TABLE OF CONTENTS

Though each reprinted article bears the pagination of the journal in which it originally appeared, the numbers given in our Table of Contents refer to our own consecutive pagination, which can be found in the outside margin of each page.

| The Purpose of the Enterprise | 1 |
| History and Development of Law Reviews | 5 |

**THE TWENTY-TWO ARTICLES**

*The Right to Privacy*, Samuel D. Warren & Louis D. Brandeis ........................................... 29
Reprinted from the *Harvard Law Review*, 4:193, 1890

*The Origin and Scope of the American Doctrine of Constitutional Law*,
James B. Thayer .............................................. 57
Reprinted from the *Harvard Law Review*, 7:129, 1893

*The Path of Law*, Oliver Wendell Holmes .......................................................... 85
Reprinted with permission from the *Harvard Law Review*, 10:457, 1897

*Mechanical Jurisprudence*, Roscoe Pound .................................................. 107
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*Legal Cause in Actions of Tort*, Jeremiah Smith .................................................. 129

*Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Wesley Newcomb Hohfeld .................................................. 211

*A Realistic Jurisprudence: The Next Step*, Karl N. Llewellyn ........................................... 257
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*Goodbye to Law Reviews*, Fred Rodell .................................................. 387
Reprinted with permission from the *Virginia Law Review*, 23:38, 1936

*Perpetuities in a Nutshell*, W. Barton Leach .................................................. 397
Reprinted with permission from the *Harvard Law Review*, 51:658, 1938

*Reflections on the Law of Copyright*, Zechariah Chafee, Jr. ........................................... 433
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I.

THE PURPOSE OF THE ENTERPRISE

One who offers in book form a collection of materials already published in periodicals no doubt has some explaining to do.¹

These words, written by Brainerd Currie in an introduction to his 1963 work, Selected Essays on the Conflict of Laws, stand both as an excellent reminder to future authors and as a question that deserves treatment at the very beginning of this essay. Why indeed attempt to collect into a new volume law review articles that have already been published?

One thing that certainly cannot be claimed with regard to such an endeavor is that it is novel. The Harvard Law Review Association has published a series of volumes centering on particular subject areas which consists of articles that appeared originally in the Harvard Law Review. In the Foreword to the first of this series, Essays on the Law of Torts, the redoubtable Dean Roscoe Pound justified collecting such articles by saying.

Papers and legal periodicals are not always readily accessible. Hence, it has seemed timely to bring together papers on the theory and problems of the law of torts which have appeared in the Harvard Law Review in the past thirty years, in order to bring them more conveniently within the reach of judges, lawyers, teachers, and students.²

Besides demonstrating that Dean Pound was not afraid of lengthy sentences, this quotation indicates one of the continuing themes expressed by earlier collectors of such articles, i.e., making readily available materials that might not find their way into the hands of the general public. Due to the expansion of law library collections and the ready availability of major law reviews in reprint and microform editions, there is little need for concern over availability today. In addition, each volume in the series of Harvard Law Review Association reprints centers on a single topic and draws only from the Harvard Law Review. While our selection will include some articles that appeared in these various collections, it will be neither centered on one topic nor limited to the pages of the Harvard Law Review.

¹Currie, Selected Essays on the Conflict of Laws (Duke) 1963, p. iii
III.
THE
TWENTY-TWO
ARTICLES

The twenty-two articles chosen for this compilation are not easily summarized. They represent studies of large issues and small ones, of very theoretical articles and quite practical ones. The common thread is that all have played a major role in influencing American legal thinking. The time spread represented by the articles is set out below:

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Listed below is a brief study of each article, complete with a short sketch of its author's biography and a few words about the article's impact.

1. Warren and Brandeis
   The Right to Privacy
   4 Harv. L. Rev. 193 (1890)

   LOUIS D. BRANDEIS, 1856–1941, son of a Louisville grain merchant, graduated first in his 1877 Harvard Law School class. SAMUEL D. WARREN, 1852–1910, from a wealthy Boston family, was second in the class. Warren began practicing law with O. W. Holmes Jr.'s firm in Boston, while Brandeis moved to St. Louis to begin practice. By the summer of 1879 Warren had convinced Brandeis to return to Boston, and the two opened their own office.

   In 1887 Brandeis assisted in the founding of the Harvard Law Review, and the partners contributed two articles to the young journal on the law of ponds. Upon his father's death in 1889, Warren left the partnership to take over the family paper business, but his sensitivity about newspaper publicity of his per-

"The Winnipeg Pond Cases, 2 Harv. L. Rev. 195 (1888); The Law of Ponds, 3 Harv. L. Rev. 1 (1889)"
sonal and social life led to a third collaboration with Brandeis. "The Right to Privacy," which appeared in 1890, described a common-law right to be let alone that had not expressly been recognized by any English or American court. The privacy doctrine advanced by Warren and Brandeis was rejected by the New York Court of Appeals in 1902, but recognized by the Georgia Supreme Court three years later. The right of privacy has since been recognized in almost every state, and the article "has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law."

The article is not so venerable, however, that it is not still subjected to attacks on grounds that it was not really very innovative, or that it was anachronistic and misguided. Neither author contributed further to the Harvard Law Review. Brandeis remained in private practice until appointed to the United States Supreme Court in 1916, and served on the Court until 1939. Under pressure from litigation over his father's estate and bothered by the attendant publicity, Warren shot himself at the age of 58.

2

Thayer

The Origin and Scope of the American Doctrine of Constitutional Law

7 Harv. L. Rev. 129 (1893)

JAMES B. THAYER, 1831-1902, was born in Haverhill, Mass., and graduated from Harvard College in 1852 and Harvard Law School in 1856. After several years in practice, he joined the Harvard faculty in 1874. He remained there until his death, specializing in constitutional law and evidence. Sixty years after his death, Felix Frankfurter referred to him as "the great figure in constitutional law at the Harvard Law School."

"The Origin and Scope of the American Doctrine of Constitutional Law" was presented to the Congress on Jurisprudence and Law Reform in Chicago in August 1893, and published that year in the Harvard Law Review. Thayer argued in the paper that statutes must be upheld unless unconstitutional "beyond a reasonable doubt," and stated simply: "Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere." The paper "influenced American jurisprudence for decades," and was chosen by Justice Frankfurter as "the most important single essay" in the field of constitutional law. Frankfurter called the article "the great guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions." In a 1984 opinion, the Court of Appeals for the District of Columbia referred to the piece as "a celebrated discussion of the presumption of constitutionality."

3

Holmes

The Path of the Law

10 Harv. L. Rev. 457 (1897)

OLIVER WENDELL HOLMES, JR., 1841-1935, son of the author and physician Oliver Wendell Holmes, was born in Boston and graduated from Harvard College in 1861. After three years in the Union Army, he graduated from Harvard Law School in 1866. While in private practice in Boston, he served as an editor of the American Law Review from 1870 to 1873, published a twelfth edition of Kent's Commentaries in 1873, and wrote his first major work of legal philosophy, The Common Law, which was published in 1881. After a year as a Harvard law professor, he became a justice of the Supreme Judicial Court of Massachusetts in 1883. He was named Chief Justice of the court in 1889, and in 1902 was appointed to the United States Supreme Court, where he served for thirty years.

