming no problems of enforcement or of distortion in the enforcement process, government has ways of commandeering society's wealth and redistributing it that do not depend upon taxation, borrowing, or inflation. The most prominent, of course, is regulation. Government need not spend a dime on a program if

it can find groups in the private sector who can be made to spend their own funds. Much of the heavy expenditure of funds required by the Clean Air Act, for example, does not appear in any governmental budget and requires neither taxes nor governmental borrowing or spending. Industry is simply required to pay to clean up emissions. That technique could be used for many other programs. Social Security benefits could be handled largely in this way, ending governmental deficits but not the share of wealth appropriated by government for its purposes. So far as I know, no one has suggested a workable way around this difficulty. Perhaps the difficulty is not as great as this may suggest. And, of course, a balanced-budget or spending-limitation amendment might still be worth adopting even if it would not be wholly effective.

Also troubling is the problem of enforcing such a constitutional provision. In the early stages of discussion, a lot of people, including most economists, apparently thought this was no problem: if Congress exceeded the constitutional limits on spending, someone would sue. That much is true. The result, however, would likely be hundreds, if not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results. By the time the Supreme Court straightened the whole matter out, the budget in question would be at least four years out of date and lawsuits involving the next three fiscal years would be slowly climbing toward the Supreme Court. It is quite possible that it would be necessary to narrow the class of possible plaintiffs significantly and to create a special, and final, court to handle this litigation.

UNLESS ATTENTION is paid to the institutional problems involved, a constitutional amendment would become in practice a nullity—either that, or the budgetary process would pass into the hands of the courts, an outcome desired by no one. When I said earlier that law is a transaction cost, I was not merely being flippant. We all know that there are the direct costs of law enforcement and that these can be large. Many recognize that there are also the costs of undesirable but unavoidable side-effects of policy enforcement. But too few understand the costs of a policy's alteration in the very process of its application. Constitutional provisions pass through the hands of judges, and any venture in constitutional economics would almost certainly be transformed to some extent in that process.

Since economists are in the forefront of those advocating constitutional economics, it may be thought ironic that so little attention has apparently been paid to the institutional problems involved, including the incentive structure that judges face and how that structure may influence their interpretations of law. Having identified the incentive structure confronting legislators as the source of the problem, it is odd that economists should advocate moving the policy into the courts without a similar inquiry. The defects of the legislative process do not of themselves render the judicial process perfect or even preferable.

If the economists' utility-maximizing hypothesis is accepted as an accurate predictor of behavior, then we need to know what it is that judges maximize. They cannot affect their money incomes, like practicing lawyers, and they cannot choose their subjects or opt for leisure, like professors. What is it that they can and do maximize? Does their incentive structure deflect them from doing what we want of them? And what mechanisms of control do we have to obtain performance that maximizes the chances of getting what the framers of a constitutional provision wanted? Until we have some inkling of an answer to at least the last of those questions, constitutionalism will accomplish less than it should, and the thought of placing new areas in the control of judges will continue to make some people apprehensive about vaguely worded constitutional amendments.

I do not mean to say that our Constitution should never be amended. What I do mean is that an exclusively philosophic or economic approach to market-freedom or fiscal-policy amendments is likely to produce provisions that either are largely unworkable or have unintended consequences. Some sophistication about the way provisions are litigated and the way they are applied by courts can reduce these problems. This may seem a mundane observation, but it is, I think, a vital one to bear in mind. The wisdom of our economic policy is important, but so too is the integrity of our legal institutions—and in the area of constitutional economics the two are inseparable. ■

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The Constitution, Original Intent, and Economic Rights†

ROBERT H. BORK*

To approach the subject of economic rights it is necessary to state a general theory about how a judge should deal with cases which require interpretation of the United States Constitution. More specifically, I intend to address the question of whether a judge should consider himself or herself bound by the original intentions of those who framed, proposed, and ratified the Constitution. I think the judge is so bound. I wish to demonstrate that original intent is the only legitimate basis for constitutional decisionmaking. Further, I intend to meet objections that have been made to that proposition.

This issue has been a topic of fierce debate in the law schools for the past thirty years. The controversy shows no sign of subsiding. To the contrary, the torrent of words is freshening. It is odd that the one group whose members rarely discuss the intellectual framework within which they decide cases is the federal judiciary. Judges, by and large, are not much attracted to theory. That is unfortunate, and [illegible] it is changing. There are several reasons why it should change.

