Viewpoint

Robert H. Bork

On Constitutional Economics

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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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.

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TRADITION AND MORALITY IN CONSTITUTIONAL LAW

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st of recipients of the Francis Boyer Award, which includes former President Gerald R. Ford, Ambassador Arthur F. Burns, British historian Paul Johnson, the late William J. Baroody, Sr., former Secretary of State Henry Kissinger, University of Chicago President Hanna Holborn Gray, and British economist Sir Alan Arthur Walters.

AEI is pleased to be able to present Judge Bork with the Francis Boyer Award, and we are grateful to the SmithKline Beckman Corporation for making possible the award and lecture. Judge Bork describes in this Boyer lecture the "sharply divergent ideas that are struggling for dominance within the legal culture," and thereby reminds us of the importance of the belief that is at the core of AEI's public policy research—the belief that the competition of ideas is fundamental to a free society.

Bill Baroody Jr.

WILLIAM J. BAROODY, JR.
President
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TRADITION AND MORALITY IN CONSTITUTIONAL LAW

When a judge undertakes to speak in public about any subject that might be of more interest than the law of incorporeal hereditaments he embarks upon a perilous enterprise. There is always, as I have learned with some pain, someone who will write a story finding it sensational that a judge should say anything. There is some sort of notion that judges have no general ideas about law or, if they do, that, like pornography, ideas are shameful and ought not to be displayed in public to shock the squeamish. For that reason, I come before you, metaphorically at least, clad in a plain brown wrapper.

One common style of speech on occasions such as this is that which paints a bleak picture, identifies even bleaker trends, and then ends on a note of strong and, from the evidence presented, wholly unwarranted optimism. I hope to avoid both extremes while talking about sharply divergent ideas that are struggling for dominance within the legal culture. While I think it serious and potentially of crisis proportions, I speak less to thrill you with the prospect of doom—which is always good fun—than to suggest to you that law is an arena of ideas that is too often ignored by

ntellectuals interested in public policy. Though it was not lways so, legal thought has become something of an intel- ctual enclave. Too few people are aware of the trends there nd the importance of those trends for public policy.

It is said that, at a dinner given in his honor, the nglish jurist Baron Parke was asked what gave him the reatest pleasure in the law. He answered that his greatest by was to write a "strong opinion." Asked what that might e, the baron said, "It is an opinion in which, by reasoning ith strictly legal concepts, I arrive at a result no layman ould conceivably have anticipated."

That was an age of formalism in the law. We have ome a long way since then. The law and its acolytes have ince become steadily more ideological and more explicit bout that fact. That is not necessarily a bad thing: there are leologies suitable, indeed indispensable, for judges, just as here are ideologies that are subversive of the very idea of he rule of law. It is the sharp recent growth in the latter that worrisome for the future.

We are entering, I believe, a period in which our legal ulture and constitutional law may be transformed, with ven more power accruing to judges than is presently the ase. There are two reasons for that. One is that constitu- onal law has very little theory of its own and hence is lmost pathologically lacking in immune defenses against he intellectual fevers of the larger society as well as against he disorders generated by its own internal organs.

The second is that the institutions of the law, in articular the schools, are becoming increasingly converted an ideology of the Constitution that demands just such an infusion of extraconstitutional moral and political notions. A not untypical example of the first is the entry into the law of the first amendment of the old, and incorrect, view that the only kinds of harm that a community is entitled to suppress are physical and economic injuries. Moral harms are not to be counted because to do so would interfere with the autonomy of the individual. That is an indefensible definition of what people are entitled to regard as harms.

The result of discounting moral harm is the privatization of morality, which requires the law of the community to practice moral relativism. It is thought that individuals are entitled to their moral beliefs but may not gather as a community to express those moral beliefs in law. Once an idea of that sort takes hold in the intellectual world, it is very likely to find lodgment in constitutional theory and then in constitutional law. The walls of the law have proved excessively permeable to intellectual osmosis. Out of prudence, I will give but one example of the many that might be cited.

A state attempted to apply its obscenity statute to a public display of an obscene word. The Supreme Court majority struck down the conviction on the grounds that regulation is a slippery slope and that moral relativism is a constitutional command. The opinion said, "The principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?" One might as well say that the negligence standard of tort law is inherently boundless, for how is one to distinguish the reckless driver from the safe one. The answer in both cases is, by the common sense of the community. Almost all judgments in the law are ones of degree, and the law does not flinch from such judgments except when, as in the case of morals, it seriously doubts the community's right to define harms. Moral relativism was even more explicit in the major-

ity opinion, however, for the Court observed, apparently thinking the observation decisive: "One man's vulgarity is another's lyric." On that ground, it is difficult to see how law on any subject can be permitted to exist.

But the Court immediately went further, reducing the whole question to one of private preference, saying: "We think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." Thus, the community's moral and aesthetic judgments are reduced to questions of style and those are then said to be privatized by the Constitution. It testifies all the more clearly to the power of ideas floating in the general culture to alter the Constitution that this opinion was written by a justice generally regarded as moderate to conservative in his constitutional views.

George Orwell reminded us long ago about the power of language to corrupt thought and the consequent baleful effects upon politics. The same deterioration is certainly possible in morality. But I am not concerned about the constitutional protection cast about an obscene word. Of more concern is the constitutionalizing of the notion that moral harm is not harm legislators are entitled to consider. As Lord Devlin said, "What makes a society is a community of ideas, not political ideas alone but also ideas about the way its members should behave and govern their lives." A society that ceases to be a community increases the danger that weariness with turmoil and relativism may bring about an order in which many more, and more valuable, freedoms

are lost than those we thought we were protecting.

I do not know the origin of the notion that moral harms are not properly legally cognizable harms, but it has certainly been given powerful impetus in our culture by John Stuart Mill's book *On Liberty*. Mill, however, was a man of two minds and, as Gertrude Himmelfarb has demonstrated, Mill himself usually knew better than this. Miss Himmelfarb traces the intellectual themes of *On Liberty* to Mill's wife. It would be ironic, to put it no higher, if we owed major features of modern American constitutional doctrine to Harriet Taylor Mill, who was not, as best I can remember, one of the framers at Philadelphia.

It is unlikely, of course, that a general constitutional doctrine of the impermissibility of legislating moral standards will ever be framed. So the development I have cited, though troubling, is really only an instance of a yet more worrisome phenomenon, and that is the capacity of ideas that originate outside the Constitution to influence judges, usually without their being aware of it, so that those ideas are elevated to constitutional doctrine. We have seen that repeatedly in our history. If one may complain today that the Constitution did not adopt John Stuart Mill's *On Liberty*, it was only a few judicial generations ago, when economic laissez faire somehow got into the Constitution, that Justice Holmes wrote in dissent that the Constitution "does not enact Mr. Herbert Spencer's Social Statics."

Why should this be so? Why should constitutional law constantly be catching colds from the intellectual fevers of the general society?

The fact is that the law has little intellectual or structural resistance to outside influences, influences that should properly remain outside. The striking, and peculiar, fact about a field of study so old and so intensively cultivated by

men and women of first-rate intelligence is that the law possesses very little theory about itself. I once heard George Stigler remark with some astonishment: "You lawyers have nothing of your own. You borrow from the social sciences, but you have no discipline, no core, of your own." And, a few scattered insights here and there aside, he was right. This theoretical emptiness at its center makes law, particularly constitutional law, unstable, a ship with a great deal of sail but a very shallow keel, vulnerable to the winds of intellectual or moral fashion, which it then validates as the commands of our most basic compact.

