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Radio Feed by Senator Heflin to WHMA-Anniston, AL

Senator Howell Heflin:

"It appears that Judge Bork wants to be a martyr by insisting on a role call vote when it is obvious that he can't win. This martyr approach is further evidence of his extremism.

I was troubled by Judge Bork's extremism and admission that he had been a socialist, a libertarian that he nearly became a communist and actually recruited people to attend a communist party meetings . . . and had a strange lifestyle.

I am further disturbed by his refusal to discuss his belief in God or the lack there of. All of this as well as other reasons gave me doubt on risking him to a life time position on the United States Supreme Court."

THE WHITE HOUSE

WASHINGTON

September 2, 1987

Dear Friend:

Enclosed is a copy of a speech, with two short addenda, by Arnold Burns, Deputy Attorney General. The speech covers all the issues that have been raised in connection with the Bork nomination. I think it is "must" reading.

Sincerely,

Max Green

Max Green
Associate Director
Office of Public Liaison

Department of Justice

ADDRESS

OF

THE HONORABLE ARNOLD I. BURNS
DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE NATIONAL JEWISH COALITION

WEDNESDAY, AUGUST 26, 1987

THE GRAND HYATT HOTEL
WASHINGTON, D.C.

Thank you for the invitation to speak before this group on a very important question -- the confirmation of Robert Bork to be the next Associate Justice of the Supreme Court of the United States.

I stand here before you to tell you I am dead opposed to the confirmation of Robert Bork -- that is --the grotesque caricature of Robert Bork that is being served up to the American public.

At the same time, I am unabashed in my support of the confirmation of the Robert Bork I know and admire --the brilliant student; partner in one of America's great law firms; holder of, not one, but two distinguished chairs at the Yale Law School; one of the nation's foremost authorities on antitrust and constitutional law; Solicitor General responsible for handling hundreds of cases before the United States Supreme Court; and, finally, a respected judge for five years on the Court of Appeals for the District of Columbia, a court often described as "the second highest in the land." My job here today -- and your job if you decide to join me -- is to destroy the fictional Robert Bork and let the nation know about the real Robert Bork.

I

Let us begin our efforts at clarification by considering the words Senator Kennedy has used to portray Judge Bork:

> 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 the government and the doors of the federal courts would be shut on the fingers of millions of citizens.

I am dead opposed to the Robert Bork described by Senator Kennedy. Such a judge would be way out of the mainstream of American judicial opinion and should not be confirmed. But I ask you to compare this purely fictional Judge Bork with the Judge Bork that was unanimously confirmed by the Senate for the D.C. Circuit after receiving the ABA's highest rating -- "exceptionally well qualified" -- which is given to only a handful of judicial nominees each year. His five-year record reveals him to be a judicial craftsman of the first order, a jurist whose opinions command widespread admiration. It is a measure of Judge Bork's success that not one of his more than 100 majority opinions has been reversed by the Supreme Court -- think of it, not one. No appellate judge in the United States has a finer record. Indeed, not one of the over 400 majority opinions in which Judge Bork has joined has been reversed by the Supreme Court -- think of it, not one.

Judge Bork's occasional dissenting opinions have also shown distinction. I must emphasize, however, that in five years on the bench, during which Judge Bork heard hundreds of cases, he has written only 10 dissents and 7 partial dissents. He was in the majority 94 percent of the time, and only rarely parted company with other so-called "liberal" judges on the D.C. Circuit, such as Ruth Bader Ginsburg and Abner Mikva. For

example, Judge Bork and Judge Ginsburg have agreed on 90% of the cases before them. But even his occasional dissenting opinion was enough to mark him as a highly capable and respected judge. In Sims versus CIA, for instance, Judge Bork criticized a panel opinion which had, in his view, impermissibly narrowed the circumstances under which the identity of confidential intelligence sources could be protected by the government. When the case was appealed, all nine members of the Supreme Court agreed that the panel's definition of "confidential source" was too narrow and voted to reverse.

So much for the notion of Judge Bork being outside the mainstream. No wonder retired Chief Justice Warren Burger recently opined that Judge Bork is the most qualified nominee for the court in the last fifty years.

II

Consider next Senator Biden's claim, that:

> We can be certain that . . . had he been Justice Bork during the past 30 years and had his view prevailed, America would be a fundamentally different place than it is today. We would live in a very different America than we do now.

I am dead opposed to the phantom, the specter of a Judge Bork that Senator Biden describes. The Biden version of Judge Bork is belied by what I have just told you about Judge Bork's never having been reversed by the "balanced" Supreme Court Senator Biden admires.

Moreover, the notion that one justice, or even the Supreme Court itself, can change America is more than wrong. It reveals a dangerous bias in favor of the omnipotent judge, at the expense of the democratic branches of government. The problem is that many of the opponents of Judge Bork regard the Supreme Court as a policy-making entity, a super legislature if you will, where they have gone to see their pet policies recognized or protected when they have found congress or the state legislatures unavailing. This is a dangerous view of the Supreme Court, fundamentally elitist and undemocratic. It makes the Supreme Court yet another political branch, a body expected to decide questions of law based on value preferences untethered to the written law.

Enthusiasts for an activist judiciary (usually carrying the liberal label) have become so accustomed to urging the courts, indeed relying on the courts, to render political judgments that it may be only natural for them to assume that President Reagan wants to use the courts for the same purposes. And there are in fact a goodly number wearing the conservative label who want this; they, too, paint a distorted picture of Robert Bork. But the President simply wants to get the Supreme Court to cease being political and to perform its constitutional role of interpreting and construing the laws made by others.

III

But allow me to continue to dispel confusion: This is the AFL-CIO leadership's Robert Bork:

> He is a man moved not by deference to the democratic process, nor by allegiance to any recognized theory of jurisprudence, but by an overriding commitment to the interests of the wealthy and powerful in society. . . . He has never shown the least concern for working people, minorities, the poor or for individuals seeking the protection of the law to vindicate their political and civil rights.

I am dead opposed to that Robert Bork. But the AFL-CIO's Bork is an imposter, and a not-too-effective one at that. It is gross mischaracterization of Judge Bork's record to say that he does not follow a "recognized theory" of jurisprudence. To the contrary, Judge Bork is universally recognized as one of the nation's leading exponents of judicial restraint, a doctrine which has as its foundation "deference to the democratic process", to quote the AFL-CIO again. He has consistently and fairly applied this philosophy in his role as a judge, emphasizing that a judge's view of what is desirable as a matter of policy has no place in the judge's decision of what the law means.

In interpreting a law, a judge must start somewhere, and the real Robert Bork begins with the text of the law, and proceeds to consider its history and structure, if necessary. This of course, is what all judges should do. Not every excellent judge will necessarily arrive at the same answer, but every judge

should apply the same set of rules -- the same methodology of judging.

A judge that interprets the law in this fashion will render some decisions in favor of, to quote the AFL-CIO again, "working people, minorities, and the poor," and will render some against them. It is enough to disprove the AFL-CIO's improbable thesis -- that Judge Bork simply computes the net worth of litigants to determine who should win the case -- to point to a couple of decisions.

Judge Bork authored an opinion holding that the Mine Safety and Health Administration had improperly excused a mine operator from complying with mine safety standards that were promulgated to protect miners. Judge Bork has also joined or authored numerous decisions that resulted in important victories for labor unions. In the private sector, these decisions include cases involving arbitration disputes, secondary boycott claims, and private settlements of unfair labor practice charges. In the public sector, they include cases involving employer attempts to withhold information from a union, employer misconduct in collective bargaining negotiations, employer obligations to grant official time to employees who negotiate labor agreements, procedures to ensure adequate labor protective arrangements in mass transit systems, judicial review in arbitration decisions, and government personnel regulations covering reductions in the labor force.

The false Robert Bork being portrayed by the AFL-CIO is a judge who bends the rules, or does not follow them, in order to reach a particular result. This portrait is the antithesis of everything for which Robert Bork has consistently stood over the last thirty years. Throughout his entire professional career, Robert Bork has inveighed against result-oriented judges.

IV

Consider next the national women's center's effigy of Robert Bork:

> [Judge Bork] would leave women defenseless against governmental sex discrimination. . . . Judge Bork's views reflect america of the 18th and 19th century, where under the law women stood behind men -- not by their side.

I am dead opposed to that Robert Bork -- because I am against the confirmation of any judge who intends to ignore the Constitution and the many laws we have on the books that prohibit discrimination on the basis of sex. But Judge Bork's record in the area of sex discrimination is hard to fault, even if we consider only the results of these cases rather than the facts and the law, which apparently is the mode of analysis of some of these groups.

But at the heart of this particular caricature is the notion that Judge Bork is a rigid, wooden judge, who clings desperately to "eighteenth century" notions in the face of twentieth century problems. Judge Bork's opinions paint quite a different picture.

The most notable example is his opinion in Ollman v. Evans. The case centered on allegedly defamatory statements by columnists criticizing a marxist history professor. Judge Bork wrote a concurring opinion, refusing to apply a "rigid doctrinal framework ... Inadequate to resolve the sometimes contradictory claims of the libel laws and the freedom of the press." Instead, wrote Judge Bork, we must be concerned that "in the past few years, a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment would most certainly prohibit." Thus, Judge Bork refused to take a narrow view of the first amendment, observing that "it is the task of a 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 ...."

Libel lawyer Bruce Sanford has observed that "there hasn't been an opinion more favorable to the press in a decade." But what I want to emphasize is not the result in this particular case, for a number of highly respected lawyers disagree with Judge Bork's expansive press protection. The important point for purposes of determining Judge Bork's fitness for the Supreme Court is that the real Judge Bork's Constitutional theory is not at all like the horse and buggy, eighteenth century parody that his opponents have created.

V

Representative Conyers, spokesman for the Congressional Black Caucus, said last week that Judge Bork would "set back race relations more than 25 years." I am dead opposed to that Robert Bork. I am against the confirmation of any judge out to achieve such mischief because the ending of racial and religious intolerance has got to continue to be among our highest priorities. But the Robert Bork I know has given full sway to the Constitutional and statutory guarantees against discrimination. While Solicitor General, Robert Bork several times advocated a construction of the civil rights laws broader than that which the Supreme Court adopted! And as a judge he has authored some very important opinions in the civil rights area.

But rather than talk about words written by Judge Bork in opinions and legal briefs, I want to give you a true picture of the man by sharing with you an incident from early in his professional career. According to the Washington Post, when Robert Bork was a young associate at a major Chicago law firm, the application of an outstanding University of Chicago law student -- Howard Krane -- was briefly considered and then rejected. One associate overheard a partner saying that Krane was passed over because he was Jewish, and mentioned this to Bork. Even though only an associate, Bork went to see several senior partners and said, according to one of his colleagues, "We have a larger stake in the future of this firm than you do. We

want this man considered on his merits." The partners agreed to take a second look, and today Krane is managing partner of the firm.

VI

In sum, then, Judge Bork is the embodiment of an almost perfect judge -- he is brilliant, he is dispassionate, he decides cases on their facts and the law, not on his personal predilections. Why then do I say that he is "almost perfect." The answer is simple -- because we have lost cases in front of Judge Bork, including some big ones. And, as an occasionally disgruntled litigant, I would have a hard time describing the author of those opinions as "perfect." But we know that Judge Bork has always given us -- and all other litigants in his courtroom -- a "fair shake", or, to recite the words inscribed above the steps to the Supreme Court, "equal justice under law." With your help, I am sure that Judge Bork will soon climb those steps and become one of history's greatest justices.

SOME CRITICS OF JUDGE BORK HAVE RAISED THE ISSUE OF ABORTION, CONFIDENTLY PRONOUNCING THAT JUDGE BORK WILL VOTE THIS WAY OR THAT ON ABORTION ISSUES. THESE CRITICS MUST HAVE A FULLY-OPERATIVE CRYSTAL BALL IN THEIR POSSESSION, BECAUSE WE DO NOT HAVE SUCH A GIFT OF PROPHECY. NEITHER THE PRESIDENT NOR ANY OTHER MEMBER OF THE ADMINISTRATION HAS EVER ASKED JUDGE BORK FOR HIS PERSONAL OR LEGAL VIEWS ON ABORTION. AND IN 1981, JUDGE BORK TESTIFIED BEFORE CONGRESS IN OPPOSITION TO THE PROPOSED HUMAN LIFE BILL, WHICH SOUGHT TO REVERSE ROE VERSUS WADE BY DECLARING THAT HUMAN LIFE BEGINS AT CONCEPTION. JUDBE BORK CALLED SUCH A STRATEGEM AN "UNCONSTITUTIONAL" DEFIANCE OF A SUPREME COURT DECISION.

IN THE PAST, JUDGE BORK HAS ONLY QUESTIONED WHETHER THERE IS A RIGHT TO ABORTION IN THE CONSTITUTION. QUESTIONS ALONG THIS LINE HAVE BEEN RAISED BY MANY, IF NOT MOST, CONSTITUTIONAL SCHOLARS IN THIS COUNTRY, INCLUDING HARVARD LAW PROFESSOR ARCHIBALD COX AND STANFORD LAW SCHOOL DEAN JOHN HART ELY. BUT HE HAS NEVER SAID THAT THE ROE DECISION OUGHT TO BE OVERRULED. INDEED, GIVEN HIS OFTEN EXPRESSED VIEW OF THE GREAT IMPORTANCE OF PRIOR DECISIONS -- STARE DECIS AS IT IS REFERRED TO BY LAWYERS -- IT IS NOT AT ALL CLEAR WHAT HIS VOTE WOULD BE IF A CASE CHALLENGING THE DECISION CAME BEFORE THE SUPREME COURT. WE DO KNOW ONE THING, HOWEVER: JUDGE BORK WOULD DECIDE SUCH A CASE

CAREFULLY, DISPASSIONATELY, ON THE LAW AND THE CONSTITUTION. THAT IS WHY THE PRESIDENT NOMINATED HIM FOR THE POSITION.

CONCERNS HAVE BEEN RAISED IN SOME QUARTERS ABOUT JUDGE BORK'S VIEWS ON THE RELIGION CLAUSES OF THE FIRST AMENDMENT. THESE CONCERNS ARE MANUFACTURERED OUT OF WHOLE CLOTH AS WELL. JUDGE BORK HAS NOT HAD OCCASION TO PASS ON MANY RELIGION ISSUES IN THE D.C. CIRCUIT. JUDGE BORK WAS NOT INVOLVED, FOR INSTANCE, IN THE RECENT CASE CONCERNING THE APPLICATION OF AIR FORCE HEADGEAR REGULATIONS TO THE YARMULKE. INDEED, JUDGE BORK HAS DECIDED ONLY ONE RELIGION CLAUSE CASE WHILE ON THE BENCH -- A CASE WHICH INVOLVED A CHALLENGE TO THE PAYMENT OF GOVERNMENT FUNDS FOR THE SERVICES OF A LEGISLATIVE CHAPLIN. IN DISMISSING THE CHALLENGE, THE D.C. CIRCUIT SIMPLY NOTED THAT THE SUPREME COURT HAD SPOKEN ON THE ISSUE AND HAD HELD THAT PAYMENT OF SUCH FUNDS DID NOT VIOLATE THE ESTABLISHMENT CLAUSE.