"The Path of the Law" was delivered in January 1897 at the dedication of the new hall of the Boston University School of Law. In it Holmes advocated a realistic and scientific development of the law, succinctly stressing his point with the much-quoted line: "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV."

Benjamin Cardozo, himself an eminent jurist, said of Holmes that he was "for all students of the law and for all students of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages."

4

Pound

Mechanical Jurisprudence

8 Colum. L. Rev. 695 (1908)

ROScoe POUND, 1870-1964, son of a Nebraska district court judge, graduated from the University of Nebraska in 1888. He attended Harvard Law School for a year and was admitted to the Nebraska bar in 1890. While practicing law in Lincoln, he earned a doctorate in botany in 1897. In 1899 he began teaching law at Nebraska and became dean of the law school in 1903. He moved in 1907 to Northwestern, in 1909 to Chicago, and in 1910 to Harvard, where he remained for 37 years, including 20 as dean of Harvard Law School. When he retired in 1947, a former colleague wrote: "In our time, in this country, in the field of legal science..."
and legal philosophy one Alpine peak appeared over the surrounding landscape. This is Roscoe Pound.48

A bibliography of Pound's writings fills over 200 pages. His first published article, "Dogs and the Law," appeared in The Green Bag in 1896,49 and his last, an article on the Federal Tort Claims Act, was published in the Tulane Law Review in 1963.50 In his later years, Pound developed his theory of sociological jurisprudence, culminating in the publication of the five-volume Jurisprudence in 1959. A half-century earlier, he shocked the 1906 American Bar Association in St. Paul with "The Causes of Popular Dissatisfaction with the Administration of Justice,"51 and argued against "Mechanical Jurisprudence" before the annual meeting of the Bar Association of North Dakota. The mechanical jurisprudence speech was published in the Columbia Law Review and is included here.

5 Smith

Legal Cause in Actions of Tort
25 Harv. L. Rev. 103, 223, 303 (1911–1912)

JEREMIAH SMITH, 1837–1921, was born in Exeter, New Hampshire, son of Chief Justice Jeremiah Smith of the state supreme court. He received a bachelor's degree from Harvard in 1856 and a master's in 1859, and attended Harvard Law School for a year. After six years of practice in Dover, N.H., he was appointed to the Supreme Court of New Hampshire at the age of thirty. Threatened with a ballot for the Supreme Court of New Hampshire in 1890. During twenty years on the Harvard faculty, he published his first book, published in 1893, with J. B. Ames, private corporations (1897), municipal corporations (1899), and the law of persons (1899).

His article "Legal Cause in Actions of Tort," published after his retirement from teaching, introduced the concept of "substantial factor" to causation analysis. Upon Smith's death, Joseph Beale called the work "a careful and suggestive article on a subject just coming into prominence."52 The article influenced later attempts to determine proximate cause, and has continued to be cited by the courts.53

6 Hoffeld

Some Fundamental Legal Conceptions as Applied in Judicial Reasoning
23 Yale L. J. 16 (1913)

WESLEY NEWCOMB HOFFELD, 1879–1918, graduated from the University of California in 1901 and from Harvard Law School in 1904. After a year of practice in San Francisco, he taught at Hastings College of the Law and then at Stanford Law School. In 1914 he moved to Yale Law School, but four years later was severely stricken in the influenza epidemic and died of endocarditis when 39 years old.

Hohfeld's writings consisted solely of articles in legal periodicals. "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" was published in 1913, while Hohfeld was at Stanford. Its organization of eight basic legal concepts into opposite and correlative pairs was "believed by many to be the most important and original contribution to legal science which has appeared in a generation," according to a Yale Law Journal obituary of Hohfeld.54 Seventy years later, the article continues to engender considerable commentary.55

Hohfeld began to expand his analysis of fundamental legal concepts in a 1917 article,56 and his entire periodical output was published in a 1923 volume, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays.

7 Llewellyn

A Realistic Jurisprudence: The Next Step
30 Colum. L. Rev. 431 (1930)

KARL N. LLEWELLYN, 1893–1962, was born in West Seattle, Washington, and graduated from Yale College in 1913 and Yale Law School in 1918. After two years with Shearmen & Sterling in New York, he joined the Yale law faculty, moving to Columbia in 1925 and the University of Chicago in 1951. His major works include The Bramble Bush: On Our Law and Its Study (1930, 1951) and The Common Law Tradition: Deciding Appeals. From 1941 to 1962 he served as Chief Reporter for the Uniform Commercial Code.

"A Realistic Jurisprudence: The Next Step" was presented at an American Association of Political Science round table in 1929, and published the following year. It was a leading article in the development of legal realism. The legal realism movement had a profound effect on twentieth century legal thought and jurisprudence. Whether modern thinkers adopt, reject, or reformulate the work of the legal realists, their work must be dealt with. Hence, the importance of this article. For a more extensive exposition of the legal realist philosophy, see Jerome Frank, Law and the Modern Mind, Karl Llewellyn, Jurisprudence and Lon Fuller, "American Legal Realism."57

48Weisb Newcomb Hoffeld, 28 Yale L.J. 166, 167 (1918).
50Hoffeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710 (1917).
LON L. FULLER, 1902–1978, was born in Texas and grew up in California’s Imperial Valley. He attended Stanford University, receiving his A.B. in 1924 and his J.D. in 1926. After teaching stints at Oregon, Illinois and Duke, he became a professor at Harvard Law School in 1940. In 1942 he passed the Massachusetts bar and practiced for three years with a Boston firm, principally in the field of labor arbitration. After the war he returned to Harvard, where he specialized in the fields of jurisprudence and contracts.

Fuller’s "first famous, and thus far, probably most influential work" was his 1936 "The Reliance Interest in Contract Damages," written with WILLIAM R. PERDUE, JR. Perdue, born in 1913, was at the time a third-year law student at Duke and a frequent contributor to the Duke Bar Association Journal. In 1937 Perdue became Current Decisions Editor of the journal, supervising a staff which included Duke Bar Association President Richard M. Nixon. Upon graduation, Perdue went to work for Cahill, Gordon, Reindel and Ohl in New York. Except for the war years, during which he advanced to lieutenant colonel, he stayed at Cahill, Gordon until 1950, when he became general counsel for Ethyl Corporation. He was promoted to executive vice-president and treasurer in 1954. In 1957 Perdue moved to Interchemical Corp., subsequently Inmont Corp., staying until it was merged into Carrier Corp. in 1977. 

FRED RODELL, 1907–1980, was born in Philadelphia and graduated in 1928 from Haverford College and in 1931 from Yale Law School, where he served as Case and Comment Editor of the Yale Law Journal. He joined the Yale faculty in 1933, after working two years for Gov. Gifford Pinchot of Pennsylvania, and stayed at Yale until his retirement in 1974.