This weakness in the law's intellectual structure may be exploited by new theories of moral relativism and egalitarianism now the dominant mode of constitutional thinking in a number of leading law schools. The attack of these theories upon older assumptions has been described by one Harvard law professor as a "battle of cultures," and so it is. It is fair to think, then, that the outcome of this confused battle may strongly affect the constitutional law of the future and hence the way in which we are governed.

The constitutional ideologies growing in the law schools display three worrisome characteristics. They are increasingly abstract and philosophical; they are sometimes nihilistic; they always lack what law requires, democratic legitimacy. These tendencies are new, much stronger now than they were even ten years ago, and certainly nothing like them appeared in our past.

Up to a few years ago most professors of constitutional law would probably have agreed with Joseph Story's dictum in 1833: "Upon subjects of government, it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common-sense of the people, and never was designed for trials of logical skill or visionary speculation." But listen to how Nathan Glazer today perceives the lawyer's task, no doubt because of the professors he knows: "As a political philosopher or a lawyer, I would try to find basic principles of justice that can be defended and argued against all other principles. As a sociologist, I look at the concrete consequences, for concrete societies."

Glazer's perception of what more and more lawyers are doing is entirely accurate. That reality is disturbing. Academic lawyers are not going to solve the age-old problems of political and moral philosophy any time soon, but the articulated premise of their abstract enterprise is that judges may properly reason to constitutional decisions in that way. But judges have no mandate to govern in the name of contractarian or utilitarian or what-have-you philosophy rather than according to the historical Constitution. Judges of this generation, and much more, of the next generation, are being educated to engage in really heroic adventures in policy making.

This abstract, universalistic style of legal thought has a number of dangers. For one thing, it teaches disrespect for the actual institutions of the American polity. These institutions are designed to achieve compromise, to slow change, to dilute absolutisms. They embody wholesome inconsistencies. They are designed, in short, to do things that abstract generalizations about the just society tend to bring into contempt.

More than this, the attempt to define individual liberties by abstract reasoning, though intended to broaden liberties, is actually likely to make them more vulnerable.

Our constitutional liberties arose out of historical experience and out of political, moral, and religious sentiment. They do not rest upon any general theory. Attempts to frame a theory that removes from democratic control areas of life the framers intended to leave there can only succeed if abstractions are regarded as overriding the constitutional text and structure, judicial precedent, and the history that gives our rights life, rootedness, and meaning. It is no small matter to discredit the foundations upon which our constitutional freedoms have always been sustained and substitute as a bulwark only abstractions of moral philosophy. The difference in approach parallels the difference between the American and the French revolutions, and the outcome for liberty was much less happy under the regime of "the rights of man."

It is perhaps not surprising that abstract, philosophical approaches to law often produce constitutional nihilism. Some of the legal philosophers have begun to see that there is no overarching theory that can satisfy the criteria that are required. It may be, as Hayek suggested, that nihilism naturally results from sudden disillusion when high expectations about the powers of abstract reasoning collapse. The theorists, unable to settle for practical wisdom, must have a single theoretical construct or nothing. In any event, one of the leading scholars has announced, in a widely admired article, that all normative constitutional theories, including the theory that judges must only interpret the law, are necessarily incoherent. The apparently necessary conclusion—that judicial review is, in that case, illegitimate—is never drawn. Instead, it is proposed that judges simply enforce

good values, or rather the values that seem to the professor good. The desire for results appears to be stronger than the respect for legitimacy, and, when theory fails, the desire to use judicial power remains.

This brings into the open the fundamental antipathy to democracy to be seen in much of the new legal scholarship. The original Constitution was devoted primarily to the mechanisms of democratic choice. Constitutional scholarship today is dominated by the creation of arguments that will encourage judges to thwart democratic choice. Though the arguments are, as you might suspect, cast in terms of expanding individual freedom, that is not their result. One of the freedoms, the major freedom, of our kind of society is the freedom to choose to have a public morality. As Chesterton put it, "What is the good of telling a community that it has every liberty except the liberty to make laws? The liberty to make laws is what constitutes a free people." The makers of our Constitution thought so too, for they provided wide powers to representative assemblies and ruled only a few subjects off limits by the Constitution.

The new legal view disagrees both with the historical Constitution and with the majority of living Americans about where the balance between individual freedom and social order lies.

Leading legal academics are increasingly absorbed with what they call "legal theory." That would be welcome, if it were real, but what is generally meant is not theory about the sources of law, or its capacities and limits, or the prerequisites for its vitality, but rather the endless exploration of abstract philosophical principles. One would suppose that we can decide nothing unless we first settle the ultimate questions of the basis of political obligation, the merits of contractarianism, rule or act utilitarianism, the nature of the

just society, and the like. Not surprisingly, the politics of the professors becomes the command of the Constitution. As Richard John Neuhaus puts it, "the theorists' quest for universality becomes simply the parochialism of a few intellectuals," and he notes "the limitations of theories of justice that cannot sustain a democratic consensus regarding the legitimacy of law."

Sometimes I am reminded of developments in another, perhaps parallel, field. I recall one evening listening to a rather traditional theologian bemoan the intellectual fads that were sweeping his field. Since I had a very unsophisticated view of theology, I remarked with some surprise that his church seemed to have remarkably little doctrine capable of resisting these trends. He was offended and said there had always been tradition. Both of our fields purport to rest upon sacred texts, and it seemed odd that in both the main bulwark against heresy should be only tradition. Law is certainly like that. We never elaborated much of a theory—as distinguished from mere attitudes—about the behavior proper to constitutional judges. As Alexander Bickel observed, all we ever had was a tradition, and in the last thirty years that has been shattered.

Now we need theory, theory that relates the framers' values to today's world. That is not an impossible task by any means, but it is a good deal more complex than slogans such as "strict construction" or "judicial restraint" might lead you to think. It is necessary to establish the proposition that the framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed. It is true that a willful judge can often clothe his legislation in sophistical argument and the misuse of history. But hypocrisy has its value. General acceptance of correct theory can force the judge to hypocrisy and, to that extent, curb his freedom. The theorists of moral abstraction are devoted precisely to removing the judge's guilt at legislating and so removing the necessity for hypocrisy. Worse still, they would free the intellectually honest judge from constraints he would otherwise recognize and honor.

It is well to be clear about the role moral discourse should play in law. Neuhaus is entirely correct in saying

> whatever else law may be, it is a human enterprise in response to human behavior, and human behavior is stubbornly entangled with beliefs about right and wrong. Law that is recognized as legitimate is therefore related to—even organically related to, if you will—the larger universe of moral discourse that helps shape human behavior. In short, if law is not also a moral enterprise, it is without legitimacy or binding force.

To that excellent statement I would add only that it is crucial to bear in mind what kind of law, and which legal institutions, we are talking about. In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.

Bickel Professorship

On April 27, 1979, Robert H. Bork was inaugurated as the first Alexander M. Bickel Professor of Public Law. This professorship was created in memory of the late Sterling Professor of Law, a member of the faculty from 1956 to 1974. Following are Dean Wellington's introductory remarks preceding Professor Bork's Inaugural Address.

Introduction of Robert H. Bork

Harry H. Wellington

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

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

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

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

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

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

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

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

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

inal research over a period of fifteen years on the Holmes Devise History of the Supreme Court. When he died in November, 1974, he had virtually completed writing the first of his two volumes. Much of the research on the second book was finished and its general shape fixed in his mind.