SO WE ARE LEFT TO RELY ON JUDGE BORK'S DECISIONS IN OTHER CASES -- CASES WHICH DEMONSTRATE THAT HE FAIRLY AND DISPASSIONATELY REVIEWS THE LAW AND THE CONSTITUTION TO REACH HIS CONCLUSIONS, FAITHFULLY APPLYING PRIOR SUPREME COURT PRECEDENTS IN THE AREA. NO ONE NEED BE CONCERNED ABOUT A RADICAL SHIFT IN THE COURT'S RELIGION CLAUSE JURISPRUDENCE FROM THE APPOINTMENT OF A JUSTICE WHO DECIDES CASES IN THIS FASHION. TO SUGGEST OTHERWISE IS NOTHING OTHER THAN PURE DEMAGOGUERY.

THE WHITE HOUSE

WASHINGTON

Bork

September 3, 1987

Dear Editor:

I have enclosed an article supporting the Bork nomination. I realize that it is a bit longer than the usual op-ed column, but I hope that you will carry it its entirety. I would, of course, be more than happy to reply to critical comments for a subsequent issue. Thank you very much for your cooperation.

Sincerely,

Max Green
Associate Director
Office of Public Liaison

The Case for Judge Robert Bork

Max Green

What is the real reason for the opposition to the nomination of Judge Robert Bork to the Supreme Court? I ask this question because to this date, the reasons that have been offered have been so patently unreal. Consider the charges:

-- "Judge Bork is an 'extremist'." This charge is belied by the fact that not one of the more than one hundred majority decisions Bork has written as a Court of Appeals judge has been overturned by the Supreme Court. Indeed, the Court reversed none of the four hundred plus decisions in which he was in the majority, and he has been in the majority in ninety four percent of the cases he has heard. In five years Bork has written a total of only ten full and seven partial dissents. This is hardly the record of an out of the mainstream judge.

-- Judge Bork opposes "freedom of choice". The truth is that none of the groups making this charge know what Bork's views are on the rights and wrongs of abortion, or on whether it should be freely available or not. Bork does not believe it is the business of appointed judges to make moral and political pronouncements; rather, it is to interpret the

constitution and laws of the land in accordance with the intention of those responsible for their adoption. Here too he is decidely in the mainstream, being in the tradition of the great Supreme Court justice Felix Frankfurter and of Alexander Bickel, probably the preeminent legal scholar of our time.

Accordingly, Bork opposed the decision in Roe v. Wade because it usurped the power of the state legislatures in the name of a "right to privacy" which is nowhere mentioned or fairly implied in the Constitution or the Bill of Rights. Bork is joined in his criticism of the decision by a growing number of legal scholars and judges including such liberal heroes as Archibald Cox.

It is worth noting as well that Bork opposed the human life bill, a legislative effort to overrule Roe by defining life as beginning at the moment of conception. In Senate testimony, Bork showed himself to be a vigilant guardian of the Court's prerogatives, arguing that the bill would strip the Court of its responsibility to interpret the provisions of the Constitution. Moreover, it is by no means clear that Bork would vote to reverse if a similar case would reach the Court in the future. Certainly his often expressed and demonstrated respect for and deference to judicial precedent would mitigate against the Court's overturning a policy which has become so ingrained and widespread in our society.

Nonetheless, we should understand what would happen and what would not happen if Roe v. Wade were indeed reversed. Abortions would not ipso facto become illegal. Rather the right to regulate access to abortion would revert to the states, the vast majority of which would almost certainly adopt liberal abortion legislation. As Michael Barone, the co-author of the encyclopedia Almanac of American Politics wrote in the Washington Post; "In the five years before the decision, legislatures in eighteen states with 41% 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% of Americans lived within one hundred miles of a place where abortions were legal. Other legislatures would surely have liberalized their abortion laws in the legislatures sessions just beginning as the Supreme Court spoke.... the legislatures were acting more rapidly on this issue than they have on almost any issue in two hundred years of American history."

-- Bork would "roll back the clock on civil rights." Just how the judge would do this is left to the imagination, because once again, the facts belie the allegation. Here we know exactly where Bork stands, and that, to his critics dismay, is with the overwhelming majority of the American people. In 1963, fresh out of law school, Judge Bork argued in the pages of the liberal New Republic magazine that no matter how morally abhorrent, private citizens but not government had the right to discriminate. But by the early 1970's,

Bork had outgrown these libertarian views. In confirmation hearings for the position of Solicitor General in 1973, Bork testified that "it seems to me that I was on the wrong track altogether. It seems to me that the law (1984 Civil Rights Act) has worked very well, and I do not see any problem with the statute."

However, over the subsequent fifteen years, problems have arisen with regard to civil rights legislation, much of which has been interpreted to require race consciousness and race preferences rather than the color blind application of the laws that was intended by their authors. Bork has taken exception to this trend, most notably in his critique of the Bakke decision. In the Bakke case, a fractured Supreme Court permitted the University of California to discriminate against a Jewish applicant in favor of a far less qualified minority. If he is to be labeled an extremist for this, then so should the Anti-Defamation League which filed an amicus curiae in the case which made the same argument Bork had in his article.

-- Judge Bork would weaken the establishment clause. For example, he is said to favor public funding of religious schools, the proof being his criticism of the Court's decision in Aguilar v. Felton, a decision that prohibited the New York City Board of Education teachers from providing remedial education to educationally disadvantaged children in the private school they attended, including private

religious schools. The Court did not prohibit the public school teachers from teaching the parochial school students, only from teaching them in parochial school buildings. To comply, the Board went to the heavy expense of purchasing vans, leasing additional space in nearby buildings, et cetera. Therefore, the Board of Education will have to spend millions more each year on the education of parochial school students than before the decision was rendered. It is this absurd result that led Bork to conclude that "not much would be endangered if a case like Aguilar went the other way." This is the sum and substance of Judge Robert Bork on public funding of religious schools.

On the general issue of church-state, Bork has forcefully argued that it must be "approached with flexibility and caution... Fidelity to the historical clauses is particularly important in this most sensitive and emotional area of constitutional law." These are hardly the thoughts of a man about to go off the deep end. Indeed, they parallel the views of Morris Abram, the eminent lawyer who now serves as Chairman of the Conference of Presidents of Major Jewish Organizations. In a recent Public Interest article, "Is 'Strict Separation' too Strict," Abram says of the tripartite test that Bork too has criticized: "Neat efforts, like the tripartite test tend to founder in an area as complicated as the church-state relationship." Instead Abram endorses a "pragmatic" approach to this area of the law that I for one cannot distinguish from Bork's.

All the above notwithstanding, Judge Bork's opponents still speak in semi-hysterical tones. To listen to them one would think that the Republic will fall when he is confirmed. I think the reason that Bork gives his opponents fits is that his nomination reveals their own hypocrisy. For years now they have been charging the President with nominating second raters who pass the conservative litmus test. Bork is nothing if not first rate; even his foes admit that he is one of the most brilliant legal minds in the country. He is also inordinately qualified by virtue of exemplary service as a practicing lawyer, professor at Yale Law School, Solicitor General and Court of Appeals judge. And, he has obviously not passed any right wing litmus test, having argued against the Human Rights Bill and also President Reagan's own Balanced Budget amendment to the Constitution. Bork, thus, forces his opponents to show their true colors. The fact is that they are interested in results e.g., racial quotas, and they do not care much about how they get there. What irks them about Bork is precisely his devotion to "neutral principles," to the process of judicial decision making. However, for those of us committed to democratic principles, that is the very best reason for his confirmation.

** Among his responsibilities at the White House, Max Green acts as a liaison with the Jewish Comminity.

BORK NOMINATION

GENERAL OVERVIEW

- Judge Robert Bork is one of the most qualified individuals ever nominated to the Supreme Court. He is a preeminent legal scholar; a practitioner who has argued and won numerous cases before the Supreme Court; and a judge who for five years has been writing opinions that faithfully apply law and precedent to the cases that come before him.

- As Lloyd Cutler, President Carter's Counsel, has recently said: "In my view, Judge Bork is neither an idealogue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues....The essence of [his] judicial philosophy is self-restraint." Mr. Cutler, one of the nation's most distinguished lawyers and a self-described "liberal democrat and...advocate of civil rights before the Supreme Court," compared Judge Bork to Justices Holmes, Brandeis, Frankfurter, Stewart, and Powell, as one of the few jurists who rigorously subordinate their personal views to neutral interpretation of the law.

- As a member of the Court of Appeals, Judge Bork has been solidly in the mainstream of American jurisprudence.

  - Not one of his more than 100 majority opinions has been reversed by the Supreme Court.

  - The Supreme Court has never reversed any of the over 400 majority opinions in which Judge Bork has joined.

  - In his five years on the bench, Judge Bork has heard hundreds of cases. In all of those cases he has written only 9 dissents and 7 partial dissents. When he took his seat on the bench, 7 of his 10 colleagues were Democratic appointees, as are 5 of the 10 now. He has been in the majority in 94 percent of the cases he has heard.

  - The Supreme Court adopted the reasoning of several of his dissents when it reversed opinions with which he had disagreed. Justice Powell, in particular,

has agreed with Judge Bork in 9 of 10 cases that went to the Supreme Court.

- Judge Bork has compiled a balanced record in all areas of the law, including the First Amendment, civil rights, labor law, and criminal law. In fact, his views on freedom of the press prompted scathing criticism from his more conservative colleague, Judge Scalia.

- Some have expressed the fear that Judge Bork will seek to "roll back" many existing judicial precedents. There is no basis for this view in Judge Bork's record. As a law professor, he often criticized the reasoning of Supreme Court opinions; that is what law professors do. But as a judge, he has faithfully applied the legal precedents of both the Supreme Court and his own Circuit Court. Consequently, he is almost always in the majority on the Court of Appeals and has never been reversed by the Supreme Court. Judge Bork understands that in the American legal system, which places a premium on the orderly development of the law, the mere fact that one may disagree with a prior decision does not mean that that decision ought to be overruled.

- Judge Bork is the leading proponent of "judicial restraint." He believes that judges should overturn the decisions of the democratically-elected branches of government only when there is warrant for doing so in the Constitution itself. He further believes that a judge has no authority to create new rights based upon the judge's personal philosophical views, but must instead rely solely on the principles set forth in the Constitution.

- Justice Stevens, in a speech before the Eighth Circuit Judicial Conference, stated his view that Judge Bork was "very well qualified" to be a Supreme Court Justice. Judge Bork, Justice Stevens explained, would be "a welcome addition to the Court."

QUALIFICATIONS

Any one of Judge Robert Bork's four positions in private practice, academia, the Executive Branch or the Judiciary would have been the high point of a brilliant career, but he has managed all of them. As The New York Times stated in 1981, "Mr. Bork is a legal scholar of distinction and principle."

- Professor at Yale Law School for 15 years; holder of two endowed chairs; graduate of the University of Chicago Law School, Phi Beta Kappa and managing editor of the Law Review.

- Among the nation's foremost authorities on antitrust and constitutional law. Author of dozens of scholarly works, including The Antitrust Paradox, a leading work on antitrust law.

- An experienced practitioner and partner at Kirkland & Ellis.

- Solicitor General of the United States, 1973-77, representing the United States before the Supreme Court in hundreds of cases.

- Unanimously confirmed by the Senate for the D.C. Circuit in 1982, after receiving the ABA's highest rating-- "exceptionally well qualified"--which is given to only a handful of judicial nominees each year.

- As an appellate judge, he has an outstanding record: not one of his more than 100 majority opinions has been reversed by the Supreme Court.

- The Supreme Court adopted the reasoning of several of his dissents when it reversed opinions with which he had disagreed. For example, in Sims v. CIA, Judge Bork criticized a panel opinion which had impermissibly, in his view, narrowed the circumstances under which the identity of confidential intelligence sources could be protected by the government. When the case was appealed, all nine members of the Supreme Court agreed that the panel's definition of "confidential source" was too narrow and voted to reverse.

GENERAL JUDICIAL PHILOSOPHY

Judge Bork has spent more than a quarter of a century refining a careful and cogent philosophy of law.

- His judicial philosophy begins with the simple proposition that judges must apply the Constitution, the statute, or controlling precedent--not their own moral, political, philosophical or economic preferences.

- He believes in neutral, text-based readings of the Constitution, statutes and cases. This has frequently led him to take positions at odds with those favored by

political conservatives. For example, he testified before the Senate Subcommittee on Separation of Powers that he believed the Human Life Bill to be unconstitutional; he has opposed conservative efforts to enact legislation depriving the Supreme Court of jurisdiction over issues like abortion and school prayer; and he has publicly criticized conservatives who wish the courts to take an active role in invalidating economic regulation of business and industry.

- He is not a political judge: He has repeatedly criticized politicized, result-oriented jurisprudence of either the right or the left.

- Judge Bork believes that there is a presumption favoring democratic decisionmaking, and he has demonstrated deference to liberal and conservative laws and agency decisions alike.

- He has repeatedly rebuked academics and commentators who have urged conservative manipulation of the judicial process as a response to liberal judicial activism.

- Judge Bork believes judges are duty-bound to protect vigorously those rights enshrined in the Constitution. He does not adhere to a rigid conception of "original intent" that would require courts to apply the Constitution only to those matters which the Framers specifically foresaw. To the contrary, he has written that 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." His opinions applying the First Amendment to modern broadcasting technology and to the changing nature of libel litigation testify to his adherence to this view of the role of the modern judge.

- He believes in abiding by precedent: he testified in 1982 regarding the role of precedent within the Supreme Court:

> I think the value of precedent and of certainty and of continuity is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that that prior decision was wrong and perhaps pernicious.

He also has said that even questionable prior precedent ought not be overturned when it has become part of the political fabric of the nation.

- As The New York Times said in a December 12, 1981, editorial endorsing his nomination to our most important appellate court in 1981:

> Mr. Bork...is a legal scholar of distinction and principle....One may differ heatedly from 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.

FIRST AMENDMENT

- During his five years on the bench, Judge Bork has been one of the judiciary's most vigorous defenders of First Amendment values.

- He has taken issue with his colleagues, and reversed lower courts, in order to defend aggressively the rights of free speech and a free press. For example:

  - In Ollman v. Evans and Novak, Judge Bork greatly expanded the constitutional protections courts had been according journalists facing libel suits for political commentary. Judge Bork expressed his concern that a recent and dramatic upsurge in high-dollar libel suits threatened to chill and intimidate the American press, and held that those considerations required an expansive view of First Amendment protection against such suits.

    Judge Bork justified his decision as completely consistent with "a judicial tradition of a continuing evolution of doctrine to serve the central purpose" of the First Amendment. This reference to "evolution of doctrine" provoked a sharp dissent from Judge Scalia, who criticized the weight Judge Bork gave to "changed social circumstances". Judge Bork's response was unyielding: "It is the task of the judge in this generation to discern how the framer's values, defined in the context of the world they knew, apply to the world we know."