After three years of teaching, Rodell published "Goodbye to Law Reviews," a short piece which is "perhaps the most widely read—and most controversial—article in all of legal literature." Except for occasional memorial pieces and a 1962 reprint and update of "Goodbye to Law Reviews," he remained true to his vow to avoid legal periodicals. Most of his writing was for publications such as the New York Times Magazine, Saturday Review, and the Progressive, and his most popular class at Yale taught law students how to write for lay readers.

Rodell’s most famous work is the 1939 book Woe Unto You, Lawyers!, in which he criticized the legal profession as a "pseudo-intellectual autocracy." Rodell’s other books included Fifty-five Men: The Story of the Constitution (1936) and Nine Men: A Political History of the Supreme Court 1790–1955 (1955).


W. BARTON LEACH, 1900–1971, received his bachelor’s degree from Harvard College in 1921 and his law degree from Harvard Law School in 1924. He clerked for Justice Holmes for a year, practiced with a Boston firm for five years, and joined the Harvard faculty in 1930. With the exception of the war years, during which he served as U.S.A.A.F. Operations Analysis Chief, he remained at Harvard until 1969.

The first of Leach’s several casebooks was Cases and Materials on the Law of Future Interests, published in 1935. Three years later he simplified the subject considerably in "Perpetuities in a Nutshell," which remains one of the most widely read articles in the Harvard Law Review’s history. Leach created the "fertile octogenarian" and the "unborn widow" to illustrate the intricacies of the Rule Against Perpetuities. State supreme courts have acclaimed the article as "renowned," "classic," and "the leading article contributing to reform of the Rule Against Perpetuities." Leach updated the nutshell in a 1965 Harvard Law Review article.

ZECHARIAH CHAFFEE, JR., 1885–1957, was born in Providence and attended Brown University there. He graduated from Harvard Law School in 1913, having declined election to the Board of Editors of the Harvard Law Review. After three years of practice in Providence, he joined the Harvard Law School faculty in 1916. For his first major publication, Freedom of Speech in 1920, he was brought before Harvard’s Board of Overseers on charges of radicalism for criticizing the harsh sentences in Abrams v. United States; the charges were dismissed.

Chafee’s major work was in the fields of First Amendment rights and equity jurisprudence. His article "Reflections on the Law of Copyright" presents an overview of the field and is adapted from the closing lecture of a Practising Law Institute course on the subject. The article was most recently cited by the Supreme Court in Justice Blackmun’s dissenting opinion in the 1984 Betamax case.”

""Griswold, Baird, Leach, 85 Harv. L. Rev.: 723, 724 (1972)
""Smith v. Lewis, 13 Cal.3d 349, 373, 118 Cal. Rptr. 621, 530 P.2d 589 (1975), (dissenting opinion).
""In re Estate of Chun Quam Yee Hop, 52 Haw. 40, ---, 469 P.2d 183 (1970)
""Leach, Perpetuities: The Nutshell Revised, 78 Harv. L. Rev.: 973 (1965)
""250 U.S. 616 (1919)
FELIX FRANKFURTER, 1882–1954, emigrated from Vienna in 1894 and graduated from the City College of New York in 1902 and Harvard Law School in 1906. Soon thereafter he went to work for U.S. Attorney Henry L. Stimson of the Southern District of New York, following Stimson back to private practice and to subsequent government service in Washington. In 1914 he joined the faculty of Harvard Law School. While at Harvard he helped found the American Civil Liberties Union and the New Republic, and argued publicly for a new trial for Sacco and Vanzetti. He was the co-author of The Business of the Supreme Court (1927, with James M. Landis) and of influential casebooks on federal jurisdiction and administrative law.

Appointed to the Supreme Court in 1939, Frankfurter was the Court’s leading proponent of judicial restraint for over three decades until his retirement in 1962. In March 1947 he delivered the Sixth Annual Benjamin N. Cardozo Lecture before the Association of the Bar of the City of New York. The lecture, “Some Reflections on the Reading of Statutes,” was published in the June 1947 Record of the bar association, and reprinted in the May 1947 Columbia Law Review. As a straightforward extra-judicial discourse on judicial reasoning, the article has been quoted time and again by courts as they try to avoid doing violence to statutory language.

13

The Case of the Speluncean Explorers
62 Harv. L. Rev. 616 (1949)

"The Case of the Speluncean Explorers," consisting of the remarks of the five justices of the Supreme Court of Newgarth on an appeal from murder convictions in 4300 A.D., is a popular and accessible introduction to jurisprudential philosophy, a field in which Fuller wrote extensively. His works include The Law in Quest of Itself (1940), The Morality of Law (1964), Anatomy of the Law (1968) and The Principles of Social Order: Selected Essays (1981).

For biographical information, see Discussion under entry number 8.

14

Tussman and tenBroek
The Equal Protection of the Laws
37 Calif. L. Rev. 341 (1949)

JACOBUS TENBROEK, 1911–1968, was born in Alberta and came to the United States in 1919. He was partially blinded in a bow and arrow accident at age seven, and lost the rest of his sight when 14 years old. He attended the University of California at Berkeley, receiving an A.B. in 1934, an M.A. in 1935, and an LL.B. in 1938. He was a tutor at the University of Chicago School of Law from 1940 to 1942, when he began teaching in Berkeley’s Department of Speech. In 1955 he became chairman of the department, and in 1963 he moved to a professorship in the Department of Political Science. In 1940 he founded the National Federation of the Blind, and served as its president for the next 21 years. He wrote numerous articles on subjects from statutory interpretation to the Thirteenth Amendment to social welfare, and was coauthor of Prejudice, War and the Constitution: Japanese American Evacuation and Resettlement (1954) and Hope Deferred: Public Welfare and the Blind (1959). He died of cancer at 56.

JOSEPH TUSSMAN was born in 1914 and received an A.B. from Wisconsin in 1936 and a Ph.D. from Berkeley in 1946. He began teaching in Berkeley’s Philosophy Department that year. In 1955 he left to teach at Syracuse for five years and at Wesleyan for two years, returning to the University of California in 1963. His publications include Obligation and the Body Politic (1960) and Government and the Mind (1977); he was also the editor of The Supreme Court on Church and State in 1962 and The Supreme Court on Racial Discrimination in 1963.

Tussman and tenBroek combined their efforts to write The Equal Protection of the Laws, published in 1949 in the California Law Review. The article was the precursor of the rapid and dramatic development of equal protection law over the following decades. While tenBroek went on to write over a dozen more law review articles, Tussman’s only other appearance in the Index to Legal Periodicals as an author was for a book review two years later."

15

The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic
66 Harv. L. Rev. 1362 (1953)

HENRY M. HART, JR., 1904–1959, was born in Butte, Montana, and graduated from Harvard College in 1926. At Harvard Law School he was president of the Harvard Law Review and received his L.L.B. in 1930. Following a year of graduate study with Felix Frankfurter, he clerked for Justice Brandeis for a year. In 1932 he joined the Harvard faculty. He served in several capacities for the federal government while on leave from Harvard: in the Solicitor General’s office (1937–38), as special assistant to the Attorney General (1940–41), in the Office of Price Administration (1942–45), and as general counsel for the Office of Economic Stabilization (1945–46).