Law is an intellectual system. If it is to progress at all, it is through continual intellectual exchanges. There is no reason why

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† This Article is an adaptation of a speech I gave at the first Sharon Siegan Memorial Lecture at the University of San Diego School of Law on November 18, 1985. Everyone who ever met Sharon Siegan is, I am certain, gratified that the University of San Diego School of Law has established a lecture series in her memory. My wife and I first met Sharon Siegan just two years ago. She was a lovely woman in every way. I am immensely honored to have been invited to give the inaugural lecture in the series named for her.

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members of the judiciary should not engage in such discussion. Rather, because theirs is the ultimate responsibility, there is every reason why they should engage in such discussion. The only real control the American people have over their judges is that of criticism—criticism that ought to be informed. Criticism focused not upon the congeniality of political results but upon the judges' faithfulness to their assigned role. Judges ought to make explicit how they perceive their assigned role.

We appear to be at a tipping point in the relationship of judicial power to democracy. The opposing philosophies about the role of judges are being articulated more clearly. Those who argue that original intention is crucial do so in order to draw a sharp line between judicial power and democratic authority. Their philosophy is called intentionalism or interpretivism. Those who would assign an ever increasing role to judges are called non-intentionalist or non-interpretivist. The future role of the American judiciary will be decided by the victory of one set of ideas over the other.

In this Article, I am not concerned with proving that any particular decision or doctrine is wrong. Rather, I am concerned with the method of reasoning by which constitutional argument should proceed.

The problem for constitutional law always has been and always will be the resolution of what has been called the Madisonian dilemma. The United States was founded as what we now call a Madisonian system, one which allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first would court tyranny by the majority; the second, tyranny by the minority.

Over time it has come to be thought that the resolution of the Madisonian problem—the definition of majority power and minority freedom—is primarily the function of the judiciary and, most especially, the function of the Supreme Court. That understanding, which now seems a permanent feature of our political arrangements, creates the need for constitutional theory. The courts must be energetic to protect the rights of individuals, but they must also be scrupulous not to deny the majority's legitimate right to govern. How can that be done?

Any intelligible view of constitutional adjudication starts from the proposition that the Constitution is law. That may sound obvious but in a moment you will see that it is not obvious to a great many people, including law professors. What does it mean to say that the words in a document are law? One of the things it means is that the

words constrain judgment. They control judges every bit as much as they control legislators, executives, and citizens.

The provisions of the Bill of Rights and the Civil War amendments not only have contents that protect individual liberties, they also have limits. They do not cover all possible or even all desirable liberties. For example, freedom of speech covers speech, not sexual conduct. Freedom from unreasonable searches and seizures does not protect the power of businesses to set prices. These limits mean that the judge's authority has limits and that outside the designated areas democratic institutions govern.

If this were not so, if judges could govern areas not committed to them by specific clauses of the Constitution, then there would be no law other than the will of the judge. It is common ground that such a situation is not legitimate in a democracy. Justice Brennan recently put the point well: "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections."[1] This means that any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges. An observer must be able to say whether or not the judge's result follows fairly from premises given by an authoritative, external source and is not merely a question of taste or opinion.

There are those in the academic world, professors at very prestigious law schools, who deny that the Constitution is law. I will not rehearse their arguments here or rebut them in detail. I note merely that there is one question they do not address. If the Constitution is not law, with the usual areas of ambiguity at the edges, but which nevertheless tolerably tells judges what to do and what not to do—if the Constitution is not law in that sense, what authorizes judges to set at naught the majority judgment of the representatives of the American people? If the Constitution is not law, why is the judge's authority superior to that of the President, the Congress, the armed forces, the departments and agencies, the governors and legislatures of the states, and that of everyone else in the nation? No answer exists.

The answer that is attempted is usually that the judge must be guided by some form of moral philosophy. Not only is moral philosophy typically inadequate to the task but, more fundamentally, there is no legitimating reason that I have seen why the rest of us should be governed by the *judge's* moral visions. Those academics who

1. Speech by William J. Brennan, Georgetown University (Oct. 12, 1985), *reprinted in* N.Y. Times, Oct. 13, 1985, at 36, col. 2.

think the Constitution is not law ought to draw the only conclusion that intellectual honesty leaves to them: that judges must abandon the function of constitutional review. I have yet to hear that suggested.