Alex spent his fiftieth year dying. That year was of a piece with his professional life. Even as few of us can manage to have a career like his, so too, few of us will be able to manage his courage. Nor was there self-pity. Alex respected too much what he had accomplished for any of that. He has shown us what it means to live grandly in the law and he has taught us how to die. No one who knew him will forget him or be quite the same ever again.

And so this School—his school—determined to perpetuate his memory in the grandest way a school can—with the Alexander M. Bickel Professorship. His friends, his students, the communications industry, responded magnificently.

Last fall the funding of the professorship was assured. And last January, President Giamatti named Robert H. Bork to the Chair.

Professor Bork was perhaps Alex's closest friend during the several years before Alex died. They talked together. They walked together. They taught together. And how they disagreed and agreed and disagreed in a course on constitutional theory; in a seminar on freedom of expression.

Bob Bork has practiced law privately in New York and Chicago; publicly—as the Solicitor General of the United States—in Washington; and academically, in the fields of antitrust and constitutional law at Yale.

He is the author of *The Antitrust Paradox* and numerous articles in his fields of interest. These days his special interest is the law and the philosophy of the First Amendment's guarantees of free speech and a free press. He has developed a new and important course in this area. His Cooley Lecture of last February at the University of Michigan is a powerful statement of the relationship between free expression and successful government.

Bob Bork is an excellent lawyer, an excellent scholar and a brilliant writer and lecturer. His insights shape our vision. Today he speaks to us of Alex's legacy.

Robert H. Bork,
Alexander M. Bickel
Professor of Public Law

The Legacy of Alexander M. Bickel

Robert H. Bork

It is four and one-half years since Alex Bickel died and, while a number of his friends are here, it is something of a shock to realize that there are many in this room who did not know him, who cannot summon up the memory of that rather small, carefully-tailored, almost dapper, figure; who cannot recall the flow of words, the expressive face, the wit and gaiety, the passionate engagement with ideas; who never experienced the sense of being more fully aware and alive that the beginning of a conversation with him always brought.

That is sad, because it means that part of Alex Bickel's legacy—the part that required immediate acquaintance and can live only in memory—is already in the course of extinction.

But there is much more to the legacy than that, a part that will be with the law and with us for a long time to come. At his memorial service, within days of his death, I began by saying: "Alex Bickel's gifts were so great and so many that we would have envied him if we had not loved him. For years we knew that he was an extraordinary man. But the warm haze of personal friendship and the diversions of colleagueship obscured at first what gradually became clear—that he can be called, without hesitation or embarrassment, a great man."

That may be thought the natural and forgiveable exaggeration of a friend shaken by a loss greater than he had ever before experienced, but I think not, and the mere fact of this chair in his name should persuade you otherwise. Consider how unusual it is for a university to so memorialize one of its own

professors, how rare it is that a number of willing donors should so quickly come forward to endow the chair. But consider how extraordinary it is that all of this should be done, without a doubt as to its rightness, to honor a man whom fate allowed a scholarly career of only half the normal length.

That alone should suggest something of the admiration and love that Alex commanded, something of his intellectual drive, his scholarly vigor, his concentrated genius.

We have long since talked out our grief over Alex's death. It is time now to begin discussing his legacy. That is a topic that cannot be adequately covered today, much less exhausted, but it is important to begin. In part, it is important because of the difficulty in knowing what greatness in the law consists of. We are a court-centered profession, but we remember the names of very few judges or advocates. The experience of teaching the opinions of the judges conventionally thought of as great often has the unfortunate effect of diminishing their memories. The lasting fame of the advocate may be suggested by the name of the man who had more Supreme Court arguments—317—than any other lawyer in our history: Walter Jones. Such men may have been among the greats of their times but they practice a plastic art and when they die their legacy is little more than a name.

There is, nevertheless, a real sense in which the legacy of Alex in person, the man of memory, will remain when no living person can say he or she knew him. He has altered the intellectual life of the law by his impact upon others in conversation and example. No one could become engaged with him without seeing law and the world differently, without coming to admire erudition worn lightly and the habit of giving shibboleths and absolutes no quarter, without experiencing a shift in his understanding of what is important and what is not. To cite a personal instance, it is doubtful that I would have returned to the academic world without Alex's example and without our discussions about it. I and others think in certain ways because of things he said that he did not write. Many have had their lives changed by Alex. It is why I said at his memorial service, "there will always be a difference in the things we choose to do and the way we do them because we knew Alex Bickel." Because that impact is unknowable does not make it any the less real or effective in shaping the law.

Alex had two other qualities that may be essential to greatness in a lawyer but are not the thing itself. If Holmes was even partially right in thinking that there may be "no true measure of men except the total of human energy which they embody," Alex qualified. He read, pondered, discussed, and wrote continually. In the half a career he was given, he wrote nine books, enough articles for a freelance journalist, taught courses, wrote briefs, testified before congressional committees, argued cases—the list of activities seems endless. Part of his genius was composed of driving energy focussed by a powerful self-discipline.

Again, if Holmes was right in saying that "as life is action and passion, it is required of a man that he share the passion and action of his time at peril of being judged not to have lived," Alex lived fully. He wrote and spoke continually of public events and issues, he counseled those involved, he cared greatly about the trends of his time and helped affect them. Though a scholar, he was fully engaged. His scholarship guided his public action, and his public action enriched his scholarship. There was with Alex no sharp break between the life of ideas and the life of affairs, which is why he was a most principled and thoughtful man of affairs and a most practical and broad man of ideas. That may be why he liked the tension he found in Edmund Burke. Alex wrote, "Our problem has been, and is most acutely now, the tyrannical tendency of ideas and the suicidal emptiness of politics without ideas . . ." Alex lived in that tension, and made it fruitful.

This brings us closer to his central legacy, which is, of course, intellectual. It took me a long time, many years [illegible] together, my [illegible] precisely what the legacy is. Even now I am sure I cannot state it adequately.

Any effort to summarize Alex Bickel's intellectual legacy must fall short, because the effort involves two kinds of distortion. In the first place, his thought was complex, rich, and valuable as much for the prolific and often profound insights he scattered in the course of an argument as for the conclusions he reached and supported. Bickel was not a systematizer. Indeed, his lesson was the danger and the ultimate impossibility of systems. A statement of the major features of his thought thus, more than in the case of most scholars, misses much of his genius.

Secondly, his thought was in continual evolution. He regarded every book, every article, as an experiment, not a final statement. He was always, moreover, open to argument, and his thinking changed in response to it, as well as to his own experience and second thoughts. Positions that he took in his early writings were frequently expanded, modified, or qualified, explicitly or implicitly, in his later work.

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

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

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

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

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

Bickel addressed that problem repeatedly, and, if I do not think he achieved an entirely successful resolution of it, his effort was a triumph in many ways. He stated the problem with a clarity that has not been achieved elsewhere. In the course of his argument he provided a series of dazzling insights that are a major and lasting contribution to our understanding of a variety of legal doctrines. This may be viewed as his technical legacy, and that alone is sufficient to ensure his place in legal thought. But the significant thing is that Alex's scholarship, while it was magnificent about technical law, was never merely technical. He enlarged our understanding by relating what seems to be law only a lawyer could love to much larger themes, the role of courts in a democracy or the egalitarian trend of western political thought. The essence of his genius, or the aspect that most impressed me, was his ability to see connections between ideas that everyone else thought separate and discrete.