"The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic" was published in the Harvard Law Review in 1953 and incorporated the same year into The Federal Courts and the Federal Court System, the acclaimed casebook Hart edited with Herbert Wechsler. The very fact that the "dialogue" survives in the current edition of the widely used casebook demonstrates its influence and power.

Hart’s other major work is The Legal Process: Basic Problems in the Making
and Application of Law, written with Albert M. Sacks and published only in a tentative mimeographed 1958 edition. It has sold thousands of copies in this format, demonstrating the compelling content of the work.

16

Currie

Married Women’s Contracts: A Study of Conflict-of-Laws Method
25 U. Chicago L. Rev. 227 (1958)

Born in Macon, Georgia, BRAINERD CURRIE, 1912–1965, received his LL.B. from Mercer University in 1935. He immediately joined the Mercer law faculty as an instructor, and subsequently served as a law professor at Wake Forest, Duke, UCLA, Pittsburgh, and Chicago. Like Henry Hart, he worked in the Offices of Price Administration and Economic Stabilization from 1942 to 1946. While at Duke in the late 1940s he was an editor of both Law and Contemporary Problems and the Journal of Legal Education. He wrote in the fields of admiralty and civil procedure, but his most enduring contributions were in conflict of laws.

Currie’s article “Married Women’s Contracts: A Study of Conflict-of-Laws Method” was published while he was a fellow at the Center for Advanced Study in the Behavioral Sciences in 1958. In it he announced his governmental interest analysis for choice-of-law problems, differentiating between cases where the forum state has no interest in applying its own law and “true conflict” cases where each state has a legitimate interest in its law being applied. For his 1963 book Selected Essays on the Conflict of Laws, which includes “Married Women’s Contracts,” Currie was awarded the first Cuff Triennial Book Award for outstanding legal scholarship. His presenter commented: “His central ideas are not accepted by all conflicts lawyers but it seems clear enough that after Brainerd Currie that dark science called the conflict of laws can never be the same again.” His work is considered as enduring for its freshness, simplicity, and “slightly self-deprecating sense of humor” as for its logic and insight.16

17

Wechsler

Toward Neutral Principles of Constitutional Law
75 Harv. L. Rev. 1 (1959)

HERBERT WECHSLER, born in 1909, graduated from the City College of New York in 1928 and Columbia Law School in 1931, where he was editor-in-chief of the law review. In 1932–33 he clerked at the Supreme Court for Justice Stone, and then joined the Columbia Law School faculty. His first major work was “A Rationale of the Law of Homicide,” with Jerome Michael.16 In 1940 the two published a casebook, Criminal Law and its Administration. With Henry Hart, Wechsler edited The Federal Courts and the Federal System in 1953. He served as

16 Dawson, in As v. Am. Law Schools 1964 Proceedings, Pt. 2, p. 80
17 Key, Brainerd Currie, 29 U. Chi. L. School Record 12, 14 (1933)
18 57 Colum. L. Rev. 701, 1261 (1957)

Assistant Attorney General from 1943 to 1945, and as Chief Reporter for the Model Penal Code from 1951 to 1962.

“Toward Neutral Principles of Constitutional Law” was delivered in April 1959 as the Oliver Wendell Holmes Lecture at the Harvard Law School, and since publication has become “almost certainly the most cited and most controversial discussion of constitutional issues since World War II.” The article calls for integrity and reason in judicial processes, discussing “startling, eloquently and courageously”20 problems which “reach to the very core of the process of judicial decision and will retain importance as long as judges sit in this country.”21 The essay is reprinted in Wechsler’s 1961 collection, Principles, Politics, and Fundamental Law: Selected Essays.

18

Coase

The Problem of Social Cost
3 J. Law & Econ. 1 (1959)

R. H. COASE was born in 1910 and received his undergraduate and doctorate degrees from the London School of Economics. He came to the United States in 1951, and taught at Buffalo for seven years and Virginia for six years. In 1964 he became Professor of Economics at the University of Chicago and Editor of the Journal of Law and Economics. He retired from teaching in 1979 and from editing in 1982.

Coase’s article “The Problem of Social Cost,” published while he was at the University of Virginia, “brought together two powerful intellectual currents, namely, the economic theory of externalities and the common-law tradition concerning torts and nuisances.” It has spawned a substantial literature. “The many insights, the timing, and the lack of clarity combine to make The Problem of Social Cost a bench-mark article. Since it is unclear, critics and advocates have been able to read into Coase’s work what they wished to support or criticize.” “Richard Posner has termed the article “basic to the whole economic analysis of law.””22

19

Posner

The Assault upon the Citadel (Strict Liability to the Consumer)
69 Yale L. J. 1099 (1960)

WILLIAM L. PROSSER, 1898–1972, received his A.B. from Harvard in 1918 and his LL.B. from the University of Minnesota in 1928. After a few years of practice in

20 Greenwall, The Enduring Significance of Neutral Principles, 78 Colum. L. Rev. 592 (1978)
21 Id
22 Id. at 994
23 Blum and Kalven, Public Law Perspectives on a Private Problem: Auto Compensation Plans (1965)
24 University of Chicago Law Review 4 (1975). This issue, dedicated to Kalven, contains an exhaustive bibliography of his works (see pages 15–19)
25 The Uneasy Case for Progressive Taxation (1953). In 1976 Blum published an ‘update’ of the original article in one of the Occasional Papers of the University of Chicago Law School
Brockman's 1960 article The Assault upon the Citadel (Strict Liability to the Consumer) has been cited more than any other article listed in Shepard's Law Review Citations. The article led to Justice Traynor's 1963 decision in Greenman v. Yuba Power Products, Inc., and to the imposition of strict products liability in Section 402A of the Restatement, Second, of Torts, for which Prosser was the Reporter. Six years after The Assault upon the Citadel, Prosser surveyed the rapid development of the law in "The Fall of the Citadel (Strict Liability to the Consumer)." Prosser produced a number of articles that rank among the most widely cited pieces ever written. He somehow found time to combine this prolific academic career with that of a humorist and playwright.

Bickel

Foreword: The Passive Virtues
75 Harv. L. Rev. 40 (1961)

Son of a Rumanian lawyer, ALEXANDER M. BICKEL, 1924-1974, was born in Bucharest and came to the United States at the age of 14. As did Frankfurter and Wechsler before him, he attended the City College of New York, graduating in 1947. After his graduation in 1949 from Harvard Law School, he clerked for Judge Calvert Magruder and Justice Felix Frankfurter. He joined the Yale law faculty in 1956 and published his first book, The Unpublished Opinions of Mr. Justice Brandeis, the following year.


20

Coons

Approaches to Court Imposed Compromise—
The Uses of Doubt and Reason
58 NW. U.L. Rev. 750 (1964)

JOHN E. COONS was born in 1929 and grew up in Duluth, Minnesota. He received his B.A. in 1950 from the University of Minnesota (Duluth) and his J.D. in 1954 from Northwestern. After two years of litigating contract appeals for the U.S. Army, he joined the faculty at Northwestern. In 1968 he moved to the University of California at Berkeley, where he has specialized largely in education law and children's rights. He is coauthor of Private Wealth and Public Education (1970, with Clune and Sugarman) and Education by Choice (1978, with Sugarman). His "Approaches to Court Imposed Compromise—The Uses of Doubt and Reason" was the major essay in a 1963 Northwestern symposium on Compromise and Decision Making in the Resolution of Controversies. Praised for its "fascinating reflections on the sources of the all or nothing predisposition of courts, its costs, its cures and its connections with . . . fear of unruly precedent," the article presaged the best current literature on negotiation and dispute resolution.