The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments. It is important to be plain at the outset what intentionalism means. It is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the Framers. In such a narrow form the philosophy is useless. Because we cannot know how the Framers would vote on specific cases today, in a very different world from the one they knew, no intentionalist of any sophistication employs the narrow version just described.

There is a version that is adequate to the task. Dean John Hart Ely has described it:

> What distinguishes interpretivism [or intentionalism] from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground.[2]

In short, all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That premise states a core value that the Framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the Framers could not foresee. Courts perform this function all of the time. Indeed, it is the same function they perform when they apply a statute, a contract, a will, or, indeed, a Supreme Court opinion to a situation the Framers of those documents did not foresee.

Thus, we are usually able to understand the liberties that were intended to be protected. We are able to apply the first amendment's Free Press Clause to the electronic media and to the changing impact of libel litigation upon all the media; we are able to apply the fourth amendment's prohibition on unreasonable searches and seizures to electronic surveillance; we apply the Commerce Clause to state regulations of interstate trucking.

Does this version of intentionalism mean that judges will invariably decide cases the way the Framers would if they were here today? Of course not. But many cases will be decided that way and, at the very least, judges will confine themselves to the principles the Fram-

2. JOHN HART ELY, DEMOCRACY AND DISTRUST 1-2 (1980).

ers put into the Constitution. Entire ranges of problems will be placed off-limits to judges, thus preserving democracy in those areas where the Framers intended democratic government. That is better than any non-intentionalist theory of constitutional adjudication can do. If it is not good enough, judicial review under the Constitution cannot be legitimate. I think it is good enough.

There is one objection to intentionalism that is particularly tiresome. Whenever I speak on the subject someone invariably asks: "But why should we be ruled by men long dead?" The question is never asked about the main body of the Constitution where we really are ruled by men long dead in such matters as the powers of Congress, the President, and the judiciary. Rather, the question is asked about the amendments that guarantee individual freedoms. The answer as to those amendments is that we are not governed by men long dead unless we wish to cut back those freedoms, which the questioner never does. We are entirely free to create all the additional freedoms we wish by legislation, and the nation has done that frequently. What the questioner is really driving at is why judges, not the public but judges, should be bound to protect only those freedoms actually specified by the Constitution. The objection underlying the question is not to the rule of dead men but to the rule of living majorities.

Moreover, when we understand that the Bill of Rights gives us major premises and not specific conclusions, the document is not at all anachronistic. The major values specified in the Bill of Rights are timeless in the sense that they must be preserved by any government we would regard as free. For that reason, courts must not hesitate to apply only values to new circumstances. A judge who refuses to deal with unforeseen threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair, and reasonable meaning, fails in his judicial duty.

But there is the opposite danger. Obviously, values and principles can be stated at different levels of abstraction. In stating the value that is to be protected, the judge must not state it with so much generality that he transforms it. When that happens the judge improperly deprives the democratic majority of *its* freedom. The difficulty in choosing the proper level of generality has led some to claim that intentionalism is impossible.

Thus, in speaking about my view of the fourteenth amendment's equal protection clause as requiring black equality, Professor Paul Brest of Stanford said,

> The very adoption of such a principle, however, demands an arbitrary choice among levels of abstraction. Just what *is* "the general principle of equality that applies to all cases"? Is it the "core idea of *black* equality" that Bork finds in the original understanding (in which case Alan Bakke did not state a constitutionally cognizable claim), or a broader principle of "*racial* equality" (so that, depending on the precise content of the principle, Bakke might have a case after all), or is it a still broader principle of equality that encompasses discrimination on the basis of gender (or sexual orientation) as well?
>
> . . . .
>
> The fact is that all adjudication requires making choices among levels of generality on which to articulate principles, and all such choices are inherently non-neutral. No form of constitutional decisionmaking can be salvaged if its legitimacy depends on satisfying Bork's requirements that principles be "neutrally derived, defined and applied."[3]

I think that Brest's statement is wrong and that an intentionalist can do what Brest says he cannot. Let me use Brest's example as a hypothetical—I am making no statement about the truth of the matter. Assume for the sake of the argument that a judge's study of the evidence shows that both black and general racial equality were clearly intended, but that equality on matters such as sexual orientation was not under discussion.