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

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

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

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

(We need not pause to remember what we know of the ways of scholars when collectively engaged in governance of institutions rather smaller and simpler than the United States

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

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

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

He tried to tame the anti-democratic thrust of this position with a series of qualifications. The Justices of the Court are not to derive principles from their own sympathies or politics: rather they are to discover and enforce the "fundamental presuppositions of our society" from the "evolving morality of our tradition." Moreover, they must not anticipate that evolution too much, but must declare as supreme law only that which "will—in time, but a rather immediate foreseeable future—gain general assent."

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

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

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

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

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

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

assertions of final authority. And the Court has adopted sweeping principles of precisely the kind he warned against. By the time he delivered the Holmes Lectures he knew that no "rigorous general accord between judicial supremacy and democratic theory" had been achieved: he said he had "come to doubt in many instances the Court's capacity to develop 'durable principles,' and to doubt, therefore, that judicial supremacy can work and is tolerable in broad areas of social policy," and to ask that it confine itself, for the most part, to narrow, interstitial lawmaking.

Those today who repeat his arguments for judicial power to enforce principles not located in the Constitution tend to be what he was not, apologists for an activist Court. They forget that he counted on a judicial tradition of modesty, intellectual coherence, the morality of process, to make judicial supremacy tolerable. These traits have often been lacking on the Court and Alex felt they may have been damaged beyond repair by the Warren Court. We have never had a rigorous theory of judicial restraint: for a time we had a tradition: now that is almost gone.

Lest there be any doubt where Alex's sympathies lay, just what he did not mean to justify or encourage, it should be remembered that he, a man not given to rhetorical excess or easy excitements, described the Warren Court as comparable to other defiances of the law in the name of moral righteousness. In an article entitled "Watergate and the Legal Order," he said:

"The assault upon the legal order by moral imperatives wasn't only or perhaps even the most effectively an assault from the outside. It came as well from within, in the Supreme Court headed for fifteen years by Earl Warren. When a lawyer stood before him arguing his side of a case on the basis of some legal doctrine or other, or making a procedural point, or contending that the Constitution allocated competence over a given issue to another branch of government than the Supreme Court or to the states rather than the federal government, the chief justice would shake him off by saying, "Yes, yes, yes, but is it [whatever the case exemplified about law or about the society], is it *right?* Is it *good?* More than once, and in some of its most important actions, the Warren Court got over doctrinal difficulties or issues of the allocation of competences among various institutions by asking what it viewed as a decisive practical question: If the Court did not take a certain action which was *right* and *good*, would other institutions do so, given political realities?"

This, or something like it, though the political thrust may vary, is what a Court, encouraged to believe it is more than a court, or perhaps less—a collection of philosophers empowered to find and apply the best in America's moral tradition—this is what such a Court will ultimately come to. Alex recognized it for what it was instantly, and he knew that it was deeply, profoundly wrong. "It is," he wrote, "the premise of our legal order that its own complicated arrangements, although subject to evolutionary change, are more important than any momentary objective." There spoke the Whig-conservative and a man, if I may say so, who was deeply and profoundly right.

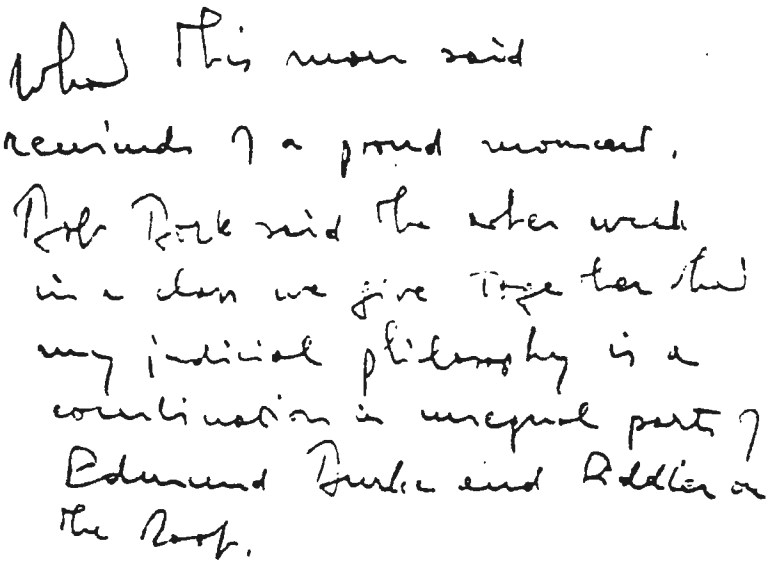
This sense of values carried over into his political thought. Alex Bickel came to regard himself as a conservative and I will suggest to you that he was always conservative in a very real sense even when his political positions and affiliations were liberal-left. The point is important, for much of what is most distinctive and valuable about his work derives from the cast of mind I describe.

It is necessary to be careful about a word like "conservative" because it stirs associations and connotations, many of which are wholly foreign to Alex's thought. Shortly before his illness he tried to locate himself. He wrote of two diverging traditions, one liberal and the other conservative which complete for control of the democratic process and the direction of our judicial policy.

"One of these, the contractarian tradition . . . long ago captured, and substantially retains possession of, the label liberal . . . The other tradition can, for lack of a better term, be called Whig in the English eighteenth-century sense. "It is," wrote Bickel, "usually called conservative, and I would associate it chiefly with Edmund Burke. This is my own model."

He specified the characteristic of Whig-conservative thought. It assesses human nature as it is seen to be. It begins not with theoretical rights but with a real society, whose values evolve but must, at any given moment, be taken as given. "The task of government [within the limits set by culture, by time- and place-bound conditions] is to make a peaceable, good, and improving society." "The Whig model," he said, "obviously is flexible, pragmatic, slow-moving, highly political. It partakes, in substantial measure, of the relativism that pervades Justice Oliver Wendell Holmes' theory of the First Amendment, although not to its ultimate logical exaggeration. Without carrying matters to a logical extreme, indeed without pretense to intellectual valor, and without sanguine spirit, the Whig model rests on mature skepticism."

This undated note was passed to Irving Kristol by Alex Bickel at a conference: "What this man said reminds me of a proud moment. Bob Bork said the other week in a class we give together that my judicial philosophy is a combination in unequal parts of Edmund Burke and Fidler on the Roof."



This approach, this habit of mind, which Bickel calls conservative, is apparent in him from first to last, from the time when his political views can only be called liberal to the time when they can appropriately be called conservative. There is a distinction between a conservative process of thought and the location on the spectrum of one's substantive views, and the question whether one tends to produce the other is too complex and too far from my subject to be pursued.

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

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

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

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

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

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

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

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

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

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

Some of this is what Alex meant when, in speaking on the question "what is happening to morality today?" he answered, "It threatens to engulf us." He meant that abstractions and moral imperatives as guides to action would make life intolerable. The politics of compromise and adjustment makes everything else possible. "Without it," he wrote, "in the stark universe of imperatives, in the politics of ideal promises and inevitable betrayals, justice is not merely imperfect . . . but soon becomes injustice."

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

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

In one of his last articles, "Watergate and the Legal Order," [illegible] institutional imperatives and transcendental moralities. There is danger in the way we are moving. Walter Bagehot wrote:

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

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

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

> Hell, Hobbes said, is truth seen too late. Republics—at least fortunate republics—can be saved from damnation by a few constitutionalists like Bickel. But threats to republics are many and constant. Great constitu-

tionalists are few and mortal. Alexander Bickel, the keenest public philosopher of our time, died of cancer late in this, his forty-ninth year.