22

Reich

The New Property
73 Yale L.J. 733 (1964)


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**74 Yale L.J. 1245 (1965)
***74 Yale L.J. 1402 (1965)
****75 Yale L.J. 1257 (1966)
*****Reich, Foreword: Mr. Justice Black as One Who Saw the Future, 9 N.W.U.L.R. 865 (1977)
the rights of the individual. Each man is responsible for his own acts and omissions only. If he condones what he reprobates, with a weapon at hand equal to his defence, he is responsible for the results. If he resists, public opinion will rally to his support. Has he then such a weapon? It is believed that the common law provides him with one, forged in the slow fire of the centuries, and to-day fitly tempered to his hand. The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

Samuel D. Warren,
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THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW.

I. How did our American doctrine, which allows to the judiciary the power to declare legislative Acts unconstitutional, and to treat them as null, come about, and what is the true scope of it?

It is a singular fact that the State constitutions did not give this power to the judges in express terms; it was inferential. In the earliest of these instruments no language was used from which it was clearly to be made out. Only after the date of the Federal constitution was any such language to be found; as in Article XII. of the Kentucky constitution of 1792. The existence of the power was at first denied or doubted in some quarters; and so late as the year 1825, in a strong dissenting opinion, Mr. Justice Gibson, of Pennsylvania, one of the ablest of American judges, and afterwards the chief justice of that State, wholly denied it under any constitution which did not expressly give it. He denied it, therefore, under the State constitutions generally, while admitting that in that of the United States the power was given; namely, in the second clause of Article VI., when providing that the constitution,
and the laws and treaties made in pursuance thereof, "shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." 1

So far as the grounds for this remarkable power are found in the mere fact of a constitution being in writing, or in judges being sworn to support it, they are quite inadequate. Neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which these departments are constitutionally authorized to take, or the determination of those departments that they are so authorized. It is enough, in confirmation of this, to refer to the fact that other countries, as France, Germany, and Switzerland, have written constitutions, and that such a power is not recognized there. "The restrictions," says Dicey, in his admirable Law of the Constitution, "placed on the action of the legislature under the French constitution are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution, and from the resulting support of public opinion." 2

How came we then to adopt this remarkable practice? Mainly as a natural result of our political experience before the War of Independence,—as being colonists, governed under written charters of government proceeding from the English Crown. The terms and limitations of these charters, so many written constitutions, were enforced by various means,—by forfeiture of the charter,

1 This opinion has fallen strangely out of sight. It has much the abest discussion of the question which I have ever seen, not excepting the judgment of Marshall in Marbury v. Madison, which, as I venture to think, has been overpraised. Gibson afterwards accepted the generally received doctrine. "I have changed that opinion," said the Chief Justice to counsel, in Norris v. Clymer, 2 Pa. St., p. 287 (1845), "for two reasons. The late convention [apparently the one preceding the Pennsylvania constitution of 1838] by their silence sanctioned the pretensions of the courts to deal freely with the Acts of the legislature; and from experience of the necessity of the case."

2 Ch. ii. p. 137, 3d ed. President Rogers, in the preface to a valuable collection of papers on the "Constitutional History of the United States, as seen in the Development of American Law," p. 11, remarks that "there is not in Europe to this day a court with authority to pass on the constitutionality of national laws. But in Germany and Switzerland, while the Federal courts cannot annul a Federal law, they may, in either country, declare a cantonal or State law invalid when it conflicts with the Federal law." Compare Dicey, at 134, and Bryce, Am. Com., 1:470, note 1st ed., as to possible qualifications of this statement.

ers, by Act of Parliament, by the direct annulling of legislation by the Crown, by judicial proceedings and an ultimate appeal to the Privy Council. Our practice was a natural result of this; but it was by no means a necessary one. All this colonial restraint was only the usual and normal exercise of power. An external authority had imposed the terms of the charters, the authority of a paramount government, fully organized and equipped for every exigency of disobedience, with a king and legislature and courts of its own. The superior right and authority of this government were fundamental here, and fully recognized; and it was only a usual, orderly, necessary procedure when our own courts enforced the same rights that were enforced here by the appellate courts in England. These charters were in the strict sense written law: as their restraints upon the colonial legislatures were enforced by the English courts of last resort, so might they be enforced through the colonial courts, by disregarding as null what went counter to them.1

The Revolution came, and what happened then? Simply this: we cut the cord that tied us to Great Britain, and there was no longer an external sovereign. Our conception now was that "the people" took their place; that is to say, our own home population in the several States were now their own sovereign. So far as existing institutions were left untouched, they were constrained by translating the name and style of the English sovereign into that of our new ruler,—ourselves, the People. After this the charters, and still more obviously the new constitutions, were not so many orders from without, backed by an organized outside government, which simply performed an ordinary function in enforcing them: they were precepts from the people themselves who were to be governed, addressed to each of their own number, and especially to those who were charged with the duty of conducting the government. No higher power existed to support these orders by compulsion of the ordinary sort. The sovereign himself, having written these expressions of his will, had retired into the clouds; in any regular course of events he had no organ to enforce his will, except...
those to whom his orders were addressed in these documents. How then should his written constitution be enforced if these agencies did not obey him, if they failed, or worked amiss?

Here was really a different problem from that which had been presented under the old state of things. And yet it happened that no new provisions were made to meet it. The old methods and the old conceptions were followed. In Connecticut, in 1776, by a mere legislative act, the charter of 1662 was declared to continue "the civil Constitution of the State, under the sole authority of the People thereof, independent of any King or Prince whatsoever, and the venerable rules of liberty and good government were added as a part of it. Under this the people of Connecticut lived till 1818. In Rhode Island the charter, unaltered, served their turn until 1842; and, as is well known, it was upon this that one of the early cases of judicial action arose for enforcing constitutional provisions under the new order of things, as against a legislative Act; namely, the case of Trevett v. Weeden, in the Rhode Island Supreme Court in 1786.1

But it is instructive to see that this new application of judicial power was not universally assented to. It was denied by several members of the Federal convention, and was referred to as unsettled by various judges in the last two decades of the last century. The surprise of the Rhode Island legislature at the action of the court in Trevett v. Weeden seems to indicate an impression in their minds that the change from colonial independence to independence had made the legislature the substitute for Parliament, with a like omnipotence.2

In Vermont it seems to have been the established doctrine of the period that the judiciary could not disregard a legislative Act; and the same view was held in Connect-

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1 Varnum's Report of the case (Providence, 1787); s. c. a Chandler's Crim. Trials, 259.
2 And so of the excitement aroused by the alleged setting aside of a legislative Act in New York in 1784, in the case of Rutgers v. Waddington. Dawson's edition of this case, "With an Historical Introduction," (Morrisiana, 1866), pp. xxiv and seq. In an "Address to the People of the State," issued by the committee of a public meeting of "the violent Whigs," it was declared (pp. xxxii) "That there should be a power vested in Courts of Judicature, whereby they might control the Supreme Legislative power, we think is absurd in itself. Such powers in courts would be destructive of liberty, and remove all security of property." For the reference to this case, and a number of others, I am indebted to a learned article on "The Relation of the Judiciary to the Constitution" (19 Am. Law Rev. 175) by William M. Meigs, Esq., of the Philadelphia bar. It gives all the earliest cases. As Mr. Meigs remarks, the New York case does not appear to be really one of holding a law unconstitutional.