    Judge Bork's decision in this case was praised as "extraordinarily thoughtful" in a New York Times column authored by Anthony Lewis. Lewis further described the opinion as "too rich" to be adequately summarized in his column. Libel lawyer Bruce Sanford

said, "There hasn't been an opinion more favorable to the press in a decade."

- In McBride v. Merrell Dow and Pharmaceuticals Inc., Judge Bork stressed the responsibility of trial judges in libel proceedings to ensure that a lawsuit not become a "license to harass" and to take steps to "minimize, so far as practicable, the burden a possibly meritless claim is capable of imposing upon free and vigorous journalism." Judge Bork emphasized that even if a libel plaintiff is not ultimately successful, the burden of defending a libel suit may itself in many cases unconstitutionally constrain a free press. He wrote: "Libel suits, if not carefully handled, can threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship. We do not mean to suggest by any means that writers and publications should be free to defame at will, but rather that suits--particularly those bordering on the frivolous--should be controlled so as to minimize their adverse impact upon press freedom."

- In Lebron v. Washington Metropolitan Area Transit Authority, Judge Bork reversed a lower court and held that an individual protestor had been unconstitutionally denied the right to display a poster mocking President Reagan in the Washington subway system. Judge Bork characterized the government's action in this case as a "prior restraint" bearing a "presumption of unconstitutionality." Its decision to deny space to the protestor, Judge Bork said, was "an attempt at censorship," and he therefore struck it down.

- Judge Bork's record indicates he would be a powerful ally of First Amendment values on the Supreme Court. His conservative reputation and formidable powers of persuasion provide strong support to the American tradition of a free press. Indeed, precisely because of that reputation, his championing of First Amendment values carries special credibility with those who might not otherwise be sympathetic to vigorous defenses of the First Amendment.

- In 1971 Judge Bork wrote an article suggesting that the First Amendment is principally concerned with protecting political speech. It has been suggested that this might mean that Bork would seek to protect only political speech. But Judge Bork has repeatedly made his position on this issue crystal clear: in a letter published in the ABA Journal in 1984, for

example, he said that "I do not think...that First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative....As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection." He also testified before Congress to this effect in 1982. He has made unmistakably clear his view that the First Amendment itself, as well as Supreme Court precedent, requires vigorous protection of non-political speech.

- On the appellate court, Judge Bork has repeatedly issued broad opinions extending First Amendment protection to non-political speech, such as commercial speech (FTC v. Brown and Williamson Tobacco Corp.), scientific speech (McBride v. Merrell Dow and Pharmaceuticals, Inc.) and cable television programming involving many forms of speech (Quincy Cable Television v. FCC).

CIVIL RIGHTS

- As Solicitor General, Judge Bork was responsible for the government arguing on behalf of civil rights in some of the most far-reaching civil rights cases in the Nation's history, sometimes arguing for more expansive interpretations of the law than those ultimately accepted by the Court.

- Among Bork's most important arguments to advance the civil rights of minorities were:

  - Beer v. United States -- Solicitor General Bork urged a broad interpretation of the Voting Rights Act to strike down an electoral plan he believed would dilute black voting strength, but the Court disagreed 5-3.

  - General Electric Co. v. Gilbert -- Bork's amicus brief argued that discrimination on the basis of pregnancy was illegal sex discrimination, but six justices, including Justice Powell, rejected this argument. Congress later changed the law to reflect Bork's view.

  - Washington v. Davis -- The Supreme Court, including Justice Powell, rejected Bork's argument that an employment test with a discriminatory "effect" was unlawful under Title VII.

- Teamsters v. United States -- The Supreme Court, including Justice Powell, ruled against Bork's argument that even a wholly race-neutral senority system violated Title VII if it perpetuated the effects of prior discrimination.

- Runyon v. McCrary -- Following Bork's argument, the Court ruled that civil rights laws applied to racially discriminatory private contracts.

- United Jewish Organization v. Carey -- The Court agreed with Bork that race-conscious redistricting of voting lines to enhance black voting strength was constitutionally permissible.

- Lau v. Nichols -- This case established that a civil rights law prohibited actions that were not intentionally discriminatory, so long as they disproportionately harmed minorities. The Court later overturned this case and narrowed the law to reach only acts motivated by a discriminatory intent.

- As a member for five years of the United States Court of Appeals for the D.C. Circuit, Judge Bork has compiled a balanced and impressive record in the area of civil rights.

- He often voted to vindicate the rights of civil rights plaintiffs, frequently reversing lower courts in order to do so. For example:

  - In Palmer v. Shultz, he voted to vacate the district court's grant of summary judgment to the government and hold for a group of female foreign service officers alleging State Department discrimination in assignment and promotion.

  - In Ososky v. Wick, he voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system.

  - In Doe v. Weinberger, he voted to reverse the district court and hold that an individual discharged from the National Security Agency for his homosexuality had been illegally denied a right to a hearing.

  - In County Council of Sumter County, South Carolina v. United States, Judge Bork rejected a South Carolina county's claim that its switch to an "at-large" election system did not require preclearance from the Attorney General under the Voting Rights Act. He later held that the County

had failed to prove that its new system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote."

- In Norris v. District of Columbia, Judge Bork voted to reverse a district court in a jail inmate's Section 1983 suit against four guards who allegedly had assaulted him. Judge Bork rejected the district court's reasoning that absent permanent injuries the case must be dismissed; the lawsuit was thus reinstated.

- In Laffey v. Northwest Airlines, Judge Bork affirmed a lower court decision which found that Northwest Airlines had discriminated against its female employees.

- In Emory v. Secretary of the Navy, Judge Bork reversed a district court's decision to dismiss a claim of racial discrimination against the United States Navy. The District Court had held that the Navy's decisions on promotion were immune from judicial review. In rejecting the district court's theory, Judge Bork held: "Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated."

- Judge Bork has rejected, however, claims by civil rights plaintiffs when he has concluded that their arguments were not supported by the law. For example:

  - In Paralyzed Veterans of America v. Civil Aeronautics Board, Judge Bork criticized a panel decision which had held that all the activities of commercial airlines were to be considered federal programs and therefore subject to a statute prohibiting discrimination against the handicapped in federal programs. Judge Bork characterized this position as flatly inconsistent with Supreme Court precedent. On appeal, the Supreme Court adopted Judge Bork's position and reversed the panel in a 6-3 decision authored by Justice Powell.

  - In Vinson v. Taylor, Judge Bork criticized a panel decision in a sexual harassment case, both because of evidentiary rulings with which he disagreed and because the panel had taken the position that employers were automatically liable for an

employee's sexual harassment, even if the employer had not known about the incident at issue. The Supreme Court on review adopted positions similar to those of Judge Bork both on the evidentiary issues and on the issue of liability.

- In Dronenberg v. Zech, Judge Bork rejected a constitutional claim by a cryptographer who was discharged from the Navy because of his homosexuality. Judge Bork held that the Constitution did not confer a right to engage in homosexual acts, and that the court therefore did not have the authority to set aside the Navy's decision. He wrote: "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court." The case was never appealed, but last year the Supreme Court adopted this same position in Bowers v. Hardwick--a decision in which Justice Powell concurred.

- In Hohri v. United States, Judge Bork criticized a panel opinion reinstating a claim by Americans of Japanese descent for compensation arising out of their World War II internment. Judge Bork denounced the internment, but pointed out that in his view the Court of Appeals did not have statutory authority to hear the case. He characterized the panel opinion as one in which "compassion displaces law." In a unanimous opinion authored by Justice Powell, the Supreme Court adopted Judge Bork's position and reversed the panel on appeal.

- Judge Bork has never had occasion to issue a ruling in an affirmative action case. While a law professor, he wrote an op-ed piece in 1979 for The Wall Street Journal in which he criticized the recently issued Bakke decision. Since then, however, the Supreme Court has issued many other decisions affecting this issue, and Judge Bork has never in any way suggested that he believes this line of cases should be overruled.

- In 1963 Bork wrote an article in the New Republic criticizing proposed public accommodations provisions that eventually became part of the Civil Rights Act as undesirable legislative interference with private business behavior.

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

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

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

- His article, as does his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination there need be no argument."

LABOR

- Judge Bork's approach to labor cases illustrates his deep commitment to principled decisionmaking. His faithful interpretation of the statutes at issue has resulted in a balanced record on labor issues that defies characterization as either "pro-labor" or "pro-management."

- He has often voted to vindicate the rights of labor unions and individual employees both against private employers and the federal government.

  - In an opinion he authored for the court in United Mine Workers of America v. Mine Safety Health Administration, Judge Bork held on behalf of the union that the Mine Safety and Health Administration could not excuse individual mining companies from compliance with a mandatory safety standard, even on an interim basis, without following particular procedures and ensuring that the miners were made as safe or safer by the exemption from compliance.

  - In concurring with an opinion authored by Judge Wright in Amalgamated Clothing and Textile Workers v. National Labor Relations Board, Judge Bork held that despite evidence that the union, at least in a limited manner, might have engaged in coercion in a very close election that the union won, the National Labor Relations Board's decision to certify the union should not be overturned nor a new election ordered.

  - In Musey v. Federal Mine Safety and Health Review Commission, Judge Bork ruled that under the Federal

Coal Mine and Health and Safety Act the union and its attorneys were entitled to costs and attorney fees for representing union members.

- In Amalgamated Transit Union v. Brock, Judge Bork, writing for the majority, held in favor of the union that the Secretary of Labor had exceeded his statutory authority in certifying in federal assistance applications that "fair and equitable arrangements" had been made to protect the collective bargaining rights of employees before labor and management had actually agreed to a dispute resolution mechanism.

- In United Scenic Artists v. National Labor Relations Board, Judge Bork joined an opinion which reversed the Board's determination that a secondary boycott by a union was an unfair labor practice, holding that such a boycott occurs only if the union acts purposefully to involve neutral parties in its dispute with the primary employer.

- Similar solicitude for the rights of employees is demonstrated by Northwest Airlines v. Airline Pilots International, where Bork joined a Judge Edwards' opinion upholding an arbitrator's decision that an airline pilot's alcoholism was a "disease" which did not constitute good cause for dismissal.

- Another opinion joined by Judge Bork, NAACP v. Donovan, struck down amended Labor Department regulations regarding the minimum "piece rates" employers were obliged to pay to foreign migrant workers as arbitrary and irrational.

- A similar decision against the government was rendered in National Treasury Employees Union v. Devine, which held that an appropriations measure barred the Office of Personnel Management and other agencies from implementing regulations that changed federal personnel practices to stress individual performance rather than seniority.

- In Oil Chemical Atomic Workers International v. National Labor Relations Board, Judge Bork joined another Edwards' opinion reversing NLRB's determination that a dispute over replacing "strikers" who stopped work to protest safety conditions could be settled through a private agreement between some of the "strikers" and the company because of the public interest in ensuring substantial remedies for unfair labor practices.

- In Donovan v. Carolina Stalite Co., Judge Bork reversed the Federal Mine Safety and Health Review Commission, holding that a state gravel processing facility was a "mine" within the meaning of the Act and thus subject to civil penalties.

- Black v. Interstate Commerce Commission, a per curiam opinion joined by Judge Bork, held that the ICC had acted arbitrarily and capriciously in allowing a railroad to abandon some of its tracks in a manner that caused the displacement of employees of another railroad.

- Where the statute, legitimate agency regulation, or collective bargaining agreement so dictated, however, he has not hesitated to rule in favor of the government or private employer.

  - In National Treasury Employees Union v. U.S. Merit Systems, Judge Bork held that seasonal government employees laid off in accordance with the conditions of their employment were not entitled to the procedural protections that must be provided to permanent employees against whom the government wishes to take "adverse action."

  - In Prill v. National Labor Relations Board, Judge Bork dissented from the panel to support the National Labor Relations Board decision that an employee's lone refusal to drive an allegedly unsafe vehicle was not protected by the "concerted activities" section of the National Labor Relations Act. Judge Bork concluded that the Board's definition of "concerted activities," which required that an employee's conduct must be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself, was compelled by the statute.

  - In International Brotherhood of Electrical Workers v. National Labor Relations Board, Judge Bork wrote an opinion for the court upholding a National Labor Relations Board decision against the union which held that an employer had not committed an unfair labor practice by declining to bargain over its failure to provide its employees with a Christmas bonus. The court found that the company's longstanding practice to provide bonuses had been superseded by a new collective bargaining agreement which represented by its terms that it formed the sole basis of the employer's obligations to its employees and did not specify a Christmas bonus.

- In Dunning v. National Aeronautics and Space Administration, Judge Bork joined Judges Wald and Scalia in denying an employee's petition for review of a Merit Systems Protection Board decision to affirm a 15-day suspension imposed by NASA for insubordination.

CRIMINAL LAW

- As Solicitor General, Robert Bork argued and won several major death penalty cases before the United States Supreme Court. He has expressed the view that the death penalty is constitutionally permissible, provided that proper procedures are followed.

- Judge Bork is a tough but fairminded judge on criminal law issues.

- He has opposed expansive interpretations of procedural rights that would enable apparently culpable individuals to evade justice.

  - In United States v. Mount, for example, he concurred in a panel decision affirming a defendant's conviction for making a false statement in a passport application. He wrote a separate concurrence to emphasize that the court had no power to exclude evidence obtained from a search conducted in England by British police officers, and that even assuming that it did, it would be inappropriate for the court to apply a "shock the conscience" test.

  - In U.S. v. Singleton, he overruled a district court order that had suppressed evidence in a defendant's retrial for robbery which had been deemed reliable in a previous court of appeals review of the first trial.

- On the other hand, however, Judge Bork has not hesitated to overturn convictions when constitutional or evidentiary considerations require such a result.

  - In U.S. v. Brown, Judge Bork joined in a panel decision overturning the convictions of members of the "Black Hebrews" sect, on the ground that the trial court, by erroneously dismissing a certain juror who had questioned the sufficiency of the government's evidence, had violated the defendants' constitutional right to a unanimous jury. Judge Bork's decision to void nearly 400 separate verdicts in what is believed to be the longest and most

expensive trial ever held in a D.C. district court highlights his devotion to vindicating the constitutional rights even of criminal defendants.

ABORTION

- Judge Bork has never stated whether he would vote to overrule Roe v. Wade. Some have suggested, however, that Judge Bork ought not to be confirmed unless he commits in advance not to vote to overrule Roe v. Wade. Traditionally, judicial nominees do not pledge their votes in future cases in order to secure confirmation. This has long been regarded as clearly improper. Indeed, any judicial nominee who did so would properly be accused not only of lacking integrity, but of lacking an open mind.

- In 1981, Judge Bork testified before Congress in opposition to the proposed Human Life Bill, which sought to reverse Roe v. Wade by declaring that human life begins at conception. Judge Bork called the Human Life Bill "unconstitutional".

- Judge Bork has in the past questioned only whether there is a right to abortion in the Constitution.