That is the legacy of Alex Bickel, a tradition of constitutionalism that we badly need to keep alive—in the law schools, in the profession, in the courts, and in the nation. This chair is a means of perpetuating that tradition. No incumbent will ever equal Alex in range, depth, and productivity. Some incumbents, doubtless, will be in active opposition to Alex's philosophy and may disagree with his entire approach. But the chair itself, the mere fact that there will always be someone known as the Alexander M. Bickel Professor of Public Law, will always remind us and those who come after us of the man, his work, and the tradition which he followed and enriched. That is no small thing. It is a gift not only to Yale but to the law and to American political democracy. To the school, and to the donors who made this contribution to a memory and to a tradition, all of us owe a debt of profound gratitude.

Alexander M. Bickel

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THE GOALS OF ANTITRUST: A DIALOGUE ON POLICY

In 1890, Senator John Sherman described the act which now bears his name as a "bill of rights, a charter of liberty."† Today, although a broad consensus has developed in favor of at least some regulation, a debate continues over the purposes of antitrust legislation and over the implementation of antitrust policy. Concern about the direction of antitrust doctrine has been aroused by recent decisions in the Supreme Court on mergers, Robinson-Patman violations and business torts.

Professors Bork and Bowman of the Yale Law School fear that the Sherman and Clayton Acts are being enforced in a way that is "anticompetitive," and are particularly critical of decisions dealing with mergers and vertical integration; Columbia Professors Blake and Jones reject the economic postulates of "these new critics of antitrust," and argue substantially in favor of existing trends. Because of the fundamental importance of the issues involved, the Editors of the COLUMBIA LAW REVIEW *have invited these eminent scholars to continue a dialogue, initiated in* FORTUNE *magazine,‡ on the purposes of our antitrust policy and the methods by which these purposes may be achieved.*

THE CRISIS IN ANTITRUST

ROBERT H. BORK* AND WARD S. BOWMAN, JR.**

Long-standing contradictions at the root of antitrust doctrine have today brought it to a crisis of policy. From its inception with the passage of the Sherman Act[1] in 1890, antitrust has vacillated between the policy of preserving competition and the policy of preserving competitors from their more energetic

† 21 CONG. REC. 2461 (1890).

‡ The dialogue will be presented in five parts: (1) a statement of position by Professors Bork and Bowman; (2) a critique by Professors Blake and Jones; (3) separate rebuttals to the Blake-Jones critique by Professor Bork and (4) then Professor Bowman; (5) a rebuttal by Professors Blake and Jones. Although based on articles that first appeared in the December 1963 and August 1964 issues of *Fortune* magazine, the first two segments of the dialogue have been expanded, revised, and documented.

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1. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1959).

and efficient rivals. It is the rapid acceleration of the latter "protectionist" trends in antitrust that has brought on the present crisis. Anti-free-market forces now have the upper hand and are steadily broadening and consolidating their victory. The continued acceptance and expansion of their doctrine, which today constitutes antitrust's growing edge, threaten within the foreseeable future to destroy the antitrust laws as guarantors of a competitive economy.

The situation would be sufficiently serious if antitrust were merely a set of economic prescriptions applicable to a sector of the economy. But it is much more than that; it is also an expression of a social philosophy, an educative force, and a political symbol of extraordinary potency. Its capture by the opponents of the free market is thus likely to have effects far beyond the confines of antitrust itself.

The very existence of this crisis—and the basic societal changes it portends—is not generally understood. Even the business community, which is most immediately affected, though it is conscious of hostility, appears to understand neither the nature nor the immediacy of the threat. To be sure, businessmen and their lawyers may frequently be heard inveighing against some particular action of the courts or of the governmental enforcement agencies. Calls from industry for mutual reasonableness and understanding between government and business are common. But such responses to the situation are dangerously beside the point. The problem is not created by a temporary aberration of the courts or the unreasonableness of a particular set of officials who can be jollied out of it or, if not, who will eventually be replaced with a more reasonable set. The danger arises from a fundamental and widespread misconception of the nature and virtues of the competitive process. This misconception, coupled occasionally with real hostility toward the free market, exists in varying degrees in the courts, in the governmental enforcement agencies, and in the Congress, with the result that in crucial areas the doctrines of antitrust are performing a 180-degree turn away from competition.

The nature of the present crisis in the law can be illustrated by comparing the law concerning price-fixing and the developing law of mergers. Their difference reflects the schizophrenia afflicting basic antitrust policy.

The rule that price-fixing and similar cartel arrangements are illegal per se, that is, incapable of legal justification, must be ranked one of the greatest accomplishments of antitrust. Though its wisdom may seem obvious now, it was not always apparent that this was the correct rule or that the courts would adopt it. The first price-fixing case to reach the Supreme Court was brought by the government under the Sherman Act against the Trans-Missouri Freight Association, an association of railroads that agreed upon rates to be charged shippers.[2] Both the trial court and the court of appeals

2. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

agreed that the government's bill should be dismissed because the agreement provided for "reasonable" rates and the new Sherman Act only struck down unreasonable restraints of trade.[3] The Supreme Court, by a five-to-four vote, rejected this view. If one vote had been cast the other way the "reasonableness" of the price agreed upon would have determined legality and the Sherman Act might easily have become not the symbol of the free market but a judicial version of the NRA. To many observers at the time, the Supreme Court's decision in *Trans-Missouri* seemed disastrous. Were businessmen to be helpless to defend themselves by reasonable agreement from "ruinous competition"? Would not the small and perhaps less efficient producer be at the mercy of the more efficient? The Supreme Court majority rejected such arguments for judicially supervised cartels. A year later William Howard Taft, writing for the Circuit Court of Appeals, rejected a similar defense in the *Addyston Pipe & Steel* case, warning that to adopt such a standard was to "set sail on a sea of doubt" and that courts that had done it had "assumed the power to say . . . how much restraint of competition is in the public interest, and how much is not."[4] Since then, with very few exceptions, the Supreme Court has hewed to the rule of per se illegality for cartel agreements.

The reason behind the characterization of this rule as one of the supreme achievements of antitrust goes straight to fundamentals. Why should we want to preserve competition anyway? The answer is simply that competition provides society with the maximum output that can be achieved at any given time with the resources at its command. Under a competitive regime, productive resources are combined and separated, shuffled and reshuffled in search for greater profits through greater efficiency. Each productive resource moves to that employment where the value of its marginal product, and hence the return paid to it, is greatest. Output is maximized because there is no possible rearrangement of resources that could increase the value to consumers of total output. Competition is desirable, therefore, because it assists in achieving a prosperous society and permits individual consumers to determine by their actions what goods and services they want most.

Price-fixing is antisocial precisely because it lessens the total output of society. When competitors agree on higher prices and put them into effect, they necessarily restrict output and so reduce total wealth. Some of the resources in the industry are then unused or are necessarily transferred to to other employment where the value placed on them by consumers is not as high. Over time, of course, such resources will move back into the industry as new firms are attracted by the higher rate of return there and move in. Usually the only way for the cartels to prevent this result is to persuade the govern-

3. United States v. Trans-Missouri Freight Ass'n, 53 Fed. 440 (C.C.D. Kan. 1892), *aff'd*, 58 Fed. 58 (8th Cir. 1893), *rev'd*, 166 U.S. 290 (1897).

4. United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

ment to impose legal barriers on entry into the industry, but that is not always possible. The tendency of competition to erode cartels does not, however, disprove the value of the rule against price-fixing. Though its life is limited, the cartel may last long enough to cause a substantial loss in output.

The per se rule fashioned by the Supreme Court is thus a model antitrust law. It is at once a relatively clear, workable rule and the expression of sound social policy.