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ticut, as expressed in 1795 by Swift, afterwards chief justice of that State. In the preface to 1 D. Chipman's (Vermont) Reports, 22 et seq., the learned reporter, writing (in 1824) of the period of the Vermont Constitution of 1777, says that "No idea was entertained that the judiciary had any power to inquire into the constitutionality of Acts of the legislature, or to pronounce them void for any cause, or even to question their validity." And at page 25 of the year 1785, he adds: "Long after the period to which we have alluded, the doctrine that the constitution is the supreme law of the land, and that the judiciary have authority to set aside . . . Acts repugnant thereto, was considered anti-republican." In 1814, for the first time, I believe, we find this court announcing an Act of the State legislature to be "void as against the constitution of the State and the United States, and even the laws of nature." It may be remarked here that the doctrine of declaring legislative Acts void as being contrary to the constitution, was probably helped into existence by a theory which found some favor among our ancestors at the time of the Revolution, that courts might disregard such acts if they were contrary to the fundamental maxims of morality, or, as it was phrased, to the laws of nature. Such a doctrine was thought to have been asserted by English writers, and even by judges at times, but was never acted on. It has been repeated here, as matter of speculation, by our earlier judges, and occasionally by later ones; but in no case within my knowledge has it ever been enforced where it was the single and necessary ground of the decision, nor can it be, unless as a revolutionary measure.

In Swift's "System of the Laws of Connecticut," published in 1795, the author argues strongly and elaborately against the power of the judiciary to disregard a legislative enactment, while men-

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1 Davenport v. Wickwire, 1 D. Chipman, 237.
2 This subject is well considered in a learned note to Paxton's Case (1761), Quincy's Rep. 51, relating to Wills of Assistance, understood to have been prepared by Horace Gray, Esq., now Mr. Justice Gray, of the Supreme Court of the United States. See the note at pp. 520 - 529. James Otis had urged in his argument that "no Act of Parliament against the Constitution is void" (Quincy, 16, n., 474). The American cases sometimes referred to as deciding that a legislative Act was void, as being contrary to the first principles of morality or of government, e. g., in Quincy, 599, citing Bowman v. Middleton, 3 May, 252, and in 1 Bryce, Am. Com., 431 n., 1st ed., citing Gardner v. Newbury, Johns. Ch. Rep. 162, will be found, on a careful examination, to require no such explanation.

3 Vol. I. pp. 50 et seq.
tioning that the contrary opinion "is very popular and prevalent."
"It will be agreed," he says, "it is as probable that the judiciary will declare laws unconstitutional which are not so, as it is that the legislature will exceed their constitutional authority." But he makes the very noticeable admission that there may be cases so monstrous, — e.g., an Act authorizing conviction for crime without evidence, or securing to the legislature their own seats for life, — "so manifestly unconstitutional that it would seem wrong to require the judges to regard it in their decisions." As late as 1807 and 1808, judges were impeached by the legislature of Ohio for holding Acts of that body to be void.1

If. When at last this power of the judiciary was everywhere established, and added to the other bulwarks of our written constitutions, how was the power to be conceived of? Strictly as a judicial one. The State constitutions had been scrupulous to part off the powers of government into three; and in giving one of them to each department, had sometimes, with curious explicitness, forbidden it to exercise either of the others. The legislative department, said the Massachusetts constitution in 1780,2 —

"Shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them; to the end, it may be a government of laws, and not of men."

With like emphasis, in 1792, the constitution of Kentucky3 said: —

"Each of them to be confided to a separate body of magistracy; to wit, those which are legislative to one, those which are executive to another, and those which are judiciary to another. No person or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly permitted." Therefore, since the power now in question was a purely judicial one, in the first place, there were many cases where it had no operation. In the case of purely political acts and of the exercise of mere discretion, it mattered not that other departments were violating the constitution, the judiciary could not interfere; on the contrary, they must accept and enforce their acts. Judge Cooley has lately said: 1 —

"The common impression undoubtedly is that in the case of any legislation where the bounds of constitutional authority are disregarded, . . . the judiciary is perfectly competent to afford the adequate remedy; that the Act indeed must be void, and that any citizen, as well as the judiciary itself, may treat it as void, and refuse obedience. This, however, is far from being the fact." Again, where the power of the judiciary did have place, its whole scope was this; namely, to determine, for the mere purpose of deciding a litigated question properly submitted to the court, whether a particular disputed exercise of power was forbidden by the constitution. In doing this the court was so to discharge its office as not to deprive another department of any of its proper power, or to limit it in the proper range of its discretion. Not merely, then, do these questions, when presenting themselves in the courts for judicial action, call for a peculiarly large method in the treatment of them, but especially they require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body. Within that margin, as among all these legislative considerations, the constitutional law-makers must be allowed a free foot. In so far as legislative choice, ranging here unfettered, may select one form of action or another, the judges must not interfere, since their question is a naked judicial one.

Moreover, such is the nature of this particular judicial question that the preliminary determination by the legislature is a fact of very great importance, since the constitutions expressly intrust to the legislature this determination; they cannot act without making it. Furthermore, the constitutions not merely intrust to the legislatures a preliminary determination of the question, but they contemplate that this determination may be the final one; for they secure no revision of it. It is only as litigation may spring up, and as the course of it may happen to raise the point of constitutionality, that any question for the courts can regularly emerge. It may be, then, that the mere legislative decision will accomplish

For the last reference I am indebted to my colleague, Professor Wambaugh.
2 Part I. Art. 30.
3 Art. 1.

results throughout the country of the profoundest importance before any judicial question can arise or be decided,—as in the case of the first and second charters of the United States Bank and of the legal tender laws of thirty years ago and later. The constitutionality of a bank charter divided the cabinet of Washington, as it divided political parties for more than a generation. Yet when the first charter was given, in 1791, to last for twenty years, it ran through its whole life unchallenged in the courts, and was renewed in 1816. Only after three years from that did the question of its constitutionality come to decision in the Supreme Court of the United States. It is peculiarly important to observe that such a result is not an exceptional or unforeseen one; it is a result anticipated and clearly foreseen. Now, it is the legislature to whom this power is given,—this power, not merely of enacting laws, but of putting an interpretation on the constitution which shall deeply affect the whole country, at first denied by the Supreme Court of the United States. The revision of the laws before they began to operate.' As the authority to interpret is given, the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect; it ran through its whole life unchallenged in the courts, and was always accepted by both branches of the legislature, but on very solid and significant grounds of policy and law. The dual may find it for his private advantage to have the judges of the Supreme Court may take part in the legislative debates over "bills relating to civil law." The constitution of Colombia, of 1886, art. 84, provides that the judges of the Supreme Court may take part in the legislative debates over "bills relating to civil law." The constitution of Colombia, of 1886, art. 84, provides that the judges of the Supreme Court may take part in the legislative debates over "bills relating to civil law."
one. Their interference was but one of many safeguards, and its scope was narrow.