- This view is shared by some of the most notable, mainstream and respected scholars of constitutional law in America:

  - Harvard Law Professors Archibald Cox and Paul Freund.

  - Stanford Law School Dean John Hart Ely.

  - Columbia Law Professor Henry Monaghan.

- Stanford law professor Gerald Gunther, the editor of the leading law school casebook on constitutional law, offered the following comments on Griswold v. Connecticut, the precursor to Roe v. Wade: "It marked the return of the Court to the discredited notion of substantive due process. The theory was repudiated in 1937 in the economic sphere. I don't find a very persuasive difference in reviving it for the personal sphere. I'm a card-carrying liberal Democrat, but this strikes me as a double standard."

- Judge Ruth Bader Ginsburg, one of Judge Bork's colleagues on the D.C. Circuit, has written that Roe v. Wade "sparked public opposition and academic

criticism...because the Court ventured too far in the change it ordered and presented an incomplete justification for its action."

- The legal issue for a judge is whether it should be the court, or the people through their elected representatives, that should decide our policy on abortion.

- If the Supreme Court were to decide that the Constitution does not contain a right to abortion, that would not render abortion illegal. It would simply mean that the issue would be decided in the same way as virtually all other issues of public policy--by the people through their legislatures.

WATERGATE

- During the course of the Cox firing, Judge Bork displayed great personal courage and statesmanship. He helped save the Watergate investigation and prevent disruption of the Justice Department. As Lloyd Cutler has recently written, "[I]t 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 irreparably crippled."

- At first, Bork informed Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus that he intended to resign his position. Richardson and Ruckelshaus persuaded him to stay. As Richardson has recently said, "There was no good reason for him to resign, and some good reason for him not to." Richardson and Ruckelshaus felt that it was important for someone of Bork's integrity and stature to stay on the job in order to avoid mass resignations that would have crippled the Justice Department.

- After carrying out the President's instruction to discharge Cox, Bork acted immediately to safeguard the Watergate investigation and its independence. He promptly established a new Special Prosecutor's office, giving it authority to pursue the investigation without interference. He expressly told the Special Prosecutor's office that they had complete independence and that they should subpoena the tapes if they saw fit--the very action that led to Cox's discharge.

- Judge Bork framed the legal theory under which the indictment of Spiro Agnew went forward. Agnew had taken the position that a sitting Vice President was immune from criminal indictment, a position which President Nixon initially endorsed. Bork wrote and filed the legal brief arguing the opposite position, i.e. that Agnew was subject to indictment. Agnew resigned shortly thereafter.

- In 1981, The New York Times described Judge Bork's decisions during Watergate as "principled."

BALANCE ON THE SUPREME COURT

- Judge Bork's appointment would not change the balance of the Supreme Court. His opinions on the Court of Appeals--of which, as previously noted, not one has been reversed--are thoroughly in the mainstream. In every instance, Judge Bork's decisions are based on his reading of the statutes, constitutional provisions, and case law before him. A Justice who brings that approach to the Supreme Court will not alter the present balance in any way.

- The unpredictability of Supreme Court appointees is characteristic. Justice Scalia, a more conservative judge than Bork, has been criticized by some conservatives for his unpredictability in his very first term on the Court. Justice O'Connor has also defied expectations, as Professor Lawrence Tribe noted: "Defying the desire of Court watchers to stuff Justices once and for all into pigeonholes of 'right' or 'left,' [her] story...is fairly typical: when one Justice is replaced with another, the impact on the Court is likely to be progressive on some issues, conservative on others."

- There is no historical or constitutional basis for making the Supreme Court as it existed in June 1987 the ideal standard to which all future Courts must be held.

  - No such standard has ever been used in evaluating nominees to the Court. The record indicates that the Senate has always tried to look to the nominee's individual merits--even when they have disagreed about them.

  - The issue of "balance" did not arise with respect to FDR's eight nominations to the Court in six years or LBJ's nominees to the Warren Court, even though, as Professor Tribe has written, Justice Black's

appointment in 1937 "took a delicately balanced Court...and turned it into a Court willing to give solid support to F.D.R.'s initiatives. So, too, Arthur Goldberg's appointment to the Court... shifted a tenuous balance on matters of personal liberty toward a consistent libertarianism...."

July 29, 1987

COMMENTARY

THE IMPOSSIBILITY OF FINDING WELFARE RIGHTS IN THE CONSTITUTION

ROBERT H. BORK*

There is a certain difficulty today—one, I think, of communication. Professor Michelman and I tend to operate in different universes of constitutional discourse. His universe is somewhat more abstract and philosophical than mine, and considerably more egalitarian, in keeping with the Zeitgeist. I would claim, although I think Professor Michelman would deny it, that the argument for welfare rights is unconnected with either the Constitution or its history. The welfare-rights theory, therefore, offers inadequate guidelines and so requires political decisionmaking by the judiciary. If that is not true—if there are criteria other than social and political sympathies—I certainly do not see the legal sources from which Professor Michelman's form of constitutional argumentation arises.

I represent that school of thought which insists that the judiciary invalidate the work of the political branches only in accordance with an inference whose underlying premise is fairly discoverable in the Constitution itself. That leaves room, of course, not only for textual analysis, but also for historical discourse and interpretation according to the Constitution's structure and function. The latter approach is the judicial method of *McCulloch v. Maryland*,[1] for example, and it has been well analyzed by my colleague Professor Charles Black in his book, *Structure and Relationship in Constitutional Law*.[2]

Given these limits to what I conceive to be the proper method of constitutional interpretation, it is not surprising that I disagree with the thesis that welfare rights derive in any sense from the Constitution or that courts may legitimately place them there. The effect of Professor Michelman's style of argument, which has quite a number of devotees on the faculties of both Yale and Harvard, is to create rights by argu-

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1. 17 U.S. (4 Wheat.) 316 (1819).

2. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTION LAW (1969).

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ments from moral philosophy rather than from constitutional text, history, and structure. The end result would be to convert our government from one by representative assembly to one by judiciary. That result seems to me unfortunate for a variety of reasons.

The impossibility of the enterprise is but one reason that this development is unfortunate. There is a certain seductiveness to the notion of judges gathered in conference and engaged in the sort of subtle philosophical analysis advanced by Professor Michelman. But the hard truth is that this kind of reasoning is impossible for committees. The violent disagreements among the legal philosophers alone demonstrate that there is no single path down which philosophical reasoning must lead. On arguments of this type, one can demonstrate that the obligation to pay for welfare is a violation of a right as easily as that there is a constitutional right to receive welfare. Under these impossible circumstances, courts—perhaps philosophers, also—will reason toward conclusions that appeal to them for reasons other than those expressed. Judicial government, at best, will be government according to the prevailing intellectual fashion and, perhaps, government according to quite idiosyncratic political and social views.

The consequence of this philosophical approach to constitutional law almost certainly would be the destruction of the idea of law. Once freed of text, history, and structure, this mode of argument can reach any result. Conventional modes of interpretation do not give precise results, but if honestly applied, they narrow the range of permissible results to a much greater extent than do arguments from moral philosophy. What is at stake, therefore, in "The Quest for Equality" through the judiciary is the answer to the question of who governs. A traditional court must leave open a wide range for democratic processes; a philosophical court in the new manner need not.

Professor Michelman has chosen to rest his argument in part upon the ongoing work of Professor John Ely.[3] The premise of their joint argument, as I understand it, is that interpretation of the Constitution cannot be confined to an "interpretivist" approach, which I and others suggest, because particular constitutional provisions—the ninth amendment and the privileges-or-immunities clause among them—

3. *See* Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

command judges to look beyond conventional sources and to create new rights. That argument seems unpersuasive for a number of reasons.

In the first place, not even a scintilla of evidence supports the argument that the framers and the ratifiers of the various amendments intended the judiciary to develop new individual rights, which correspondingly create new disabilities for democratic government. Although we do not know precisely what the phrase "privileges or immunities" meant to the framers, a variety of explanations exist for its open-endedness other than that the framers intended to delegate to courts the power to make up the privileges or immunities in the clause.

The obvious possibility, of course, is that the people who framed the privileges-or-immunities clause did have an idea of what they meant, but that their idea has been irretrievably lost in the mists of history. If that is true, it is hardly a ground for judicial extrapolation from the clause.

Perhaps a more likely explanation is that the framers and ratifiers themselves were not certain of their intentions. Although the judiciary must give content to vague phrases, it need not go well beyond what the framers and ratifiers reasonably could be supposed to have had in mind. If the framers really intended to delegate to judges the function of creating new rights by the method of moral philosophy, one would expect that they would have said so. They could have resolved their uncertainty by writing a ninth amendment that declared: "The Supreme Court shall, from time to time, find and enforce such additional rights as may be determined by moral philosophy, or by consideration of the dominant ideas of republican government." But if that was what they really intended, they were remarkably adroit in managing not to say so.

It should give theorists of the open-ended Constitution pause, moreover, that not even the most activist courts have ever grounded their claims for legitimacy in arguments along those lines. Courts closest in time to the adoption of the Constitution and various amendments, who might have been expected to know what powers had been delegated to them, never offered argument along the lines advanced by Professor Michelman. The Supreme Court, in fact, has been attacked repeatedly throughout its history for exceeding its delegated powers; yet this line of defense seems never to have occurred to its members. For these rea-

sons I remain unpersuaded that the interpretivist argument can be escaped.

For purposes of further discussion, however, let us assume that the interpretivist argument has been escaped; that the Court may read new rights into the Constitution. Even so, the welfare-rights thesis is a long way from home. Professor Michelman, so far as I can tell, rests the argument for his thesis on two bases: first, on a cluster of Supreme Court decisions; and second, on Professor Ely's discovery of a transcedent value in the Constitution that vests courts with the power and function called "representation-reinforcement." I think neither argument supports the theory.

The most obvious problem with Professor Michelman's argument from case law is one that he recognizes. The cases, as he admits, are confusing and internally contradictory. This absence of a clear pattern is less suggestive of an emerging-constitutional right to basic needs than it is of a politically divided Court that has wandered so far from constitutional moorings that some of its members are engaging in free votes. Moreover, even if a right to basic needs clearly emerged from the cases, the question would remain whether these decisions were constitutionally legitimate.

That question brings us to Professor Michelman's basic argument for the legitimacy of representation-reinforcement—the idea that people will have better access to the political process if their basic needs are met. This argument raises at least two problems: one concerns justification of representation-reinforcement as a value that courts are entitled to press beyond that representation provided by the written Constitution and statutes; the other relates to the factual accuracy of the assertion that persons at the lower end of the economic spectrum need assistance to be represented adequately.

It would not do to derive the legitimacy of representation-reinforcement from such materials as, for example, the one-man-one-vote cases because those cases themselves require justification and cannot be taken to support the principle advanced to support them. Nor would it do to rest the concept of representation-reinforcement on the American history of steadily expanding suffrage. That expansion was accomplished politically, and the existence of a political trend cannot of itself give the Court a warrant to carry the trend beyond its own limits. How far the people decide not to go is as important as how far they do go.

The idea of representation-reinforcement, therefore, is internally

contradictory. As a concept it tends to devour itself. It calls upon the judiciary to deny representation to those who have voted in a particular way to enhance the representation of others. Thus, what is reinforced is less democratic representation than judicial power and the trend toward redistribution of goods. If I were looking at the Constitution for a suffusing principle that judges were entitled to enforce even though it was not explicitly stated, that principle would be the separation of powers or the limited political authority of courts. That principle, of course, would run the argument in a direction opposite to Professor Michelman's. In truth, the notion of a representation-reinforcement finds no support as a constitutional value beyond those guarantees written into the document.

Let us pass over that hurdle, however, to ask what kind of a function the courts would perform to reinforce representation. The effort to apply that value would completely transform the nature and role of courts. Aside from the enforcement problem that limits application of the value, a theoretical problem plagues the theory. Professor Michelman apparently concludes that a claimant cannot go into a court and demand a welfare program as a constitutional right, but if a welfare program already exists, he can demand that it be broadened. The right to broadening rests upon the premise that there is a basic right to the program. If so, why cannot the Court order a program to start up from scratch? In part it seems to be a remedial problem—how to order the United States Congress, for example, to establish a medical health insurance program—but that is not entirely convincing. If a constitutional right is at stake, why should the Court not issue a declaratory judgment, at least to exert a hortatory effect upon the legislature? A constitutional lawyer with the boldness to suggest a constitutional right to welfare ought not to shy at remedial difficulties.

It might be useful to consider what a court would have to decide in a constitutional claim to a welfare right. Suppose a claimant represented by Professor Michelman came to the Supreme Court, alleged that the state of *X* had just repealed its welfare statutes, and asked for an authoritative judgment that he and all similarly situated persons are entitled to welfare so that they could better participate in the political process. Because they would not have to devote all their energies to making a living, they not only would have a better opportunity for participation in the political process, but also would not be stigmatized as a poor and powerless group. The Justices might find this plausible.

Suppose, however, that the attorney general for the state of *X* then stands up and argues that the state, in repealing the welfare laws, acted precisely for the purpose of reinforcing representation. The legislature had at last become convinced that welfare payments tend to relegate entire groups to a condition of permanent dependency so that they are not the active and independent political agents that they ought to be; moreover, these groups had lost political influence because they had been stigmatized as people on welfare. Experience had convinced the legislature that it would be better for people of that class, and for their participation in the political process, to struggle without state support as other poor groups have done successfully in our history.

What is the Court to do when faced with two arguments of this sort, neither of them obviously true or untrue? Is the Court to make a sociological estimate of which actions will, in fact, reinforce representation in society? And what of the possibility that payment of welfare benefits today may reinforce representation, but ten or twenty years from now welfare payments will have the opposite effect? In a judicial context, the problem is hopeless. Courts simply are not equipped, much less authorized, to make such decisions. There are almost no limits to where this concept of representation-reinforcement will lead the courts. If, for example, the concept of representation-reinforcement justifies the demand for welfare, why might it not also justify judicial invalidation of the minimum wage and the collective bargaining laws? Counsel could show theoretically and empirically that those laws create unemployment, that they do so primarily among the poor and disproportionately among the young black population, and that unemployment harms these groups' capacity to participate in the political process. Representation-reinforcement could take us back to *Lochner*.[4]

You may view this as ribaldry if you wish, but if the Harvard theorists succeed in establishing representation-reinforcement as a constitutional right, we ought to consider suing the United States for an increase in defense expenditures, because the Soviets clearly intend domination, and if *they* succeed, our representation, among other things, will be drastically curtailed. It is preposterous that the Supreme Courts should control the defense budget to reinforce or safeguard access to a democratic political process, but not much more preposterous

4. Lochner v. New York, 198 U.S. 45 (1905).

than the suggestion that the Court control the nondefense budget to the same end.

There are any number of difficulties with the welfare-rights theory. For instance, why should the Court or any other nondemocratic body define basic needs? A welfare recipient might tell the Court that he would be better able to participate in the democratic process if the government provided him with something better than the existing package of public housing, food stamps, and health insurance; that he would feel more dignified or would be less stigmatized if he looked like everybody else; *i.e.*, had disposable income. The solution is a negative income tax. How could the Court legitimately tell the claimant either that he is wrong about himself or that, if he is right, he still has no case?