The intentionalist may conclude that he must enforce black and racial equality but that he has no guidance at all about any higher level of generality. He has, therefore, no warrant to displace a legislative choice that prohibits certain forms of sexual behavior. That result follows from the principle of acceptance of democratic choice where the Constitution is silent. The same sort of analysis could be used to determine whether an amendment imposes black equality only or the broader principle of racial equality. In short, the problem of levels of generality may be solved by choosing no level of generality higher than that which interpretation of the words, structure, and history of the Constitution fairly support.

The power of extreme generalization was demonstrated by Justice William O. Douglas in *Griswold v. Connecticut*.[4] In *Griswold* the Court struck down Connecticut's anticontraception statute. Justice Douglas created a constitutional right of privacy that invalidated the state's law against the use of contraceptives. He observed that many provisions of the Bill of Rights could be viewed as protections of aspects of personal privacy. He then generalized these particulars into an overall right of privacy that applies even where no provision of the Bill of Rights does. By choosing that level of abstraction, the Bill of Rights was expanded beyond the known intentions of the Framers. Since there is no constitutional text or history to define the

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3. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1091-92 (1981) (footnotes omitted).

4. 381 U.S. 479 (1965).

right, privacy becomes an unstructured source of judicial power. I am not arguing that any of the privacy cases were wrongly decided—that is a different question. My point is simply that the level of abstraction chosen makes the application of a generalized right of privacy unpredictable. A concept of original intent, one that focuses on each specific provision of the Constitution rather than upon values stated at a high level of abstraction, is essential to prevent courts from invading the proper domain of democratic government.

That proposition is directly relevant to the subject of economic rights and the Constitution. Article I, section 10, provides that no state shall pass any law impairing the obligations of contracts.[5] The fifth and fourteenth amendments prevent either the federal or any state government from taking private property for public use without paying just compensation.[6] The intention underlying these clauses has been a matter of dispute and perhaps they have not been given their proper force. But that is not my concern here because few would deny that original intention should govern the application of these particular clauses.

My concern is with the contention that a more general spirit of libertarianism pervades the original intention underlying the fourteenth amendment so that courts may review all regulations of human behavior under the due process clause of that amendment. As Judge Learned Hand understood, economic freedoms are philosophically indistinguishable from other freedoms. Judicial review would extend, therefore, to all economic regulations. The burden of justification would be placed on the government so that all such regulations would start with a presumption of unconstitutionality. Viewed from the standpoint of economic philosophy, and of individual freedom, the idea has many attractions. But viewed from the standpoint of constitutional structures, the idea works a massive shift away from democracy and toward judicial rule.

Professor Siegan has explained what is involved:

> In suit challenging the validity of restraints, the government would have the burden of persuading a court . . . first, that the legislation serves important governmental objectives; second, that the restraint imposed by government is substantially related to the achievement of these objectives, that is, . . . the fit between means and ends must be close; and third, that a similar result cannot be achieved by a less drastic means.[7]

This method of review is familiar to us from case law. It has merit

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5. U.S. CONST. art. I, § 10.
6. *Id.* amend. V; *id.* amend. XIV, § 1.
7. B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 324 (1980).

where the court is examining legislation that appears to threaten a right or a value specified by a provision of the Constitution. But when employed as a formula for the general review of all restrictions on human freedom without guidance from the historical Constitution, the court is cut loose from any external moorings and required to perform tasks that are not only beyond its competence, but beyond any conceivable judicial function. That assertion is true, I submit, with respect to each of the three steps of the process described.

The first task assigned the government's lawyers is that of carrying the burden of persuading a court that the "legislation serves important governmental objectives."[8] That means, of course, objectives the court regards as important, and importance also connotes legitimacy. It is well to be clear about the stupendous nature of the function that is thus assigned the judiciary. That function is nothing less than working out a complete and coherent philosophy of the proper and improper ends of government with respect to all human activities and relationships. This philosophy must cover all questions: social, economic, sexual, familial, and political.

It must be so detailed and well-articulated, all the major and minor premises in place, that it allows judges to decide infinite numbers of concrete disputes. It must also rest upon more than the individual preferences of judges in order that internal inconsistency be avoided and that the legitimacy of forcing the chosen ends of government upon elected representatives, who have other ends in mind, can be justified. No theory of the proper end of government that possesses all of these characteristics is even conceivable. Certainly no philosopher has ever produced a generally acceptable theory of the sort required, and there is no reason to suppose that such a universal theory is just over the horizon. Yet, to satisfy the requirements of adjudication and the premise that a judge may not override democratic choice without an authority other than his own will, a theory with each of the mentioned qualities is essential.