The rigor of this limitation upon judicial action is sometimes freely recognized, yet in a perverted way which really operates to extend the judicial function beyond its just bounds. The court's duty, we are told, is the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the constitution as being of superior obligation,—an ordinary and humble judicial duty, as the courts sometimes describe it. This way of putting it easily results in the wrong kind of disregard of legislative considerations; not merely in refusing to let them directly operate as grounds of judgment, but in refusing to consider them at all. Instead of taking them into account and allowing for them as furnishing possible grounds of legislative action, there takes place a pedantic and academic treatment of the texts of the constitution and the laws. And so we miss that combination of a lawyer's rigor with a statesman's breadth of view which should be found in dealing with this class of questions in constitutional law. Of this petty method we have many specimens; they are found only too easily to-day in the volumes of our current reports.

In order, however, to avoid falling into these narrow and literal methods, in order to prevent the courts from forgetting, as Marshall said, that "it is a constitution we are expounding," these literal precepts about the nature of the judicial task have been accompanied by a rule of administration which has tended, in competent hands, to give matters a very different complexion.

III. Let us observe the course which the courts, in point of fact, have taken, in administering this interesting jurisdiction.

They began by resting it upon the very simple ground that the legislature had only a delegated and limited authority under the constitutions; that these restraints, in order to be operative, must be regarded as so much law; and, as being law, that they must be interpreted and applied by the court. This was put as a mere matter of course. The reasoning was simple and narrow. Such was Hamilton's method in the Federalist, in 1788, 1 while discussing the Federal constitution, but on grounds applicable, as he con-

1 No. 78, first published on May 26, 1788. See Lodge's edition, pp. xxxvi and alliv.
cant rule of administration, — one which corrected their operation, and brought into play large considerations not adverted to in the reasoning so far mentioned. In 1811, Chief Justice Tilghman, of Pennsylvania, while asserting the power of the court to hold laws unconstitutional, but declining to exercise it in a particular case, stated this rule as follows:

"For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt."

When did this rule of administration begin? Very early. We observe that it is referred to as thoroughly established in 1811. In the earliest judicial consideration of the power of the judiciary over this subject, of which any report is preserved, — an obiter discussion in Virginia in 1782, while the general power of the court is declared by other judges with histrionic emphasis, Pendleton, the president of the court, in declining to pass upon it, foreshadowed the reasons of this rule, in remarking,

"How far this court, in whom the judicial powers may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, contrary to the plain terms of that constitution, is indeed a deep, important, and, I will add, a tremendous question, the decision of which would involve consequences to which gentlemen may not . . . have extended their ideas."

There is no occasion, he added, to consider it here. In 1793, when the General Court of Virginia held a law unconstitutional, Tyler, Justice, remarked: —

"But the violation must be plain and clear, or there might be danger of the judiciary preventing the operation of laws which might produce much public good."

In the Federal convention of 1787, while the power of declaring laws unconstitutional was recognized, the limits of the power were also admitted. In trying to make the judges revise all legislative acts before they took effect, Wilson pointed out that laws might be dangerous and destructive, and yet not so "unconstitutional as to justify the judges in refusing to give them effect." In 1796 Mr. Justice Chase, in the Supreme Court of the United States, said, that without then determining whether the court could declare an Act of Congress void, "I am free to declare that I will never exercise it but in a very clear case." And in 1800, in the same court, as regards a statute of Georgia, Mr. Justice Patterson, who had already, in 1795, on the circuit, held a legislative Act of Pennsylvania invalid, said that in order to justify the court in declaring any law void, there must be "a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication."

In 1808 in Georgia it was strongly put, in a passage which has been cited by other courts with approval. In holding an Act constitutional, Mr. Justice Charlton, for the court, asserted this power, as being inseparable from the organization of the judicial department. But, he continued, in what manner should it be exercised?

"No nice doubts, no critical exposition of words, no abstract rules of interpretation, suitable in a contest between individuals, ought to be resorted to in deciding on the constitutional operation of a statute. This violation of a constitutional right ought to be as obvious to the comprehension of every one as an axiomatic truth, as that the parts are equal to the whole. I shall endeavor to illustrate this: the first section of the second article of the constitution declares that the executive function shall be vested in the governor. Now, if the legislature were to vest the executive power in a standing committee of the House of Representatives, every mind would at once perceive the unconstitutionality of the statute. The judiciary would be authorized without hesitation to declare the Act unconstitutional. But when it remains doubtful whether the legislature have or have not trespassed on the constitution, a conflict ought to be avoided, because there is a possibility in such a case of the constitution being with the legislature."

In South Carolina, in 1812, Chancellor Waties, always distinguished for his clear assertion of the power in the judiciary to disregard unconstitutional enactments, repeats and strongly reaffirms it:

"I feel so strong a sense of this duty that if a violation of the constitution were manifest, I should not only declare the Act void, but I should
think I rendered a more important service to my country than in discharging the ordinary duties of my office for many years. ... But while I assert this power and insist on its great value to the country, I am not insensible of the high deference due to legislative authority. It is supreme in all cases where it is not restrained by the constitution; and as it is the duty of legislators as well as judges to consult this and conform their acts to it, so it should be presumed that all their acts do conform to it unless the contrary is manifest. This confidence is necessary to insure due obedience to its authority. If this be frequently questioned, it must tend to diminish the reverence for the laws which is essential to the public safety and happiness. I am not, therefore, disposed to examine with scrupulous exactness the validity of a law. It would be unwise on another account. The interference of the judiciary with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the constitution. The validity of the law ought not then to be questioned unless it is so obviously repugnant to the constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy. By such a cautious exercise of this judicial check, no jealousy of it will be excited, the public confidence in it will be promoted, and its salutary effects be justly and fully appreciated."