I will conclude with a consideration that is increasingly beneath the notice of the abstract, philosophical style of argument: the factual premises of this constitutional position seem deficient. The premise that the poor or the black are underrepresented politically is quite dubious. In the past two decades we have witnessed an explosion of welfare legislation, massive income redistributions, and civil rights laws of all kinds. The poor and the minorities have had access to the political process and have done very well through it. In addition to its other defects, then, the welfare-rights theory rests less on demonstrated fact than on a liberal shibboleth.

Perhaps we should be discussing not "The Quest for Equality," but the question of how much equality in what areas of life is desirable. Equality is not the only value in society; we must balance degrees of it against other values. That balance is preeminently a matter for the political process, not for the courts.

Note on Judge Bork's 1971 Article in Indiana Law Journal, "Neutral Principles and Some First Amendment Problems"

In the course of a lengthy article in the Indiana Law Journal in 1971, then-Professor Bork concluded that the First Amendment protected only explicitly political speech. In his 1982 confirmation hearings before the Senate Judiciary Committee and again in a February 1984 letter to the ABA Journal, Judge Bork discussed the evolution of his views on this issue:

> I do not think...that First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative and based on an attempt to apply Prof. Herbert Wechsler's concept of neutral principles. As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection. I have repeatedly stated this position in my classes. I continue to think that obscenity and pornography do not fit this rationale for protection.

70 Feb. 1984 ABA J. 132.

> Within the speech area, I was dealing with an application of Prof. Herbert Wechsler's concept of neutral principles, which is quite a famous concept in academic debate. I was engaged in an academic exercise in the application of those principles, a theoretical argument, which I think is what professors are expected to do.
>
> It seems to me that the application of the concept of neutral principles to the First Amendment reaches the result I suggested. On the other hand, while political speech is the core of the...First Amendment, the Supreme Court has clearly expanded the concept well beyond that. It seems to me in my putative function as a judge that what is relevant is what the Supreme Court has said, and not my theoretical writings in 1971.

Confirmation Hearings, 1982.

On the appellate court, Judge Bork has repeatedly issued or joined broad opinions extending First Amendment protection to nonpolitical speech, such as commercial speech (FTC v. Brown & Williamson Tobacco Corp.), scientific speech (McBride v. Merrell Dow Pharmaceuticals, Inc.) and cable television regulations that affected many forms of speech (Quincy Cable Television v. FCC).

These opinions make clear that Judge Bork believes that the First Amendment itself, as well as controlling Supreme Court precedent, requires the vigorous protection of both non-political and political speech.

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NEUTRAL PRINCIPLES AND SOME FIRST AMENDMENT PROBLEMS*

ROBERT H. BORK†

A persistently disturbing aspect of constitutional law is its lack of theory, a lack which is manifest not merely in the work of the courts but in the public, professional and even scholarly discussion of the topic. The result, of course, is that courts are without effective criteria and, therefore we have come to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes. In the present state of affairs that expectation is inevitable, but it is nevertheless deplorable.

The remarks that follow do not, of course, offer a general theory of constitutional law. They are more properly viewed as ranging shots, an attempt to establish the necessity for theory and to take the argument of how constitutional doctrine should be evolved by courts a step or two farther. The first section centers upon the implications of Professor Wechsler's concept of "neutral principles," and the second attempts to apply those implications to some important and much-debated problems in the interpretation of the first amendment. The style is informal since these remarks were originally lectures and I have not thought it worthwhile to convert these speculations and arguments into a heavily researched, balanced and thorough presentation, for that would result in a book.

THE SUPREME COURT AND THE DEMAND FOR PRINCIPLE

The subject of the lengthy and often acrimonious debate about the proper role of the Supreme Court under the Constitution is one that preoccupies many people these days: when is authority legitimate? I find it convenient to discuss that question in the context of the Warren Court and its works simply because the Warren Court posed the issue in acute form. The issue did not disappear along with the era of the Warren Court

* The text of this article was delivered in the Spring of 1971 by Professor Bork at the Indiana University School of Law as part of the Addison C. Harris lecture series.

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majorities, however. It arises when any court either exercises or declines to exercise the power to invalidate any act of another branch of government. The Supreme Court is a major power center, and we must ask when its power should be used and when it should be withheld.

Our starting place, inevitably, is Professor Herbert Wechsler's argument that the Court must not be merely a "naked power organ," which means that its decisions must be controlled by principle.[1] "A principled decision," according to Wechsler, "is one that rests on reasons with respect to all the issues in a case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[2]

Wechsler chose the term "neutral principles" to capsulate his argument, though he recognizes that the legal principle to be applied is itself never neutral because it embodies a choice of one value rather than another. Wechsler asked for the neutral application of principles, which is a requirement, as Professor Louis L. Jaffe puts it, that the judge "sincerely believe in the principle upon which he purports to rest his decision." "The judge," says Jaffe, "must believe in the validity of the reasons given for the decision at least in the sense that he is prepared to apply them to a later case which he cannot honestly distinguish."[3] He must not, that is, decide lawlessly. But is the demand for neutrality in judges merely another value choice, one that is no more principled than any other? I think not, but to prove it we must rehearse fundamentals. This is familiar terrain but important and still debated.

The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic. The anomaly is dissipated, however, by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests. This model we may for convenience, though perhaps not with total accuracy, call "Madisonian."[4]

A Madisonian system is not completely democratic, if by "democratic" we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for no better reason that they are majorities. We need not pause here to examine the philosophical underpinnings of that assumption since it is a "given" in our society; nor need we worry that "majority" is a term of art meaning often no more than the shifting combinations of minorities that add up to temporary majorities in the legislature. That majorities are so constituted is inevitable. In any case, one essential premise of the Madisonian model is majoritarianism. The model has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.

1. H. Wechsler, *Toward Neutral Principles of Constitutional Law*, in Principles, Politics, and Fundamental Law 3, 27 (1961) [hereinafter cited as Wechsler].
2. *Id.*
3. L. Jaffe, English and American Judges as Lawmakers 38 (1969).
4. *See* R. Dahl, A Preface to Democratic Theory 4-33 (1956).

Some see the model as containing an inherent, perhaps an insoluble, dilemma.[5] Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor the minority can be trusted to define the freedom of the other. This dilemma is resolved in constitutional theory, and in popular understanding, by the Supreme Court's power to define both majority and minority freedom through the interpretation of the Constitution. Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.

But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority.

This argument is central to the issue of legitimate authority because the Supreme Court's power to govern rests upon popular acceptance of this model. Evidence that this is, in fact, the basis of the Court's power is to be gleaned everywhere in our culture. We need not canvass here such things as high school civics texts and newspaper commentary, for the most telling evidence may be found in the U.S. Reports. The Supreme Court regularly insists that its results, and most particularly its controversial results, do not spring from the mere will of the Justices in the majority

5. *Id.* at 23-24.

but are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises tells you what it thinks its customers demand.

This is, I think, the ultimate reason the Court must be principled. If it does not have and rigorously adhere to a valid and consistent theory of majority and minority freedoms based upon the Constitution, judicial supremacy, given the axioms of our system, is, precisely to that extent, illegitimate. The root of its illegitimacy is that it opens a chasm between the reality of the Court's performance and the constitutional and popular assumptions that give it power.

I do not mean to rest the argument entirely upon the popular understanding of the Court's function. Even if society generally should ultimately perceive what the Court is in fact doing and, having seen, prove content to have major policies determined by the unguided discretion of judges rather than by elected representatives, a principled judge would, I believe, continue to consider himself bound by an obligation to the document and to the structure of government that it prescribes. At least he would be bound so long as any litigant existed who demanded such adherence of him. I do not understand how, on any other theory of judicial obligation, the Court could, as it does now, protect voting rights if a large majority of the relevant constituency were willing to see some groups or individuals deprived of such rights. But even if I am wrong in that, at the very least an honest judge would owe it to the body politic to cease invoking the authority of the Constitution and to make explicit the imposition of his own will, for only then would we know whether the society understood enough of what is taking place to be said to have consented.

Judge J. Skelly Wright, in an argument resting on different premises, has severely criticized the advocates of principle. He defends the value-choosing role of the Warren Court, setting that Court in opposition to something he refers to as the "scholarly tradition," which criticizes that Court for its lack of principle.[6] A perceptive reader, sensitive to nuance, may suspect that the Judge is rather out of sympathy with that tradition from such hints as his reference to "self-appointed scholastic mandarins."[7]

The "mandarins" of the academy anger the Judge because they engage in "haughty derision of the Court's powers of analysis and reasoning."[8] Yet, curiously enough, Judge Wright makes no attempt to refute the charge but rather seems to adopt the technique of confession and avoidance. He seems to be arguing that a Court engaged in choosing fundamental values for society cannot be expected to produce principled decisions at the same time. Decisions first, principles later. One wonders, however, how the Court or the rest of us are to know that the decisions are correct or what they portend for the future if they are not accompanied by the principles that explain and justify them. And it would not be amiss to point out that quite often the principles required of the Warren Court's decisions never did put in an appearance. But Judge Wright's main point appears to be that value choice is the most important function of the Supreme Court, so that if we must take one or the other, and apparently we must, we should prefer a process of selecting values to one of constructing and articulating principles. His argument, I believe, boils down to a syllogism. I. The Supreme Court should "protect our constitutional rights and liberties." II. The Supreme Court must "make fundamental value choices" in order to "protect our constitutional rights and liberties." III. Therefore, the Supreme Court should "make fundamental value choices."[9]

The argument displays an all too common confusion. If we have constitutional rights and liberties already, rights and liberties specified by the Constitution,[10] the Court need make no fundamental value choices in order to protect them, and it certainly need not have difficulty enunciating

6. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971) [hereinafter cited as Wright].

7. *Id.* at 777.

8. *Id.* at 777-78.

9. This syllogism is implicit in much of Judge Wright's argument. *E.g.*, "If it is proper for the Court to make fundamental value choices to protect our constitutional rights and liberties, then it is self-defeating to say that if the Justices cannot come up with a perfectly reasoned and perfectly general opinion *now*, then they should abstain from decision altogether." *Id.* at 779. The first clause is the important one for present purposes; the others merely caricature the position of commentators who ask for principle.

10. A position Judge Wright also seems to take at times. "Constitutional choices are in fact different from ordinary decisions. The reason is simple: the most important value choices have already been made by the framers of the Constitution." *Id.* at 784. One wonders how the Judge squares this with his insistence upon the propriety of the judiciary making "fundamental value choices." One also wonders what degree of specificity is required before the framers may realistically be said to have made the "most important value choices." The Warren Court has chosen to expand the fourteenth amendment's theme of equality in ways certainly not foreseen by the framers of that provision. A prior Court expanded the amendment's theme of liberty. Are both Courts to be judged innocent of having made the most important value choices on the ground that the framers mentioned both liberty and equality? If so, the framers must be held to have delegated an almost complete power to govern to the Supreme Court, and it is untrue to say that a constitutional decision is any different from an ordinary governmental decision. Judge Wright simply never faces up to the problem he purports to address: how free is the Court to choose values that will override the values chosen by elected representatives?

principles. If, on the other hand, "constitutional rights and liberties" are not in some real sense specified by the Constitution but are the rights and liberties the Court chooses, on the basis of its own values, to give to us, then the conclusion was contained entirely in the major premise, and the Judge's syllogism is no more than an assertion of what it purported to prove.

If I am correct so far, no argument that is both coherent and respectable can be made supporting a Supreme Court that "chooses fundamental values" because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society. The man who understands the issues and nevertheless insists upon the rightness of the Warren Court's performance ought also, if he is candid, to admit that he is prepared to sacrifice democratic process to his own moral views. He claims for the Supreme Court an institutionalized role as perpetrator of limited coups d'etat.

Such a man occupies an impossible philosophic position. What can he say, for instance, of a Court that does not share his politics or his morality? I can think of nothing except the assertion that he will ignore the Court whenever he can get away with it and overthrow it if he can. In his view the Court has no legitimacy, and there is no reason any of us should obey it. And, this being the case, the advocate of a value-choosing Court must answer another difficult question. Why should the Court, a committee of nine lawyers, be the sole agent of change? The man who prefers results to processes has no reason to say that the Court is more legitimate than any other institution. If the Court will not listen, why not argue the case to some other group, say the Joint Chiefs of Staff, a body with rather better means for implementing its decisions?

We are driven to the conclusion that a legitimate Court must be controlled by principles exterior to the will of the Justices. As my colleague, Professor Alexander Bickel, puts it, "The process of the coherent, analytically warranted, principled declaration of general norms alone justifies the Court's function . . . ."[11] Recognition of the need for principle is only the first step, but once that step is taken much more follows. Logic has a life of its own, and devotion to principle requires that we follow where logic leads.

Professor Bickel identifies Justice Frankfurter as the leading judicial proponent of principle but concedes that even Frankfurther never found a "rigorous general accord between judicial supremacy and democratic

11. A. Bickel, The Supreme Court and the Idea of Progress 96 (1970).

theory."[12] Judge Wright responds, "The leading commentators of the scholarly tradition have tried ever since to succeed where the Justice failed."[13] As Judge Wright quite accurately suggests, the commentators have so far had no better luck than the Justice.

One reason, I think, is clear. We have not carried the idea of neutrality far enough. We have been talking about neutrality in the *application* of principles. If judges are to avoid imposing their own values upon the rest of us, however, they must be neutral as well in the *definition* and the *derivation* of principles.

It is easy enough to meet the requirement of neutral application by stating a principle so narrowly that no embarrassment need arise in applying it to all cases it subsumes, a tactic often urged by proponents of "judicial restraint." But that solves very little. It certainly does not protect the judge from the intrusion of his own values. The problem may be illustrated by *Griswold v. Connecticut*,[14] in many ways a typical decision of the Warren Court. *Griswold* struck down Connecticut's statute making it a crime, even for married couples, to use contraceptive devices. If we take the principle of the decision to be a statement that government may not interfere with any acts done in private, we need not even ask about the principle's dubious origin for we know at once that the Court will not apply it neutrally. The Court, we may confidently predict, is not going to throw constitutional protection around heroin use or sexual acts with a consenting minor. We can gain the possibility of neutral application by reframing the principle as a statement that government may not prohibit the use of contraceptives by married couples, but that is not enough. The question of neutral definition arises: Why does the principle extend only to married couples? Why, out of all forms of sexual behavior, only to the use of contraceptives? Why, out of all forms of behavior, only to sex? The question of neutral derivation also arises: What justifies any limitation upon legislatures in this area? What is the origin of any principle one may state?