Suppose that in meeting a challenge to a federal minimum wage law the government's counsel stated that the statute was the outcome of interest group politics, or that it was thought best to moderate the speed of the migration of industry from the north to the south, or that it was part of a policy to aid unions in collective bargaining. How is a court to demonstrate that none of those objectives is important and legitimate? Or, suppose that the lawyer for Connecticut in the *Griswold* case stated that a majority, or even a politically influential minority, regarded it as morally abhorrent that couples capable of procreation should copulate without the intention, or at least the possibility, of conception. Can the court demonstrate

8. *Id.*

that moral abhorrence is not an important and legitimate ground for legislation? I think the answer is that the court can make no such demonstration in either of the supposed cases. Further, though it may be only a confession of my own limitations, I have not the remotest idea of how one would go about constructing the philosophy that would give the necessary answers—to judges. I am quite clear how I would vote as a citizen or a legislator on each of these statutes.

This brings me to the second stage of review, in which the government bears the burden of persuading the court that the challenged law is "substantially related to the achievement of [its] objectives."[9] In the case of most laws about which there is likely to be controversy, the social sciences are simply not up to the task assigned. For example, if the government insists upon arguing that a minimum wage law is designed to improve the lot of workers generally, microeconomic theory and empirical investigation may be adequate to show that the means do not produce the ends. The requisite demonstration will become more complex and eventually impossible as the economic analyses grow more involved. It is well to remember, too, that judge-made economics has not been universally admirable. Much that has been laid down under the antitrust laws testifies to that. Moreover, microeconomics is the best, the most powerful, and the most precise of the social sciences.

What is the court to do when told that a ban on the use of contraceptives in fact reduces the amount of adultery in the population? Or if it is told that slowing the migration of industry to the Sun Belt is good because it is more painful to lose jobs than not to get new jobs? The substantive due process formulation does not directly address cost-benefit analysis, but one might suppose a court employing this kind of review would also ask whether the benefits achieved were worth the costs incurred. Perhaps that is included in the concept of a substantial relationship between ends and means. If so, that introduces into the calculus yet another judgment that can only be legislative and impressionistic.

The third step—that the government must show that a "similar result cannot be achieved by a less drastic means"[10]—is loaded with ambiguities and disguised tradeoffs. A "similar" result may be one along the same lines but not the full result desired by the government. Usually, it would presumably involve a lesser amount of coer-

9. *Id.*
10. *Id.*

cion. A court undertaking to judge such matters will have no guidance other than its own sense of legislative prudence about whether the greater result is or is not worth the greater degree of restriction.

There are some general statements by some Framers of the fourteenth amendment that seem to support a conception of the judicial function like this one. But it does not appear that the idea was widely shared or that it was understood by the states that ratified the amendment. Such a revolutionary alteration in our constitutional arrangements ought to be more clearly shown to have been intended before it is accepted. This version of judicial review would make judges platonic guardians subject to nothing that can properly be called law.

The conclusion, I think, must be that only by limiting themselves to the historic intentions underlying each clause of the Constitution can judges avoid becoming legislators, avoid enforcing their own moral predilections, and ensure that the Constitution is law. For the subject of economic rights, that means we must turn away from the glamor of abstract philosophic discourse and back to the mundane and difficult task of discovering what the Framers were trying to accomplish with the Contract Clause and the Takings Clause.

Speeches of different tone
Earl Warren

BROOKINGS SPEECH
September 12, 1985

~~The subject of religion~~ and the law has become a national issue. But I will be talking about the subject from perspectives that have little or no bearing upon my performance as a judge. These are, rather, thoughts that seem interesting to me as a law professor and a citizen. ~~I will mention two of them.~~ Yale experience

~~The first is the extraordinary power and scope of the interpretations given the two clauses of the first amendment concerned with religion. The second is the recent upsurge~~ in ~~litigation~~.

Brief — Cut out all the interesting parts

The religious clauses state simply that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The establishment clause might have been read merely to preclude the recognition of an official church, or to prevent discriminatory aid to one or a few religions. The free exercise clause might have been read simply to prohibit laws that directly and intentionally penalize religious observance. Instead both have been interpreted to give them far greater breadth and severity.