In dismal contrast has been the record of the courts in the field of mergers and of practices that are thought to injure competition by injuring competitors. Such practices as exclusive dealing and price discrimination fall within this latter category. It is here that antitrust has gone awry and that the immediate cause of its crisis lies. In order to understand the crisis, it is essential to understand the doctrines that underlie the courts' performance. These consist primarily of the theories of: (1) monopoly-gaining or exclusionary practices; (2) incipiency; and (3) the "social" purposes of the antitrust law. Though they enjoy nearly universal acceptance and provide the impetus and intellectual support for the law's current growth, these doctrines in their present form are inadequate theoretically and seriously disruptive when applied to practical business relationships.

Questionable Doctrines of Antitrust

A. *Exclusionary Practices*

Economic theory indicates that present notions of the exclusionary practices are fallacious. This was first perceived by Professor Aaron Director, of the University of Chicago Law School,[5] who noted that practices conventionally labeled "exclusionary"—notably, price discrimination, vertical mergers, exclusive dealing contracts, and the like—appeared to be either competitive tactics equally available to all firms or means of maximizing the returns from a market position already held.[6] Director's analysis indicates that, absent special factors that have not been shown to exist, so-called exclusionary practices are not means of injuring the competitive process. The example of requirements contracts illustrates the point. The theory of exclusionary tactics underlying the law appears to be that firm X, which already has ten percent of the market, can sign up more than ten percent of the retailers, perhaps twenty percent, and, by thus "foreclosing" rivals from retail outlets, obtain a larger share of the market. But one must then ask why so many retailers are willing to limit themselves to selling X's product. Why do not ninety percent of them turn to X's rivals? Because X has greater market

5. The authors are indebted to Professor Director by whom they were introduced to the general economic approach to antitrust problems represented in this article. He, of course, bears no responsibility for the specific analysis here.

6. See Director & Levi, *Law and the Future: Trade Regulation*, 51 Nw. U. L. Rev. 281 (1956).

acceptance? But then X's share of the market would grow for that reason and requirements contracts have nothing to do with it. Because X offers them some extra inducement? But that sounds like competition. It is equivalent to a price cut, and surely X's competitors can be relied upon to meet competition.

The theory of exclusionary practices, here exemplified in the use of requirements contracts, is in need of one of two additional assumptions to be theoretically plausible. One is the assumption that there are practices by which a competitor can impose greater costs upon his rivals than upon himself. That would mean that X could somehow make it more expensive for his rivals to sign retailers to requirements contracts than it is for X to do so. It would be as though X could offer a retailer a one dollar price reduction and it would cost any rival two dollars to match the offer. It is difficult to imagine that such a mechanism exists in the case of requirements contracts, price cutting, or the usual examples of predatory or exclusionary practices, but it is perhaps conceivable.

The other assumption upon which the theory of exclusionary practices might rest is that there are imperfections in or difficulties of access to the capital market that enable X to offer a one dollar inducement (it has a bankroll) and prevent its rivals from responding (they have no bankroll and, though the offering of the inducement is a responsible business tactic, for some reason cannot borrow the money). But it has yet to be demonstrated that imperfections of this type exist in the capital market.

Professor Director's reasoning applies to all practices thought to be exclusionary or monopoly gaining. A moment's thought indicates, moreover, that the notion of exclusionary practices is not merely theoretically weak but is for such a widely accepted idea, remarkably lacking in factual support. Has anybody ever seen a firm gain a monopoly or anything like one through the use of requirements contracts? Or through price discrimination? One may begin to suspect that antitrust is less a science than an elaborate mythology, that it has operated for years on hearsay and legends rather than on reality. The few supposedly verified cases of the successful use of exclusionary tactics to achieve monopoly are primarily in the early history of antitrust. The story of the old Standard Oil trust is probably the classic example. The Supreme Court's 1911 *Standard Oil* opinion[7] is pivotal not merely because it is thought to have launched the famous "rule of reason," nor because it decreed a dissolution that made the oil industry more competitive. Its greatest significance is that it gave substance and seeming historical veracity to the whole theory of exclusionary and monopoly-gaining techniques. It thus provided much of the impetus for the passage of the Clayton[8] and Federal Trade

7. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
8. 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1959), as amended, 15 U.S.C. §§ 13, 21 (Supp. V, 1964).

Commission[9] Acts in 1914. Such intellectual support as can be mustered for the law against price discrimination derives from the lessons supposedly taught by that case.

The factual accuracy of the *Standard Oil* legend is under attack and is coming to seem as dubious as the theory that it is thought to support. Professor John McGee has reviewed the entire case record of the *Standard Oil* litigation and reported that there is not one clear episode of the successful use by Standard Oil of local price cutting or other predatory practices.[10] The other supposed instances of monopolies gained through such tactics deserve similar investigation.

It would be claiming too much to assert that there is no merit to the theory of exclusionary practices, but it is fair to say that that theory has been seriously challenged at both the theoretical and the empirical levels. Perhaps a sound theoretical base can be constructed. The law could then be directed at those practices that in particular settings may be exclusionary. So far as is known, however, this task has not been undertaken or even recognized by the Antitrust Division, the Federal Trade Commission, or any court.

B. *Incipiency*

The incipiency theory starts from the idea that it is possible to nip restraints of trade and monopolies in the bud before they blossom to Sherman Act proportions. It underlies the Clayton Act, the Robinson-Patman Act,[11] and the Federal Trade Commission Act. Though the idea initially sounds plausible, its consequences have proved calamitous. The courts have used the incipiency notion as a license for almost unlimited extrapolation, reasoning from any trend toward concentration in an industry that there is an incipient lessening of competition. The difficulty with stopping a trend toward a more concentrated condition at a very early stage is that the existence of the trend is prima facie evidence that greater concentration is socially desirable. The trend indicates that there are emerging efficiencies or economies of scale—whether due to engineering and production developments or to new control and management techniques—which make larger size more efficient. This increased efficiency is valuable to society at large, for it means that fewer of our available resources are being used to accomplish the same amount of production and distribution. By inducing courts to strike at such trends in their very earliest stages, the concept of incipiency prevents the realization of those very efficiencies that competition is supposed to encourage. But it is when the incipiency concept works in tandem with the unsophisticated, but

9. 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-51 (1959), as amended, 15 U.S.C. §§ 41, 45 (Supp. V, 1964).

10. See McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. & Economics 137 (1958).

11. 49 Stat. 1526 (1936), as amended, 15 U.S.C. §§ 13, 21(a) (Supp. V, 1964).

currently ascendant, theory of exclusionary practices that its results are most anticompetitive. Where a court or the Federal Trade Commission lacks the means to distinguish between tactics that impose greater costs on rivals and those that are normal means of competing, what evidence can it look to in its effort to discern an incipient lessening of competition? The obvious resort is to evidence that a competitor has been injured, for it is through the infliction of injury upon competitors that the exclusionary devices are thought ultimately to injure the competitive process itself. There seems no way to tell that a competitor has been "injured," however, except that he has lost business. And this is precisely the meaning that the statutory test of incipient lessening of competition or tendency toward monopoly is coming to have. In case after case the FTC, for example, nails down its finding that competition is injured with the testimony of competitors of the defendant that his activities and aggressiveness may or have cost them sales. The conduct that threatens such "injury" is then prohibited. That this result is itself profoundly anticompetitive seems never to occur to the Commission or to most courts.