To put the matter another way, if a neutral judge must demonstrate why principle X applies to cases A and B but not to case C (which is, I believe, the requirement laid down by Professors Wechsler and Jaffe), he must, by the same token, also explain why the principle is defined as X rather than as X *minus*, which would cover A but not cases B and C, or as X *plus*, which would cover all cases, A, B and C. Similarly, he must

12. *Id.* at 34.
13. Wright, *supra* note 6, at 775.
14. 381 U.S. 479 (1965).

explain why X is a proper principle of limitation on majority power at all. Why should he not choose *non-X*? If he may not choose lawlessly between cases in applying principle X, he may certainly not choose lawlessly in defining X or in choosing X, for principles are after all only organizations of cases into groups. To choose the principle and define it is to decide the cases.

It follows that the choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. The case just mentioned illustrates the point. The *Griswold* decision has been acclaimed by legal scholars as a major advance in constitutional law, a salutary demonstration of the Court's ability to protect fundamental human values. I regret to have to disagree, and my regret is all the more sincere because I once took the same position and did so in print.[15] In extenuation I can only say that at the time I thought, quite erroneously, that new basic rights could be derived logically by finding and extrapolating a more general principle of individual autonomy underlying the particular guarantees of the Bill of Rights.

The Court's *Griswold* opinion, by Justice Douglas, and the array of concurring opinions, by Justices Goldberg, White and Harlan, all failed to justify the derivation of any principle used to strike down the Connecticut anti-contraceptive statute or to define the scope of the principle. Justice Douglas, to whose opinion I must confine myself, began by pointing out that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[16] Nothing is exceptional there. In the case Justice Douglas cited, *NAACP v. Alabama*,[17] the State was held unable to force disclosure of membership lists because of the chilling effect upon the rights of assembly and political action of the NAACP's members. The penumbra was created solely to preserve a value central to the first amendment, applied in this case through the fourteenth amendment. It had no life of its own as a right independent of the value specified by the first amendment.

But Justice Douglas then performed a miracle of transubstantiation. He called the first amendment's penumbra a protection of "privacy" and

15. Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec., 1968, at 170.
16. 381 U.S. at 484.
17. 357 U.S. 449 (1958).

then asserted that other amendments create "zones of privacy."[18] He had no better reason to use the word "privacy" than that the individual is free within these zones, free to act in public as well as in private. None of these penumbral zones—from the first, third, fourth or fifth amendments, all of which he cited, along with the ninth—covered the case before him. One more leap was required. Justice Douglas asserted that these various "zones of privacy" created an independent right of privacy,[19] a right not lying within the penumbra of any specific amendment. He did not disclose, however, how a series of specified rights combined to create a new and unspecified right.

The *Griswold* opinion fails every test of neutrality. The derivation of the principle was utterly specious, and so was its definition. In fact, we are left with no idea of what the principle really forbids. Derivation and definition are interrelated here. Justice Douglas called the amendments and their penumbras "zones of privacy," though of course they are not that at all. They protect both private and public behavior and so would more properly be labelled "zones of freedom." If we follow Justice Douglas in his next step, these zones would then add up to an independent right of freedom, which is to say, a general constitutional right to be free of legal coercion, a manifest impossibility in any imaginable society.

Griswold, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it. We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future. The truth is that the Court could not reach its result in *Griswold* through principle. The reason is obvious. Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure. Compare the facts in *Griswold* with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical.

In *Griswold* a husband and wife assert that they wish to have sexual relations without fear of unwanted children. The law impairs their sexual gratifications. The State can assert, and at one stage in that litigation did assert, that the majority finds the use of contraceptives immoral. Knowl-

18. 381 U.S. at 484.
19. *Id.* at 485, 486.

edge that it takes place and that the State makes no effort to inhibit it causes the majority anguish, impairs their gratifications.

The electrical company asserts that it wishes to produce electricity at low cost in order to reach a wide market and make profits. Its customer asserts that he wants a lower cost so that prices can be held low. The smoke pollution regulation impairs his and the company's stockholders' economic gratifications. The State can assert not only that the majority prefer clean air to lower prices, but also that the absence of the regulation impairs the majority's physical and aesthetic gratifications.

Neither case is covered specifically or by obvious implication in the Constitution. Unless we can distinguish forms of gratification, the only course for a principled Court is to let the majority have its way in both cases. It is clear that the Court cannot make the necessary distinction. There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another.[20] Why is sexual gratification more worthy than moral gratification? Why is sexual gratification nobler than economic gratification? There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy. The issue of the community's moral and ethical values, the issue of the degree of pain an activity causes, are matters concluded by the passage and enforcemment of the laws in question. The judiciary has no role to play other than that of applying the statutes in a fair and impartial manner.

One of my colleagues refers to this conclusion, not without sarcasm, as the "Equal Gratification Clause." The phrase is apt, and I accept it, though not the sarcasm. Equality of human gratifications, where the document does not impose a hierarchy, is an essential part of constitutional doctrine because of the necessity that judges be principled. To be perfectly clear on the subject, I repeat that the principle is not applicable to legislatures. Legislation requires value choice and cannot be principled in the sense under discussion. Courts must accept any value choice the legislature

20. The impossibility is related to that of making interpersonal comparisons of utilities. *See* L. Robbins, The Nature and Significance of Economic Science, ch. 4 (2d ed. 1969); P. Samuelson, Foundations of Economic Analysis 243-52 (1965).

makes unless it clearly runs contrary to a choice made in the framing of the Constitution.

It follows, of course, that broad areas of constitutional law ought to be reformulated. Most obviously, it follows that substantive due process, revived by the *Griswold* case, is and always has been an improper doctrine. Substantive due process requires the Court to say, without guidance from the Constitution, which liberties or gratifications may be infringed by majorities and which may not. This means that *Griswold*'s antecedents were also wrongly decided, *e.g.*, *Meyer v. Nebraska*,[21] which struck down a statute forbidding the teaching of subjects in any language other than English; *Pierce v. Society of Sisters*,[22] which set aside a statute compelling all Oregon school children to attend public schools; *Adkins v. Children's Hospital*,[23] which invalidated a statute of Congress authorizing a board to fix minimum wages for women and children in the District of Columbia; and *Lochner v. New York*,[24] which voided a statute fixing maximum hours of work for bakers. With some of these cases I am in political agreement, and perhaps *Pierce's* result could be reached on acceptable grounds, but there is no justification for the Court's methods. In *Lochner*, Justice Peckham, defending liberty from what he conceived as a mere meddlesome interference, asked, "[A]re we all . . . at the mercy of legislative majorities?"[25] The correct answer, where the Constitution does not speak, must be "yes."

The argument so far also indicates that most of substantive equal protection is also improper. The modern Court, we need hardly be reminded, used the equal protection clause the way the old Court used the due process clause. The only change was in the values chosen for protection and the frequency with which the Court struck down laws.

The equal protection clause has two legitimate meanings. It can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause. The bare concept of equality provides no guide for courts. All law discriminates and thereby creates inequality. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of "fairness" or to what it regards as "fundamental" interests in order to demand equality in some

21. 262 U.S. 390 (1922).
22. 268 U.S. 510 (1925).
23. 261 U.S. 525 (1923).
24. 198 U.S. 45 (1905).
25. *Id.* at 59.

cases but not in others, thus choosing values and producing a line of cases as improper and as intellectually empty as *Griswold v. Connecticut*. Any casebook lists them, and the differing results cannot be explained on any ground other than the Court's preferences for particular values: *Skinner v. Oklahoma*[26] (a forbidden inequality exists when a state undertakes to sterilize robbers but not embezzlers); *Kotch v. Board of River Port Pilot Commissioners*[27] (no right to equality is infringed when a state grants pilots' licenses only to persons related by blood to existing pilots and denies licenses to persons otherwise as well qualified); *Goesaert v. Cleary*[28] (a state does not deny equality when it refuses to license women as bartenders unless they are the wives or daughters of male owners of licensed liquor establishments); *Railway Express Agency v. New York*[29] (a city may forbid truck owners to sell advertising space on their trucks as a distracting hazard to traffic safety though it permits owners to advertise their own business in that way); *Shapiro v. Thompson*[30] (a state denies equality if it pays welfare only to persons who have resided in the state for one year); *Levy v. Louisiana*[31] (a state may not limit actions for a parent's wrongful death to legitimate children and deny it to illegitimate children). The list could be extended, but the point is that the cases cannot be reconciled on any basis other than the Justices' personal beliefs about what interests or gratifications ought to be protected.

Professor Wechsler notes that Justice Frankfurter expressed "disquietude that the line is often very thin between the cases in which the Court felt compelled to abstain from adjudication because of their 'political' nature, and the cases that so frequently arise in applying the concepts of 'liberty' and 'equality'."[32] The line is not very thin; it is nonexistent. There is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is required. These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions.

We may now be in a position to discuss certain of the problems of legitimacy raised by Professor Wechsler. Central to his worries was the

26. 316 U.S. 535 (1942).
27. 330 U.S. 552 (1947).
28. 335 U.S. 464 (1948).
29. 336 U.S. 106 (1949).
30. 394 U.S. 618 (1969).
31. 391 U.S. 68 (1968).
32. WECHSLER, *supra* note 1, at 11, *citing* Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 227-28 (1955).

Supreme Court's decision in *Brown v. Board of Education*.[33] Wechsler said he had great difficulty framing a neutral principle to support the *Brown* decision, though he thoroughly approved of its result on moral and political grounds. It has long been obvious that the case does not rest upon the grounds advanced in Chief Justice Warren's opinion, the specially harmful effects of enforced school segregation upon black children. That much, as Wechsler and others point out, is made plain by the per curiam decisions that followed outlawing segregated public beaches, public golf courses and the like. The principle in operation may be that government may not employ race as a classification. But the genesis of the principle is unclear.

Wechsler states that his problem with the segregation cases is not that:

> History does not confirm that an agreed purpose of the fourteenth amendment was to forbid separate schools or that there is important evidence that many thought the contrary; the words are general and leave room for expanding content as time passes and conditions change.[34]

The words are general but surely that would not permit us to escape the framers' intent if it were clear. If the legislative history revealed a consensus about segregation in schooling and all the other relations in life, I do not see how the Court could escape the choices revealed and substitute its own, even though the words are general and conditions have changed. It is the fact that history does not reveal detailed choices concerning such matters that permits, indeed requires, resort to other modes of interpretation.

Wechsler notes that *Brown* has to do with freedom to associate and freedom not to associate, and he thinks that a principle must be found that solves the following dilemma:

> [I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension. . . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in

33. 347 U.S. 483 (1954).
34. WECHSLER, *supra* note 1, at 43.

> neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases."

It is extemely unlikely that Professor Wechsler ever will be able to write that opinion to his own satisfaction. He has framed the issue in insoluble terms by calling it a "conflict between human claims of high dimension," which is to say that it requires a judicial choice between rival gratifications in order to find a fundamental human right. So viewed it is the same case as *Griswold v. Connecticut* and not susceptible of principled resolution.

A resolution that seems to me more plausible is supported rather than troubled by the need for neutrality. A court required to decide *Brown* would perceive two crucial facts about the history of the fourteenth amendment. First, the men who put the amendment in the Constitution intended that the Supreme Court should secure against government action some large measure of racial equality. That is certainly the core meaning of the amendment. Second, those same men were not agreed about what the concept of racial equality requires. Many or most of them had not even thought the matter through. Almost certainly, even individuals among them held such views as that blacks were entitled to purchase property from any willing seller but not to attend integrated schools, or that they were entitled to serve on juries but not to intermarry with whites, or that they were entitled to equal physical facilities but that the facilities should be separate, and so on through the endless anomalies and inconsistencies with which moral positions so frequently abound. The Court cannot conceivably know how these long-dead men would have resolved these issues had they considered, debated and voted on each of them. Perhaps it was precisely because they could not resolve them that they took refuge in the majestic and ambiguous formula: the equal protection of the laws.

But one thing the Court does know: it was intended to enforce a core idea of black equality against governmental discrimination. And the Court, because it must be neutral, cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that

35. Id. at 47.

applies to all cases. For the same reason, the Court cannot decide that physical equality is important but psychological equality is not. Thus, the no-state-enforced-discrimination rule of *Brown* must overturn and replace the separate-but-equal doctrine of *Plessy v. Ferguson*. The same result might be reached on an alternative ground. If the Court found that it was incapable as an institution of policing the issue of the physical equality of separate facilities, the variables being insufficiently comparable and the cases too many, it might fashion a no-segregation rule as the only feasible means of assuring even physical equality.

In either case, the value choice (or, perhaps more accurately, the value impulse) of the fourteenth amendment is fleshed out and made into a legal rule—not by moral precept, not by a determination that claims for association prevail over claims for separation as a general matter, still less by consideration of psychological test results, but on purely juridical grounds.

I doubt, however, that it is possible to find neutral principles capable of supporting some of the other decisions that trouble Professor Wechsler. An example is *Shelly v. Kraemer*,[36] which held that the fourteenth amendment forbids state court enforcement of a private, racially restrictive covenant. Although the amendment speaks only of denials of equal protection of the laws by the state, Chief Justice Vinson's opinion said that judicial enforcement of a private person's discriminatory choice constituted the requisite state action. The decision was, of course, not neutral in that the Court was most clearly not prepared to apply the principle to cases it could not honestly distinguish. Any dispute between private persons about absolutely any aspect of life can be brought to a court by one of the parties; and, if race is involved, the rule of *Shelley* would require the court to deny the freedom of any individual to discriminate in the conduct of any part of his affairs simply because the contrary result would be state enforcement of discrimination. The principle would apply not merely to the cases hypothesized by Professor Wechsler—the inability of the state to effectuate a will that draws a racial line or to vindicate the privacy of property against a trespasser excluded because of the homeowner's racial preferences—but to any situation in which the person claiming freedom in any relationship had a racial motivation.

That much is the common objection to *Shelley v. Kraemer*, but the trouble with the decision goes deeper. Professor Louis Henkin has suggested that we view the case as correctly decided, accept the principle

36. 334 U.S. 1 (1948).

that must necessarily underline it if it is respectable law and proceed to apply that principle:

> Generally, the equal protection clause precludes state enforcement of private discrimination. There is, however, a small area of liberty favored by the Constitution even over claims to equality. Rights of liberty and property, of privacy and voluntary association, must be balanced in close cases, against the right not to have the state enforce discrimination against the victim. In the few instances in which the right to discriminate is protected or preferred by the Constitution, the state may enforce it.[37]

This attempt to rehabilitate *Shelley* by applying its principle honestly demonstrates rather clearly why neutrality in the application of principle is not enough. Professor Henkin's proposal fails the test of the neutral derivation of principle. It converts an amendment whose text and history clearly show it to be aimed only at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion. The judge's power to govern does not become more legitimate if he is constrained to apply his principle to all cases but is free to make up his own principles. Matters are only made worse by Professor Henkin's suggestion that the judge introduce a small number of exceptions for cases where liberty is more important than equality, for now even the possibility of neutrality in the application of principle is lost. The judge cannot find in the fourteenth amendment or its history any choices between equality and freedom in private affairs. The judge, if he were to undertake this task, would be choosing, as in *Griswold v. Connecticut*, between competing gratifications without constitutional guidance. Indeed, Professor Henkin's description of the process shows that the task he would assign is legislative:

> The balance may be struck differently at different times, reflecting differences in prevailing philosophy and the continuing movement from *laissez-faire* government toward welfare and meliorism. The changes in prevailing philosophy themselves may sum up the judgment of judges as to how the conscience of our society weighs the competing needs and claims of liberty and equality in time and context—the adequacy of progress toward

37. Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 496 (1962).