The Supreme Court has fashioned a three-part rule for the establishment clause: "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither

advances ~~nor~~ inhibits religion, and if it does not foster an excessive government entanglement with religion." Those tests are obviously designed to erase all traces of religion in governmental action, to produce, as Richard John Neuhaus put it, a "public square naked of religious symbol and substance." And the modern law largely accomplishes that, except when the Court simply ignores the test, as it sometimes does. ~~And though the Justices cannot agree on the meaning of their three-part test so that in the words of Judge Scalia, before he was a judge and was still free to say such things, the law is "in a state of utter chaos and unpredictable change," the primary thrust of the law is as I have described it.~~

Let me illustrate the severity of the substantive rules ~~under the clause~~ by describing a case recently decided by the Supreme Court. In Aguilar v. Felton, the Supreme Court, ~~in a taxpayer suit~~, held violative of the establishment clause a New York City program, subsidized with federal funds, by which public school teachers who volunteered for the duty taught in private schools, including but not limited to religious schools. The program offered remedial instruction to educationally deprived children in remedial reading, mathematics, and English as a second language. The teachers were accountable only to the public school system, used teaching materials selected by city employees and screened for religious content, and taught in rooms free of religious symbols or artifacts. They were

generally not members of the religious faith espoused by the schools to which they were assigned. The record contains no evidence that any such teacher has complained of interference by private school officials or had sought to teach or promote religion. In fact, the lower court, before striking the program down, described it as "a program that apparently has done much good and little, if any, detectable harm."

The Supreme Court did not dispute that the program passed two parts of the three-part test since it had a secular purpose and its primary effect was neither to advance nor inhibit religion. The program was held unconstitutional, however, on the theory that it might entangle religion and government. The State, in order to be sure that the subsidized teachers do not inculcate religion, must engage in some form of continuing surveillance, which constitutes impermissible entanglement.

This case illustrates the power of the three-part test to outlaw a program that had not resulted in any advancement of religion but seems entirely worthy.

The point I want to make about these cases is an entirely unoriginal one. The three-part test is not useful in enforcing the values underlying the establishment clause. Time permits me to discuss only the first part of the test -- that governmental action is unconstitutional if it has a religious purpose. That cannot be squared with governmental actions that we know to be constitutional. I remember the day our court

heard en banc a challenge by atheists to the Houses of Congress paying salaries to chaplains. The judges and the lawyers for the atheists stood while the marshal opened court with the words: "God save the United States and this honorable court." The first part of the test -- no religious purpose -- appears to be inconsistent with the historical practice that suggests the intended meaning of the establishment clause. The Northwest Ordinance of 1789 allowed land grants for schools, including sectarian schools, on the ground that "religion, morality, and education" must be advanced. From the beginning, Presidents, at the request of Congress, have issued Thanksgiving Day proclamations that were explicitly religious. Jefferson alone refused. There were chaplains in the Continental Congress, and the First Congress, which proposed the first amendment four days earlier, provided for a chaplain for each House. That Congress also enacted a law authorizing the President, "by and with the advice and consent of the Senate," to appoint a paid chaplain for the military establishment. These may seem relatively minor actions but, in the context of a federal government that had very few functions that might have touched upon matters of religion, they seem not so minor after all.

(4) to p. 7

There are difficulties with ~~every~~ each part of the three-part test, which may explain why the Court from time to time simply drops the test altogether. That happened in Marsh v. Chambers,

The practice followed in Nebraska was, of course, quite traditional. [Insert (A)]

where the Court upheld the Nebraska legislature's practice of opening each legislative day with a prayer by a chaplain who was paid by the State out of tax monies. The Court majority reasoned essentially from ~~the~~ this historical record ~~that I have cited to show~~ that the amendment ~~was not~~ could not have been intended to cover this practice. The Court was undoubtedly correct in that, but there is a broader lesson: if the three-part test does not accord with what we know of the framers' intentions with respect to specific practices, it probably does not accord with the general intention of the establishment clause.

The religious clauses today have an impact on government and on society far beyond any impact they had only forty or fifty years ago. How is one to account for the enormous potency of these clauses, a potency many observers think to have been unsuspected by the framers? The exceptional sweep of establishment clause doctrine has led some to conclude that there is an anti-religious animus pervading the evolution of law. But that seems by no means a necessary conclusion, since the Court has been almost equally assiduous in demanding religious freedom for individuals under the free exercise clause. That hardly bespeaks a hostility to religion. Indeed, the court sometimes demands special accommodations for religion under the free exercise clause that it would undoubtedly have struck down as a violation of the establishment clause if government had made the accommodation voluntarily. The clauses

have been brought into conflict or, in more polite language, tension because of what Justice Rehnquist calls "our overly expansive interpretation of both Clauses."