C. *Social Purpose and Antitrust Law*

When the anti-efficiency impact of the law is occasionally perceived, the third theory—the social purpose of the antitrust laws—is called upon to provide a rationalization. Judge Learned Hand's opinion in *Alcoa*[12] contains the most famous exposition of this view. Hand suggested that Congress, in passing the Sherman Act, had not necessarily been actuated by economic motives alone. "[I]t is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."[13] He went on to say: "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."[14]

Hand's rhetoric has commended itself to most commentators on the topic, but it seems clear upon reflection that it is a position which is questionable as a description of congressional intent, dubious as social policy, and impossible as antitrust doctrine. It is simply not accurate to say that Congress ever squarely decided to prefer the preservation of small business to the preservation of a free market in which the forces of competition were dominant. There was much oratory in Congress about the virtues of small business but no clear indication that antitrust should create shelters for the inefficient. Moreover,

12. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
13. *Id.* at 427.
14. *Id.* at 429.

the statutory language of all the major antitrust laws after the Sherman Act explicitly requires the preservation of *competition*.[15] That places an enormous burden of persuasion upon those who purport to find in the legislative history a direction to value small business above competition.

Hand's notion, moreover, is dubious, and indeed radical, social policy. It would be hard to demonstrate that the independent druggist or groceryman is any more solid and virtuous a citizen than the local manager of a chain operation. The notion that such persons are entitled to special consideration by the state is an ugly demand for class privilege. It hardly seems suited to the United States, whose dominant ideal, though doubtless too often flouted in legislative practice, has been that each business should survive only by serving consumers as they want to be served. If that ideal is to be departed from here, if antitrust is to turn from its role as the maintainer of free markets to become the industrial and commercial equivalent of the farm price-support program, then we are entitled to an unequivocal policy choice by Congress and not to vague philosophizing by courts that lack the qualifications and the mandate to behave as philosopher kings.

It is clear, in addition, that the "social purpose" concept is impossible as antitrust doctrine. It runs into head-on conflict with the per se rules against cartel agreements. Those rules leave it entirely to the play of competitive forces to determine which competitors shall grow and which shall shrink and disappear. If the social-policy argument makes sense, then we had better drop the per se rule in favor of one permitting the defense that cartels benefit small businessmen. Coexistence of the social-policy argument with the pro-competitive rules would introduce so vague a factor that prediction of the courts' behavior would become little more than a guessing game. How could one know in a particular case whether the court would apply a rigorously pro-competitive rule or the social policy of preserving small business units from aggressive behavior? When the person whose conduct is to be judged is in doubt concerning which of two completely contradictory policies will be applied, the system hardly deserves the name of law.

D. *Application of the Doctrines to Mergers*

The three theories discussed are active in many areas of antitrust, but perhaps they may be best illustrated in the law that is now developing under the provisions governing mergers. Collaboration of the theories produced the crash of antitrust merger policy in Chief Justice Warren's opinion for the Supreme Court in *Brown Shoe Co. v. United States*.[16] The Court there held illegal the merger of Brown, primarily a shoe manufacturer, with the G. R. Kinney Co., primarily a retailer. Their respective shares of the nation's shoe

15. See, *e.g.*, Clayton Act §§ 2, 3, 7, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 14, 18 (1959), as amended, 15 U.S.C. § 13 (Supp. V, 1964).

16. 370 U.S. 294 (1962).

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17. *Id.* at 334.

output were four percent and one-half of one percent. Kinney had 1.2 percent of total national retail shoe sales by dollar volume (no figure was given for Brown), and together the companies had 2.3 percent of total retail shoe outlets. With over 800 shoe manufacturers, the industry was as close to pure competition as is possible outside a classroom model. Yet the seven Justices participating in the case purported—by application of the three theories—to find a threat to competition at both the manufacturing and the retailing levels.

The Court held the merger illegal in both its vertical and its horizontal aspects. The Court generally views vertical integration as a form of exclusionary practice, on the ground that it is always possible that the manufacturing level will sell to the retail level of the same firm and thereby "foreclose" a share of the retail market otherwise open to competing manufacturers. In *Brown Shoe*, the Court said the share of the market foreclosed was not enough by itself to make the merger illegal, but that it became illegal when two other factors were examined: "[T]he trend toward vertical integration in the shoe industry, [and] . . . Brown's avowed policy of forcing its own shoes upon its retail subsidiaries."[17] It is instructive to examine the facts upon which that conclusion rests. The "trend toward vertical integration" was seen in the fact that a number of manufacturers had acquired retailing chains. The district court found that the thirteen largest shoe manufacturers, for example, operated twenty-one percent of the census shoe stores. Accepting that figure for the moment, it is impossible to see any harm to competition. On a straight extrapolation, there would be room for over sixty manufacturers of equal size to integrate to the same extent, and that would result in as pure competition as is conceivable. In fact, since these were the largest shoe manufacturers, there would be room for many more manufacturers. But that is by no means all. The category of census shoe stores includes only those that make at least half their income from selling shoes. It thus leaves out about two-thirds of the outlets that actually sell shoes, including such key ones as department and clothing stores. Even if, as there was no reason to expect, complete vertical integration took place in the industry, there would obviously be room for hundreds of shoe manufacturers and, given the ease of entry into shoe retailing, no basis for imagining that any new manufacturer could not find or create outlets any time he chose. The Court's cited "trend toward vertical integration" was thus impossible to visualize as a threat to competition.

Brown's "avowed policy of forcing its own shoes upon its retail subsidiaries" turns out, upon inspection of the Court's footnotes, to spring from the testimony of its president that Brown's motive in making the deal was to get distribution in a range of prices it was not covering, and also, as Kinney moved into stores in higher income neighborhoods and needed to upgrade and add new lines, "it would give us an opportunity . . . to be able to sell them in

17. *Id.* at 334.

that category."[18] The empirical evidence of coercion was no more impressive than this "avowal." At the time of the merger, Kinney bought no shoes from Brown, but two years later Brown was supplying 7.9 percent of Kinney's needs. (Brown's sales to its other outlets apparently had risen no higher than thirty-three percent of requirements, except in one case in which Brown supplied over fifty percent.) The "trend toward vertical integration" and the "avowed policy of forcing its own shoes upon its retail subsidiaries" were thus almost entirely imaginary. But even if they were accepted at face value, it ought to be noted that, since Kinney supplied about twenty percent of its own retail requirements, less than one percent of the nation's total retail shoe sales was open to "foreclosure" by Brown through this merger and it had actually "foreclosed" slightly less than one-tenth of one percent. The idea of vertical integration as an exclusionary device had to be coupled with almost unlimited extrapolation in the name of incipiency to reach the incredible result that the Court achieved on the vertical aspect of the case.

The horizontal aspect—the putting together of Brown's and Kinney's retail outlets—was held illegal on similar reasoning. The Court found illegal the creation of market shares of as low as five percent of shoe retailing in any city. "If a merger achieving 5% control were now approved," it asserted, "we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered."[19] On this reasoning every merger "furthers" oligopoly no matter how small a share of the market is taken over. To imagine that every firm would then merge up to five percent is to indulge in sheer conjecture, and in any event the result would be competition. Twenty firms in an industry is far too many for oligopolist behavior to occur. Given additional factors of the ease and rapidity of entry into shoe retailing, the Supreme Court's fear of oligopoly where the merger created five percent control is incomprehensible.

Then, apparently without realizing the inconsistency with its earlier prediction that Brown would "force" its shoes upon Kinney, the Court suggested that another anticompetitive aspect of Kinney's new ability to get Brown's shoes more cheaply would give it an advantage over other retailers. "The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers."[20] The merger was bad both because Brown might "force" Kinney and because Kinney wanted to be "forced." This fascinating holding creates an antitrust analogue to the crime of statutory rape.