> equality as a result of social and economic forces, the effect of lack of progress on the life of the Negro and, perhaps, on the image of the United States, and the role of official state forces in advancing or retarding this progress.[38]

In short, after considering everything a legislator might consider, the judge is to write a detailed code of private race relations. Starting with an attempt to justify *Shelley* on grounds of neutral principle, the argument rather curiously arrives at a position in which neutrality in the derivation, definition and application of principle is impossible and the wrong institution is governing society.

The argument thus far claims that, cases of race discrimination aside, it is always a mistake for the Court to try to construct substantive individual rights under the due process or the equal protection clause. Such rights cannot be constructed without comparing the worth of individual gratifications, and that comparison cannot be principled. Unfortunately, the rhetoric of constitutional adjudication is increasingly a rhetoric about "fundamental" rights that inhere in humans. That focus does more than lead the Court to construct new rights without adequate guidance from constitutional materials. It also distorts the scope and definition of rights that have claim to protection.

There appear to be two proper methods of deriving rights from the Constitution. The first is to take from the document rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules. We may call these specified rights. The second method derives rights from governmental processes established by the Constitution. These are secondary or derived individual rights. This latter category is extraordinarily important. This method of derivation is essential to the interpretation of the first amendment, to voting rights, to criminal procedure and to much else.

Secondary or derivative rights are not possessed by the individual because the Constitution has made a value choice about individuals. Neither are they possessed because the Supreme Court thinks them fundamental to all humans. Rather, these rights are located in the individual for the sake of a governmental process that the Constitution outlines and that the Court should preserve. They are given to the individual because his enjoyment of them will lead him to defend them in court and thereby preserve the governmental process from legislative or executive deformation.

38. *Id.* at 494.

The distinction between rights that are inherent and rights that are derived from some other value is one that our society worked out long ago with respect to the economic market place, and precisely the same distinction holds and will prove an aid to clear thought with respect to the political market place. A right is a form of property, and our thinking about the category of constitutional property might usefully follow the progress of thought about economic property. We now regard it as thoroughly old hat, passe and in fact downright tiresome to hear rhetoric about an inherent right to economic freedom or to economic property. We no longer believe that economic rights inhere in the individual because he is an individual. The modern intellectual argues the proper location and definition of property rights according to judgments of utility—the capacity of such rights to forward some other value. We may, for example, wish to maximize the total wealth of society and define property rights in a way we think will advance that goal by making the economic process run more efficiently. As it is with economic property rights, so it should be with constitutional rights relating to governmental processes.

The derivation of rights from governmental processes is not an easy task, and I do not suggest that a shift in focus will make anything approaching a mechanical jurisprudence possible. I do suggest that, for the reasons already argued, no guidance whatever is available to a court that approaches, say, voting rights or criminal procedures through the concept of substantive equality.

The state legislative reapportionment cases were unsatisfactory precisely because the Court attempted to apply a substantive equal protection approach. Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument. The principle of one man, one vote was not neutrally derived: it runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula.[39] The principle was not neutrally defined: it presumably rests upon some theory of equal weight for all votes, and yet we have no explanation of why it does not call into question other devices that defeat the principle, such as the executive veto, the committee system, the filibuster, the requirement on some issues of two-thirds majorities and the practice

39. See the dissents of Justice Frankfurter in Baker v. Carr, 369 U.S. 186, 266 (1962); Justice Harlan in Reynolds v. Sims, 377 U.S. 533, 589 (1964); and Justice Stewart in Lucas v. Forty-Fourth Gen. Ass'y, 377 U.S. 713, 744 (1964).

of districting. And, as we all know now, the principle, even as stated, was not neutrally applied.[40]

To approach these cases as involving rights derived from the requirements of our form of government is, of course, to say that they involve guarantee clause claims. Justice Frankfurter opposed the Court's consideration of reapportionment precisely on the ground that the "case involves all the elements that have made the Guarantee Clause cases nonjusticiable," and was a "Guarantee Clause claim masquerading under a different label."[41] Of course, his characterization was accurate, but the same could be said of many voting rights cases he was willing to decide. The guarantee clause, along with the provisions and structure of the Constitution and our political history, at least provides some guidance for a Court. The concept of the primary right of the individual in this area provides none. Whether one chooses to use the guarantee of a republican form of government of article IV, § 4 as a peg or to proceed directly to considerations of constitutional structure and political practice probably makes little difference. Madison's writing on the republican form of government specified by the guarantee clause suggests that representative democracy may properly take many forms, so long as the forms do not become "aristocractic or monarchical."[42] That is certainly less easily translated into the rigid one person, one vote requirement, which rests on a concept of the right of the individual to equality, than into the requirement expressed by Justice Stewart in *Lucas v. Forty-Fourth General Assembly*[43] that a legislative apportionment need only be rational and "must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State."[44] The latter is a standard derived from the requirements of a democratic process rather than from the rights of individuals. The topic of governmental processes and the rights that may be derived from them is so large that it is best left at this point. It has been raised only as a reminder that there is a legitimate mode of deriving and defining constitutional rights, however difficult intellectually, that is available to replace the present unsatisfactory focus.

At the outset I warned that I did not offer a complete theory of constitutional interpretation. My concern has been to attack a few points that may be regarded as salient in order to clear the way for such a theory. I

40. *See* Fortson v. Morris, 385 U.S. 231 (1966).
41. Baker v. Carr, 369 U.S. 186, 297 (1962).
42. THE FEDERALIST No. 43 (J. Madison).
43. 377 U.S. 713 (1964).
44. *Id.* at 753-54.

turn next to a suggestion of what neutrality, the decision of cases according to principle, may mean for certain first amendment problems.

Some First Amendment Problems: The Search for Theory

The law has settled upon no tenable, internally consistent theory of the scope of the constitutional guarantee of free speech. Nor have many such theories been urged upon the courts by lawyers or academicians. Professor Harry Kalven, Jr., one whose work is informed by a search for theory, has expressed wonder that we should feel the need for theory in the area of free speech when we tolerate inconsistencies in other areas of the law so calmly.[45] He answers himself:

> If my puzzle as to the First Amendment is not a true puzzle, it can only be for the congenial reason that free speech is so close to the heart of democratic organization that if we do not have an appropriate theory for our law here, we feel we really do not understand the society in which we live.[46]

Kalven is certainly correct in assigning the first amendment a central place in our society, and he is also right in attributing that centrality to the importance of speech to democratic organization. Since I share this common ground with Professor Kalven, I find it interesting that my conclusions differ so widely from his.

I am led by the logic of the requirement that judges be principled to the following suggestions. Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law.

I am, of course, aware that this theory departs drastically from existing Court-made law, from the views of most academic specialists in the field and that it may strike a chill into the hearts of some civil libertarians. But I would insist at the outset that constitutional law, viewed as the set of rules a judge may properly derive from the document and its history, is not an expression of our political sympathies or of our judg-

45. H. Kalven, The Negro and the First Amendment 4-5 (1966) [hereinafter cited as Kalven].
46. *Id.* at 6.

ments about what expediency and prudence require. When decision making is principled it has nothing to say about the speech we like or the speech we hate; it has a great deal to say about how far democratic discretion can govern without endangering the basis of democratic government. Nothing in my argument goes to the question of what laws should be enacted. I like the freedoms of the individual as well as most, and I would be appalled by many statutes that I am compelled to think would be constitutional if enacted. But I am also persuaded that my generally libertarian commitments have nothing to do with the behavior proper to the Supreme Court.

In framing a theory of free speech the first obstacle is the insistence of many very intelligent people that the "first amendment is an absolute." Devotees of this position insist, with a literal respect they do not accord other parts of the Constitution, that the Framers commanded complete freedom of expression without governmental regulation of any kind. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech. . . ." Those who take that as an absolute must be reading "speech" to mean any form of verbal communication and "freedom" to mean total absence of governmental restraint.

Any such reading is, of course, impossible. Since it purports to be an absolute position we are entitled to test it with extreme hypotheticals. Is Congress forbidden to prohibit incitement to mutiny aboard a naval vessel engaged in action against an enemy, to prohibit shouted harangues from the visitors' gallery during its own deliberations or to provide any rules for decorum in federal courtrooms? Are the states forbidden, by the incorporation of the first amendment in the fourteenth, to punish the shouting of obscenities in the streets?

No one, not the most obsessed absolutist, takes any such position, but if one does not, the absolute position is abandoned, revealed as a play on words. Government cannot function if anyone can say anything anywhere at any time. And so we quickly come to the conclusion that lines must be drawn, differentiations made. Nor does that in any way involve us in a conflict with the wording of the first amendment. Laymen may perhaps be forgiven for thinking that the literal words of the amendment command complete absence of governmental inhibition upon verbal activity, but what can one say of lawyers who believe any such thing? Anyone skilled in reading language should know that the words are not necessarily absolute. "Freedom of speech" may very well be a term referring to a defined or assumed scope of liberty, and it may be this area of liberty that is not to be "abridged."

If we turn to history, we discover that our suspicions about the wording are correct, except that matters are even worse. The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject. Professor Leonard Levy's, work, *Legacy of Suppression*,[47] demonstrates that the men who adopted the first amendment did not display a strong libertarian stance with respect to speech. Any such position would have been strikingly at odds with the American political tradition. Our forefathers were men accustomed to drawing a line, to us often invisible, between freedom and licentiousness. In colonial times and during and after the Revolution they displayed a determination to punish speech thought dangerous to government, much of it expression that we would think harmless and well within the bounds of legitimate discourse. Jeffersonians, threatened by the Federalist Sedition Act of 1798, undertook the first American elaboration of a libertarian position in an effort to stay out of jail. Professor Walter Berns offers evidence that even then the position was not widely held.[48] When Jefferson came to power it developed that he read the first amendment only to limit Congress and he believed suppression to be a proper function of the state governments. He appears to have instigated state prosecutions against Federalists for seditious libel. But these later developments do not tell us what the men who adopted the first amendment intended, and their discussions tell us very little either. The disagreements that certainly existed were not debated and resolved. The first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended. One reason, as Levy shows, is that the Anti-Federalists complained of the absence of a Bill of Rights less because they cared for individual freedoms than as a tactic to defeat the Constitution. The Federalists promised to submit one in order to get the Constitution ratified. The Bill of Rights was then drafted by Federalists, who had opposed it from the beginning; the Anti-Federalists, who were really more interested in preserving the rights of state governments against federal power, had by that time lost interest in the subject.[49]

We are, then, forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or to its history. But we are not without materials

47. L. Levy, Legacy of Suppression (1960) [hereinafter cited as Levy].
48. Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 Sup. Ct. Rev. 109.
49. Levy, *supra* note 47, at 224-33.

for building. The first amendment indicates that there is something special about speech. We would know that much even without a first amendment, for the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment. Further guidance can be gained from the fact that we are looking for a theory fit for enforcement by judges. The principles we seek must, therefore, be neutral in all three meanings of the word: they must be neutrally derived, defined and applied.

The law of free speech we know today grows out of the Supreme Court decisions following World War I—*Schenck v. United States*,[50] *Abrams v. United States*,[51] *Gitlow v. New York*,[52] *Whitney v. California*[53]—not out of the majority positions but rather from the opinions, mostly dissents or concurrences that were really dissents, of Justices Holmes and Brandeis. Professor Kalven remarks upon "the almost uncanny power" of these dissents. And it is uncanny, for they have prevailed despite the considerable handicap of being deficient in logic and analysis as well as in history. The great Smith Act cases of the 1950's, *Dennis v. United States*,[54] as modified by *Yates v. United States*,[55] and, more recently, in 1969, *Brandenburg v. Ohio*[56] (voiding the Ohio criminal syndicalism statute), mark the triumph of Holmes and Brandeis. And other cases, culminating perhaps in a modified version of *Roth v. United States*,[57] have pushed the protections of the first amendment outward from political speech all the way to the fields of literature, entertainment and what can only be called pornography. Because my concern is general theory I shall not attempt a comprehensive survey of the cases nor engage in theological disputation over current doctrinal niceties. I intend to take the position that the law should have been built on Justice Sanford's majority opinions in *Gitlow* and *Whitney*. These days such an argument has at least the charm of complete novelty, but I think it has other merits as well.

Before coming to the specific issues in *Gitlow* and *Whitney*, I wish

50. 249 U.S. 47 (1919).
51. 250 U.S. 616 (1919).
52. 268 U.S. 652 (1925).
53. 274 U.S. 357 (1927).
54. 341 U.S. 494 (1951).
55. 354 U.S. 298 (1957).
56. 395 U.S. 444 (1969).
57. 354 U.S. 476 (1957).

to begin the general discussion of first amendment theory with consideration of a passage from Justice Brandeis' concurring opinion in the latter case. His *Whitney* concurrence was Brandeis' first attempt to articulate a comprehensive theory of the constitional protection of speech, and in that attempt he laid down premises which seem to me correct. But those premises seem also to lead to conclusions which Justice Brandeis would have disowned.

As a starting point Brandeis went to fundamentals and attempted to answer the question why speech is protected at all from governmental regulation. If we overlook his highly romanticized version of history and ignore merely rhetorical flourishes, we shall find Brandeis quite provocative.

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. The belief that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against, the dissemination of noxious doctrine. . . . They recognized the risks to which all human institutions are subject. But they knew . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[58]

We begin to see why the dissents of Brandeis and Holmes possessed the power to which Professor Kalven referred. They were rhetoricians of extraordinary potency, and their rhetoric retains the power, almost half a century latter, to swamp analysis, to persuade, almost to command assent.

But there is structure beneath the rhetoric, and Brandeis is asserting, though he attributes it all to the Founding Fathers, that there are four benefits to be derived from speech. These are:

58. 274 U.S. at 375.

1. The development of the faculties of the individual;
2. The happiness to be derived from engaging in the activity;
3. The provision of a safety value for society; and,
4. The discovery and spread of political truth.

We may accept these claims as true and as satisfactorily inclusive. When we come to analyze these benefits, however, we discover that in terms of constitutional law they are very different things.

The first two benefits—development of individual faculties and the achievement of pleasure—are or may be found, for both speaker and hearer, in all varieties of speech, from political discourse to shop talk to salacious literature. But the important point is that these benefits do not distinguish speech from any other human activity. An individual may develop his faculties or derive pleasure from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors. Speech with only the first two benefits can be preferred to other activities only by ranking forms of personal gratification. These functions or benefits of speech are, therefore, to the principled judge, indistinguishable from the functions or benefits of all other human activity. He cannot, on neutral grounds, choose to protect speech that has only these functions more than he protects any other claimed freedom.