One is left, however, to account for this overly expansive interpretation of the two clauses. Perhaps it may be put down to the centralizing tendency some have observed in the Court. Perhaps it may be attributed to the tendency others have remarked of the Court to expand its own powers to govern by expanding the meaning of the prohibitory clauses it administers. Whether or not those propositions are true, it is possible to offer a third hypothesis based upon similar trends in constitutional doctrine elsewhere. One thinks of developments in free speech doctrine in which it has been held that government may not, for example, deal with obscenity and pornography except in the most extreme cases, because, as one opinion put it, one man's vulgarity is another man's lyric. One notes the rise of the so-called right to privacy cases, which deal mainly with sexual morality and which generally conclude that sexual morality may be regulated only in extreme cases. ~~All of~~ these trends, ~~from interpretations of the religious clauses, to readings of the speech clause, to the privacy cases~~ share the common theme that morality is not usually the business of government but is instead primarily the concern of the individual. Whether or not so intended, these cases may be seen as representing the privatization of morality.

If that is correct, it may reflect an extra-constitutional intellectual tradition dating back at least to John Stuart Mill's On Liberty. This line of thought takes the position that an individual's liberty may not be infringed unless he causes harm to others. That formulation is obviously empty unless we know what counts as harm to others. Mill's position, essentially, was that material injury counted as harm but that moral or aesthetic injury does not. Thus, morality becomes a matter for the individual, not for democratic regulation. That stance would produce the trends in constitutional law that I have mentioned. In particular, it might help to explain the religious cases, since religion and morality are closely connected. Indeed, it appears to be a sociological fact that most Americans regard religion as the sole or primary basis for morality. One might expect, then, the privatization of religion by a stringent application of the establishment clause to keep the community, through government, from advancing or retarding religion, and an equally or almost as stringent application of the free exercise clause to permit the individual maximum freedom in his beliefs.

~~The second fact I mentioned is the~~ There is an enormous contemporaneous stirring in this field of constitutional law. That is part, of course, of the more general agitation of the issue of the relationship of religion to politics and government. We are witnessing now~~, perhaps, a resurgence in religion, but~~

~~certainly~~ a resurgence in the political assertiveness of religion-based movements. ~~One of the catalysts for that seem to be the recent rise of political awareness and sophistication~~ particularly among evangelical and fundamentalists Americans. This religious movement is said largely to have disappeared from the arena of public policy after the Scopes trial. Since then public policies have moved in directions evangelicals and fundamentalists, among others, do not like. They have organized politically and returned to the national public policy scene with fervor and with greatly increased sophistication. Their challenge to the secularism of our culture, now dominant in our constitutional law, has reenergized other religious groups, notably many Roman Catholics, to take stands demanding the return of religious values to our public life. These groups do not by any means agree on what religious values suggest for public policy but on some topics there may be a broad consensus among them. Among the things that very religious people are apt not to like is the privatization of morality and religion. That smacks too much of moral relativism. Hence, we observe such manifestations of opposition to the past trend of constitutional law as demands for school prayer, moments of silence, opposition to abortion and to pornography, financial aid to religious schools, and the like. This movement runs head on into the view that morality and religion are private

matters in which government must not become involved. In some part, then, it is the counter-movement of the religious, a movement which is both intellectual and religious, that can be expected to increase constitutional litigation around, among other things, the religious clauses of the first amendment.]

Many observers expected a major recasting of doctrine, but the Supreme Court this past term surprised them by adhering to the old tests. Eventually, however, we may see such a reformulation, not because I think the attitude of the Court will change, though of course it may, and not because of political pressures, but because, as observers of this area commonly remark, present doctrine is so unsatisfactory.(8) Courts can live with logical incoherence for extended periods of time. They have demonstrated that capacity in various fields of law. But sooner or later the paradoxes in which they are involved become so rich and so widely noted that they are likely to try again. The new doctrine that emerges may ultimately come to seem equally unsatisfactory. It may be safe to predict change. There is no reason to anticipate the resolution of all problems.