Apparently concerned that the achievement of efficiency and low prices

18. *Id.* at 304 n.8.
19. *Id.* at 343-44.
20. *Id.* at 344.

Though merger seemed to be illegal under this formulation, the Court then said:

> Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.[21]

No matter how many times you read it, that passage states: Although mergers are not rendered unlawful by the mere fact that small independent stores may be adversely affected, we must recognize that mergers are unlawful when small independent stores may be adversely affected.

The *Brown Shoe* case employed the theory of exclusionary practices to outlaw vertical integration that promised lower prices, the theory of incipiency to foresee danger in a presumably desirable trend that was barely started, and the theory of "social purpose" to justify the fact that the decision prevented the realization of efficiencies by a merger which, realistically viewed, did not even remotely threaten competition.

The FTC and some of the lower federal courts are now pushing these doctrines to their logical conclusion—an attack on efficiency itself as anticompetitive. This is seen most clearly in the rash of suits challenging conglomerate mergers. A conglomerate merger is one between parties that are neither competitors nor related as supplier and customer, an example being the acquisition by a locomotive manufacturer of an underwear maker. It neither increases any firm's share of a market nor forecloses anybody from a market or source of supply. The government's attack on such mergers, therefore, has had to be on the theory that they create a "competitive advantage" which may enable the new firm to injure rivals. The competitive advantage, upon inspection, turns out to be efficiency. Thus, a district court entered a preliminary injunction at the government's request restraining Ingersoll-Rand Co. from acquiring three manufacturers of underground coal-mining machinery and equipment.[22] Though the opinion rested in part upon the competing status of the acquired companies, it stressed the conglomerate aspects of the merger. One of the court's explicit fears was that the merger would create "economies of scale" (efficiencies due to size) which would put other companies at a competitive disadvantage.[23] The court of appeals affirmed, noting as anticompetitive the

21. *Ibid.*
22. United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963).
23. *Id.* at 554.

fact that Ingersoll-Rand would be able "to offer a complete line of equipment to its consumers and to further enhance its position and dominance in the market by extending consumer financing to prospective purchasers through its wholly owned subsidiary finance company."[24] This is a decision that illegality attaches when the merger enables better service to consumers.

The Federal Trade Commission expressed a similar philosophy in holding illegal Procter & Gamble's acquisition of the Clorox Chemical Co., primarily because the advantages which Clorox might derive from the union were thought likely to hurt the sales of other liquid bleach manufacturers.[25] The opinion met head on the obvious objection that the Commission was condemning efficiencies:

> In stressing as we have the importance of advantages of scale as a factor heightening the barriers to new entry into the liquid bleach industry, and so impairing competitive conditions in that industry, we reject, as specious in law and unfounded in fact, the argument that the Commission ought not, for the sake of protecting the "inefficient" small firms in the industry, proscribe a merger so productive of "efficiencies." The short answer to this argument is that, in a proceeding under Section 7, economic efficiency or any other social benefit resulting from a merger is pertinent only insofar as it may tend to promote or retard the vigor of competition.[26]

This passage applies not simply to advertising advantages but to all efficiency. It turns the normal order of policy around. Instead of desiring competition as a means to efficiency, the Commission here makes "the vigor of competition" an end in itself, defines it by ease of entry into the market, and expresses willingness to sacrifice societal wealth through efficiency to the maintenance of competition as so defined. The result is simply to label efficiency as anticompetitive whenever it may cause injury to competitors or make it more difficult for new firms to enter the market. All efficiency, however, is likely to have such effects. The Commission's rationale, consistently applied, would thus favor inefficient producers at the expense of the consuming public over enormous ranges of economic activity.

Neither the *Ingersoll-Rand* case nor the *Procter & Gamble* decision considers that the creation of efficiencies is the main benefit competition has to offer society. If it now takes fewer salesmen and distribution personnel to move a product from the factory to the consumer than it used to or if advertising or promotion can be accomplished less expensively, that is a net gain to society. We are all richer to that extent. Multiplying such additions to social wealth by hundreds and thousands of transactions and an enormously important social phenomenon is perceived. And law that makes the creation of efficiency the touchstone of illegality can only tend to impoverish us as a nation.

24. United States v. Ingersoll-Rand Co., 320 F.2d 509, 524 (3d Cir. 1963).
25. Proctor & Gamble Co., 3 TRADE REG. REP. ¶ 16673 (FTC 1963).
26. *Id.* at p. 21585.

To inhibit the creation of efficiency in order to make life easier for other producers or for would-be entrants is to impose a tax upon efficiency for the purpose of subsidizing the inept. It is precisely analogous to a tariff designed to shield a high-cost domestic industry from more efficient foreign industry, or to a law requiring manufacturers to practice resale price maintenance in order to ease entry into retailing. The anticompetitive impact of such laws is recognized by almost all students of antitrust. It is surprising that so many of them fail to perceive the same principle in operation when the antitrust law protects competitors in the name of protecting competition.

Too few people understand that it is the essential mechanism of competition and its prime virtue that more efficient firms take business away from the less efficient. Some businesses will shrink and some will disappear. Competition is an evolutionary process. Evolution requires the extinction of some species as well as the survival of others. The business equivalents of the dodoes, the dinosaurs, and the great ground sloths are in for a bad time—and they should be. It is fortunate for all of us that there was no Federal Biological Commission around when the first small furry mammals appeared and began eating dinosaur eggs. The commission would undoubtedly have perceived a "competitive advantage," labeled it an "unfair method of evolution," and stopped the whole process right there.

In trying to understand the development of this anticompetitive strain in antitrust, it would be wrong to underestimate the role of the Supreme Court. Though compelled by neither the wording nor the legislative history of the laws, the Court has with increasing frequency taken extreme anticompetitive positions. In many cases the Court has materially changed the law as it had previously been understood. This means that the Court is making major social policy, and the policy it chooses to make today is predominantly anticompetitive. It is naive to imagine that Congress can always correct the Court when it legislates in this fashion. When the Court, consciously or unconsciously, changes the meaning of a statute or the direction of a body of law, it may very well accomplish a change that Congress was politically incapable of making, but is equally incapable of reversing. In fact, the prestige of the Court is so high that by taking the lead in formulating new policy, it may make further legislative change in the same direction much easier. The propriety of this process and of the Court's rather unrestrained use of its power and influence depends of course upon one's view of the correct roles and relationships of the judiciary and the legislature. It seems at least highly doubtful that it is appropriate for major policy shifts to come through the judicial process when they could not initially have been arrived at by the political process.

Policy is thus made by the Supreme Court to a far more significant degree than by the Antitrust Division and the Federal Trade Commission. It is a policy that is also forwarded by Congress and that is, of course, acquiesed

in by the electorate. The crisis in antitrust, therefore, seems finally traceable to widespread economic misconceptions that create the opportunity for groups with political power to extract rewards from consumers that they cannot command in the market place. This gives antitrust a high political assay and greatly strengthens its protectionist bias. Scolding the enforcement agencies, while it is highly diverting sport at bar association meetings—a sort of sedentary version of bullbaiting suitable for middle-aged lawyers—is ultimately rather beside the point. Even if they wished to, they could hardly be expected to withstand the continual pressure from Congress. Basic education about the role and functioning of the market, therefore, may be the only long run hope there is for the survival of antitrust as rational social policy.