The third benefit of speech mentioned by Brandeis—its safety valve function—is different from the first two. It relates not to the gratification of the individual, at least not directly, but to the welfare of society. The safety valve function raises only issues of expediency or prudence, and, therefore, raises issues to be determined solely by the legislature or, in some cases, by the executive. The legislature may decide not to repress speech advocating the forcible overthrow of the goverment in some classes of cases because it thinks repression would cause more trouble than it would prevent. Prosecuting attorneys, who must in any event pick and choose among cases, given their limited resources, may similarly decide that some such speech is trivial or that ignoring it would be wisest. But these decisions, involving only the issue of the expedient course, are indistinguishable from thousands of other managerial judgments governments must make daily, though in the extreme case the decision may involve the safety of the society just as surely as a decision whether or not to take a foreign policy stand that risks war. It seems

plain that decisions involving only judgments of expediency are for the political branches and not for the judiciary.

This leaves the fourth function of speech—the "discovery and spread of political truth." This function of speech, its ability to deal explicitly, specifically and directly with politics and government, is different from any other form of human activity. But the difference exists only with respect to one kind of speech: explicitly and predominantly political speech. This seems to me the only form of speech that a principled judge can prefer to other claimed freedoms. All other forms of speech raise only issues of human gratification and their protection against legislative regulation involves the judge in making decisions of the sort made in *Griswold v. Connecticut*.

It is here that I begin to part company with Professor Kalven. Kalven argues that no society in which seditious libel, the criticism of public officials, is a crime can call itself free and democratic.[59] I agree, even though the framers of the first amendment probably had no clear view of that proposition. Yet they indicated a value when they said that speech in some sense was special and when they wrote a Constitution providing for representative democracy, a form of government that is meaningless without open and vigorous debate about officials and their policies. It is for this reason, the relation of speech to democratic organization, that Professor Alexander Meiklejohn seems correct when he says:

> The First Amendment does not protect a "freedom to speak." It protects the freedom of those activities of thought and communication by which we "govern." It is concerned, not with a private right, but with a public power, a governmental responsibility.[60]

But both Kalven and Meiklejohn go further and would extend the protection of the first amendment beyond speech that is explicitly political. Meiklejohn argues that the amendment protects:

> Forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express.

59. KALVEN, *supra* note 45, at 16.
60. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

He lists four such thoughts and expressions:

> 1. Education, in all its phases. . . . 2. The achievements of philosophy and the sciences. . . . 3. Literature and the arts. . . . 4. Public discussions of public issues. . . .[61]

Kalven, following a similar line, states: "[T]he invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming."[62] It is an invitation, I wish to suggest, the principled judge must decline. A dialectic progression I take to be a progression by analogy from one case to the next, an indispensable but perilous method of legal reasoning. The length to which analogy is carried defines the principle, but neutral definition requires that, in terms of the rationale in play, those cases within the principle be more like each other than they are like cases left outside. The dialectical progression must have a principled stopping point. I agree that there is an analogy between criticism of official behavior and the publication of a novel like *Ulysses*, for the latter may form attitudes that ultimately affect politics. But it is an analogy, not an identity. Other human activities and experiences also form personality, teach and create attitudes just as much as does the novel, but no one would on that account, I take it, suggest that the first amendment strikes down regulations of economic activity, control of entry into a trade, laws about sexual behavior, marriage and the like. Yet these activities, in their capacity to create attitudes that ultimately impinge upon the political process, are more like literature and science than literature and science are like political speech. If the dialectical progression is not to become an analogical stampede, the protection of the first amendment ~~amendment~~ must be cut off when it reaches the outer limits of political speech.

Two types of problems may be supposed to arise with respect to this solution. The first is the difficulty of drawing a line between political and non-political speech. The second is that such a line will leave unprotected much speech that is essential to the life of a civilized community. Neither of these problems seems to me to raise crippling difficulties.

The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel, whether the govern-

61. *Id.* at 256-57.
62. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221.

mental unit involved is executive, legislative, judicial or administrative. Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, educational, commercial or literary expressions as such. A novel may have impact upon attitudes that affect politics, but it would not for that reason receive judicial protection. This is not anomalous, I have tried to suggest, since the rationale of the first amendment cannot be the protection of all things or activities that influence political attitudes. Any speech may do that, and we have seen that it is impossible to leave all speech unregulated. Moreover, any conduct may affect political attitudes as much as a novel, and we cannot view the first amendment as a broad denial of the power of government to regulate conduct. The line drawn must, therefore, lie between the explicitly political and all else. Not too much should be made of the undeniable fact that there will be hard cases. Any theory of the first amendment that does not accord absolute protection for all verbal expression, which is to say any theory worth discussing, will require that a spectrum be cut and the location of the cut will always be, arguably, arbitrary. The question is whether the general location of the cut is justified. The existence of close cases is not a reason to refuse to draw a line and so deny majorities the power to govern in areas where their power is legitimate.

The other objection—that the political-nonpolitical distinction will leave much valuable speech without constitutional protection—is no more troublesome. The notion that all valuable types of speech must be protected by the first amendment confuses the constitutionality of laws with their wisdom. Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives. That is hardly a terrible fate. At least a society like ours ought not to think it so.

The practical effect of confining constitutional protection to political speech would probably go no further than to introduce regulation or prohibition of pornography. The Court would be freed of the stultifying obligation to apply its self-inflicted criteria: whether "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social

value."[63] To take only the last criterion, the determination of "social value" cannot be made in a principled way. Anything some people want has, to that degree, social value, but that cannot be the basis for constitutional protection since it would deny regulation of any human activity. The concept of social value necessarily incorporates a judgment about the net effect upon society. There is always the problem that what some people want some other people do not want, or wish actively to banish. A judgment about social value, whether the judges realize it or not, always involves a comparison of competing values and gratifications as well as competing predictions of the effects of the activity. Determination of "social value" is the same thing as determination of what human interests should be classed as "fundamental" and, therefore, cannot be principled or neutral.

To revert to a previous example, pornography is increasingly seen as a problem of pollution of the moral and aesthetic atmosphere precisely analogous to smoke pollution. A majority of the community may foresee that continued availability of pornography to those who want it will inevitably affect the quality of life for those who do not want it, altering, for example, attitudes toward love and sex, the tone of private and public discourse and views of social institutions such as marriage and the family. Such a majority surely has as much control over the moral and aesthetic environment as it does over the physical, for such matters may even more severely impinge upon their gratifications. That is why, constitutionally, art and pornography are on a par with industry and smoke pollution. As Professor Walter Berns says "[A] thoughtful judge is likely to ask how an artistic judgment that is wholly idiosyncratic can be capable of supporting an objection to the law. The objection, 'I like it,' is sufficiently rebutted by 'we don't.' "[64]

We must now return to the core of the first amendment, speech that is explicitly political. I mean by that criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country.

A qualification is required, however. Political speech is not any speech that concerns government and law, for there is a category of such speech that must be excluded. This category consists of speech

63. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 418 (1966).

64. Berns, *Pornography vs. Democracy: The Case for Censorship*, THE PUB. INTEREST, Winter, 1971, at 23.

advocating forcible overthrow of the government or violation of law. The reason becomes clear when we return to Brandeis' discussion of the reasons for according constitutional protection to speech.

The fourth function of speech, the one that defines and sets apart political speech, is the "discovery and spread of political truth." To understand what the Court should protect, therefore, we must define "political truth." There seem to me three possible meanings to that term:

1. An absolute set of truths that exist independently of Constitution or statute.

2. A set of values that are protected by constitutional provision from the reach of legislative majorities.

3. Within that area of life which the majority is permitted to govern in accordance with the Madisonian model of representative government, whatever result the majority reaches and maintains at the moment.

The judge can have nothing to do with any absolute set of truths existing independently and depending upon God or the nature of the universe. If a judge should claim to have access to such a body of truths, to possess a volume of the annotated natural law, we would, quite justifiably, suspect that the source of the revelation was really no more exalted than the judge's viscera. In our system there is no absolute set of truths, to which the term "political truth" can refer.

Values protected by the Constitution are one type of political truth. They are, in fact, the highest type since they are placed beyond the reach of simple legislative majorities. They are primarily truths about the way government must operate, that is, procedural truths. But speech aimed at the discovery and spread of political truth is concerned with more than the desirability of constitutional provisions or the manner in which they should be interpreted.

The third meaning of "political truth" extends the category of protected speech. Truth is what the majority thinks it is at any given moment precisely because the majority is permitted to govern and to redefine its values constantly. "Political truth" in this sense must, therefore, be a term of art, a concept defined entirely from a consideration of the system of government which the judge is commissioned to operate and maintain. It has no unchanging content but refers to the temporary outcomes of the democratic process. Political truth is what the majority

decides it wants today. It may be something entirely different tomorrow, as truth is rediscovered and the new concept spread.

Speech advocating forcible overthrow of the government contemplates a group less than a majority seizing control of the monopoly power of the state when it cannot gain its ends through speech and political activity. Speech advocating violent overthrow is thus not "political speech" as that term must be defined by a Madisonian system of government. It is not political speech because it violates constitutional truths about processes and because it is not aimed at a new definition of political truth by a legislative majority. Violent overthrow of government breaks the premises of our system concerning the ways in which truth is defined, and yet those premises are the only reasons for protecting political speech. It follows that there is no constitutional reason to protect speech advocating forcible overthrow.

A similar analysis suggests that advocacy of law violation does not qualify as political speech any more than advocacy of forcible overthrow of the government. Advocacy of law violation is a call to set aside the results that political speech has produced. The process of the "discovery and spread of political truth" is damaged or destroyed if the outcome is defeated by a minority that makes law enforcement, and hence the putting of political truth into practice, impossible or less effective. There should, therefore, be no constitutional protection for any speech advocating the violation of law.

I believe these are the only results that can be reached by a neutral judge who takes his values from the Constitution. If we take Brandeis' description of the benefits and functions of speech as our premise, logic and principle appear to drive us to the conclusion that Sanford rather than Brandeis or Holmes was correct in *Gitlow* and *Whitney*.

Benjamin Gitlow was convicted under New York's criminal anarchy statute which made criminal advocacy of the doctrine that organized government should be overthrown by force, violence or any unlawful means. Gitlow, a member of the Left Wing section of the Socialist party, had arranged the printing and distribution of a "Manifesto" deemed to call for violent action and revolution. "There was," Justice Sanford's opinion noted, "no evidence of any effect resulting from the publication and circulation of the Manifesto."[65] Anita Whitney was convicted under California's criminal syndicalism statute, which forbade advocacy of the commission of crime, sabotage, acts of force or violence or terrorism

65. 268 U.S. at 656.

"as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Also made illegal were certain connections with groups advocating such doctrines. Miss Whitney was convicted of assisting in organizing the Communist Labor Party of California, of being a member of it and of assembling with it.[66] The evidence appears to have been meager, but our current concern is doctrinal.

Justice Sanford's opinions for the majorities in *Gitlow* and *Whitney* held essentially that the Court's function in speech cases was the limited but crucial one of determining whether the legislature had defined a category of forbidden speech which might constitutionally be suppressed.[67] The category might be defined by the nature of the speech and need not be limited in other ways. If the category was defined in a permissible way and the defenadant's speech or publication fell within the definition, the Court had, it would appear, no other issues to face in order to uphold the conviction. Questions of the fairness of the trial and the sufficiency of the evidence aside, this would appear to be the correct conclusion. The legislatures had struck at speech not aimed at the discovery and spread of political truth but aimed rather at destroying the premises of our political system and the means by which we define political truth. There is no value that judges can independently give such speech in opposition to a legislative determination.

Justice Holmes' dissent in *Gitlow* and Justice Brandeis' concurrence in *Whitney* insisted the Court must also find that, as Brandeis put it, the "speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent."[68] Neither of them explained why the danger must be "clear and imminent" or, as Holmes had put it in *Schenck*, "clear and present"[69] before a particular instance of speech could be punished. Neither of them made any attempt to answer Justice Sanford's argument on the point:

> [T]he immediate danger [created by advocacy of overthrow of the government] is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency . . . .[70]

66. 274 U.S. at 372 (Brandeis, J., dissenting).
67. 268 U.S. at 668; 274 U.S. at 362-63.
68. 274 U.S. at 373.
69. 249 U.S. at 52.

To his point that proof of the effect of speech is inherently unavailable and yet its impact may be real and dangerous, Sanford might have added that the legislature is not confined to consideration of a single instance of speech or a single speaker. It fashions a rule to dampen thousands of instances of forcible overthrow advocacy. Cumulatively these may have enormous influence, and yet it may well be impossible to show any effect from any single example. The "clear and present danger" requirement, which has had a long and uneven career in our law, is improper not, as many commentators have thought, because it provides a subjective and an inadequate safeguard against the regulation of speech, but rather because it erects a barrier to legislative rule where none should exist. The speech concerned has no political value within a republican system of government. Whether or not it is prudent to ban advocacy of forcible overthrow and law violation is a different question although. Because the judgment is tactical, implicating the safety of the nation, it resembles very closely the judgment that Congress and the President must make about the expediency of waging war, an issue that the Court has wisely thought not fit for judicial determination.

The legislature and the executive might find it wise to permit some rhetoric about law violation and forcible overthrow. I am certain that they would and that they should. Certain of the factors weighted in determining the constitutionality of the Smith Act prosecutions in *Dennis* would, for example, make intelligible statutory, though not constitutional, criteria: the high degree of organization of the Communist party, the

70. 268 U.S. at 669.

rigid discipline of its members and the party's ideological affinity to foreign powers.[71]

Similar objections apply to the other restrictions Brandeis attempted to impose upon government. I will mention but one more of these restrictions. Justice Brandeis argued that:

> Even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. . . . Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state.[72]

It is difficult to see how a constitutional court could properly draw the distinction proposed. Brandeis offered no analysis to show that advocacy of law violation merited protection by the Court. Worse, the criterion he advanced is the importance, in the judge's eyes, of the law whose violation is urged.

Modern law has followed the general line and the spirit of Brandeis and Holmes rather than of Sanford, and it has become increasingly severe in its limitation of legislative power. *Brandenburg v. Ohio*, a 1969 per curiam decision by the Supreme Court, struck down the Ohio criminal syndicalism statute because it punished advocacy of violence, the opinion stating:

> . . . *Whitney* [the majority opinion] has been thoroughly discredited by later decisions. . . . These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[73]

71. 341 U.S. at 511.
72. 274 U.S. at 377-78.

It is certainly true that Justice Sanford's position in *Whitney* and in *Gitlow* has been completely undercut, or rather abandoned, by later cases, but it is not true that his position has been discredited, or even met, on intellectual grounds. Justice Brandeis failed to accomplish that, and later Justices have not mounted a theoretical case comparable to Brandeis'.

* * * * *

These remarks are intended to be tentative and exploratory. Yet at this moment I do not see how I can avoid the conclusions stated. The Supreme Court's constitutional role appears to be justified only if the Court applies principles that are neutrally derived, defined and applied. And the requirement of neutrality in turn appears to indicate the results I have sketched here.

73. 395 U.S. at 447.