~~What, then, is at stake in the choice of legal doctrine to govern the relationship between church and state? It may be that there is both less and more than the advocates on both sides suppose.~~

8-) It has been suggested that the program struck down in Aguilar might become constitutionally permissible if the teaches were placed in trailers outside the school house, with the children coming to them rather than the other way around. Odd as it may seem, precedent supports the idea that the crucial issue is whether the publicly-funded teachers physically enter the private building. Now,

Constitutional doctrine cannot separate either religion and law or religion and politics. As to the first, there is very little law that does not rest ultimately upon moral choice and moral assumptions. That is inevitable. Most Americans believe that morality derives from religion. They will, as they always have, continue to legislate on the basis of their moral-religious beliefs. More than that, clergy of various denominations will, as they always have, continue to proclaim what Christianity or Judaism requires of government policy. They will often be demonstrably wrong because great moral precepts do not translate easily into policy detail, and the clergy may or may not understand the reality -- often economic or technological or political -- which lies between the moral precept and the choice of wise action. Still, the participation of churches and of those who address politics in religious terms serves as a reminder that public policy ought always to be based upon, and held accountable to, morality and not simply upon interest group struggles. I do not suppose for a moment that raw interest cannot be dressed in religious and moral argument, but the requirement that interest wear the clothes of morality may alter outcomes and may confer a legitimacy on the process of policy formation that the naked struggle for material gain can never achieve.

A relaxation of current rigidly secularist doctrine would in the first place permit some sensible things to be done. Not

much would be endangered if a case like Aguilar went the other way and public school teachers permitted to teach remedial reading to that portion of educationally deprived children who attend religious schools. I suspect that the greatest perceived change would be in the reintroduction of some religion into public schools and some greater religious symbolism in our public life.

It is contended that such symbolism creates political divisiveness, and no doubt it does, but that argument assumes that it is only the presence and not the enforced absence of religion that divides people. The deliberate and thorough-going exclusion of religion is seen as an affront and has become the cause of great devisiveness.

The subject at hand is endlessly complex and ought to be approached with flexibility and caution. In particular, we ought to be chary of formulating clear rules for every conceivable interaction of religion and government. It is a fact that the attempt to deal with a subject in a complex, nuanced way, mindful of all the subtleties and variations that do not lend themselves to the formulation of flat statements is regarded as a sign of maturity and wisdom everywhere but on the bench. There it is regarded as, if not injudicious, at least as unjudicial. The mark of the judge, apparently, is that he can reduce the most complex reality to a three-pronged test. Indeed, he can. And in so doing, he leaves out most of the reality, and distorts the rest.

The best a judge can do is attempt to discern the core of the value the framers intended to guard and apply it to today's world. Fidelity to the historical clauses is particularly important in this most sensitive and emotional area of constitutional law. The legitimacy of any decision, going either way, is much more likely to be recognized, however grudgingly, if we can honestly say, this is the meaning of the original compact by which our nation was created, and everyone -- religionists, non-religionists, and anti-religionists -- must live by it.

What may finally be at stake are matters far beyond those a judge is permitted to contemplate in reaching a decision. The case for the absolute separation of religion and government is well known. It is that when religion and government merge, the individual is less free both in his faith and in his politics. Jefferson said that "religion is a matter which lies solely between a man and his God" and he approved what he called "a wall of separation between church and State." That is the individualistic view, but there is a communitarian view.

There may be in man an ineradicable longing for the transcendent. If religion is officially removed from public celebration, other transcendent principles, some of them very ugly indeed, may replace them. Neuhaus makes the point by paraphrasing Spinoza, "transcendence abhors a vacuum." The public square will not remain naked. If religion departs, some

other principle -- perhaps political or racial -- will arrive. Again Neuhaus: "This is the cultural crisis -- and therefore the political and legal crisis -- of our society: the popularly accessible and vibrant belief systems and world views of our society are largely excluded from the public arena in which the decisions are made about how the society should be ordered . . . . Specifically with regard to law, there is nothing in store but a continuing and deepening crisis of legitimacy if courts persist in systematically ruling out of order the moral traditions in which Western law has developed and which bear, for the overwhelming majority of the American people, a living sense of right and wrong. The result, quite literally, is <u>the outlawing of the basis of law</u>."

Revised standard version of what framers intended

Repugnant "tirade" in Jefferson core - Madison as "opportunist"

Intentions - S. Chicago

Attendance in Senate

Even if intent of founders - impossible now - legislature

argument

Intent of framers - everything else is legislative

Europe ⇒ Jaffer ? - Dayen

Particular

Disestablishment ~~spectacle~~ - 5 States w/ state churches

Privileging status of non-duty