1 This well-known rule is laid down by Cooley (Const. Lim., 6th ed., 216), and supported by emphatic judicial declarations and by a long list of citations from all parts of the country. In Ogden v. Saunders, 1 Wheat. 213 (1822), Mr. Justice Washington, after remarking that the question was a doubtful one, said: "I could rest my opinion in favor of the constitutionality of the law ... on no other ground than this doubt, so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the ... legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court when that subject has called for its decision; and I know it expresses the honest sentiments of each and every member of this bench." In the Sinking Fund Cases, 99 U. S. 700 (1880), Chief Justice Waite, for the court, said: "This declaration [that an Act of Congress is unconstitutional] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." In Wellington et al. v. Petitioners, 6 Pick. 87 (1834), Chief Justice Shaw, for the court, remarked that it was proper "to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an Act of legislation [they will] never declare a statute void unless the nullity and invalidity of the Act are placed, in their judgment, beyond a reasonable doubt." In Com. v. Five Cents Sar. Dir., 5 Allen, 482 (1852), Chief Justice Bigelow, for the court, said: "It may be well to repeat the rule of exposition which has been oftentimes enunciated by this court, that where a statute has been passed

IV. I have accumulated these citations and run them back to the beginning, in order that it may be clear that the rule in question is something more than a mere form of language, a mere expression of courtesy and deference. It means far more than that. The courts have perceived with more or less distinctness that this exercise of the judicial function does in truth go far beyond the simple business which judges sometimes describe. If their duty were in truth merely and nedly to ascertain the meaning of the text of the constitution and of the impeached Act of the legislature, and to determine, as an academic question, whether in

with all the forms and solemnities required to give it the force of law, the presumption is in favor of its validity, and that the court will not declare it to be ... void unless its invalidity is established beyond reasonable doubt." And he goes on to state a corollary of this "well-established rule." In Ex parte McCulloch, 1 Cow. p. 364 (1829), Cowen, J. (for the court), said: "Before the court will deem it their duty to declare an Act of the legislature unconstitutional, a case must be presented in which there can be no rational doubt." In the People v. The Supervisors of Orange, 17 N. Y. 235 (1858), Harris, J. (for the court), said: "A legislative Act is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the Act cannot be supported by any reasonable interpretation or an unanswerable presumption." In Perry v. Keene, 55 N. H. 514, 534 (1856), Ladd, J. (with the concurrence of the rest of the court), said: "Certainly it is not for the court to shrink from the discharge of a constitutional duty; but, at the same time, it is not for this branch of the government to set an example of encroachment upon the province of the others. It is only the enunciation of a rule that is now elementary In the American States, to say that before we can declare this law unconstitutional, we must be fully satisfied—satisfied beyond a reasonable doubt—that the purpose for which the tax is authorized is private, and not public." In The Cincinnati, etc., Railroad Company, c. Or. St. 77 (1854), Kennedy, J. (for the court), said: "The right and duty of interference in a proper case are thus undeniably clear, the principles by which a court should be guided in such an inquiry are equally clear, both upon principle and authority. ... It is only when manifest assumption of authority and clear incompatibility between the constitution and the law appear, that the judicial power can refuse to execute it. Such interference can never be permitted in a doubtful case. And this results from the very nature of the case involved in the inquiry. The adjudged cases speak a uniform language on this subject. ... An unbroken chain of decisions to the same effect is to be found in the State courts." In Syndicate v. Brooks & Weyman, 3 Martin (L. A.), 9, 12 (1813), it was said by the court: "We reserve to ourselves the authority to declare null any legislative Act which shall be repugnant to the constitution; but it must be manifestly so, not susceptible of doubt." (Cited with approval in Johnson v. Duncan, 1 B. 539.) In Cotton v. The County Commissioners, 6 Fla. 610 (1856), DuPont, J. (for the court), said: "It is a most grave and important power, not to be exercised lightly or rashly; nor in any case where it cannot be made plainly to appear that the legislature has exceeded its powers. If there exist upon the mind of the court a reasonable doubt, that doubt must be given in favor of the law. ... In further support of this position, it may be cited any number of decisions by the State courts. ... If there be one to be found which constitutes an exception to the general doctrine, it has escaped our search."
the court's judgment the two were in conflict, it would, to be sure, be an elevated and important office, one dealing with great matters, involving large public considerations, but yet a function far simpler than it really is. Having ascertained all this, yet there remains a question — the really momentous question — whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course, — merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the rule of administration that the courts lay down. It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question. That is the standard of duty to which the courts bring their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional. This is the principle which the rule that I have been illustrating affirms and supports. The meaning and effect of it are shortly and very strikingly intimated by a remark of Judge Cooley,1 to the effect that one who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional.

Will any one say, You are over-emphasizing this matter, and making too much turn upon the form of a phrase? No, I think not. I am aware of the danger of doing that. But whatever may be said of particular instances of unguarded or indecisive judicial language, it does not appear to me possible to explain the early, constant, and emphatic statements upon this subject on any slight ground. The form of it is in language too familiar to courts, having too definite a meaning, adopted with too general an agreement, and insisted upon quite too emphatically, to allow us to think it a mere courteous and smoothly transmitted platitude. It has had to maintain itself against denial and dispute. Incidentally, Mr. Justice Gibson disputed it in 1825, while denying the whole power to declare laws unconstitutional.1 If there be any such power, he insisted (page 352), the party's rights would depend, not on the greatness of the supposed discrepancy with the constitution, but on the existence of any discrepancy at all. But the majority of the court reaffirmed their power, and the qualifications of it, with equal emphasis. This rule was also denied in 1817 by Jeremiah Mason, one of the leaders of the New England bar, in his argument of the Dartmouth College case, at its earlier stage, in New Hampshire.2 He said substantially this: "An erroneous opinion still prevails to a considerable extent, that the courts . . . ought to act . . . with more than ordinary deliberation, . . . that they ought not to declare Acts of the legislature unconstitutional unless they come to their conclusion with absolute certainty, . . . and where the reasons are so manifest that none can doubt." He conceded that the courts should treat the legislature "with great decorum, . . . but . . . the final decision, as in other cases, must be according to the unbiassed dictate of the understanding." Legislative Acts, he said, require for their passage at least a majority of the legislature, and the reasons against the validity of the Act cannot ordinarily be so plain as to leave no manner of doubt. The rule, then, really requires the court to surrender its jurisdiction. "Experience shows that legislatures are in the constant habit of exerting their power to its utmost extent." If the courts retire, whenever a plausible ground of doubt can be suggested, the legislature will absorb all power. Such was his argument. But notwithstanding this, the Supreme Court of New Hampshire declared that they could not act without "a clear and strong conviction," and on error, in 1819, Marshall, in his celebrated opinion at Washington, declared, for the court, "that in no doubtful case would it pronounce a legislative Act to be contrary to the Constitution."

Again, when the great Charles River Bridge Case3 was before the Massachusetts courts, in 1829, Daniel Webster, arguing, together

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2 7 Pick. 344.


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2 7 Pick. 344.
with Lemuel Shaw, for the plaintiff, denied the existence or propriety of this rule. All such cases, he said (p. 442,) involve some doubt; it is not to be supposed that the legislature will pass an Act palpably unconstitutional. The correct ground is that the court will interfere when a case appearing to be doubtful is made out to be clear. Besides, he added, "members of the legislature sometimes vote for a law, of the constitutionality of which they doubt, on the consideration that the question may be determined by the judges." This Act passed in the House of Representatives by a majority of five or six.

"We could show, if it were proper, that more than six members voted for it because the unconstitutionality of it was doubtful; leaving it to this court to determine the question. If the legislature is to pass a law because its unconstitutionality is doubtful, and the judge is to hold it valid because its unconstitutionality is doubtful, in what a predicament is the citizen Judicial and privilege of an American judge to decide on constitutional questions. ... Judicial tribunals are the only ones suitable for the investigation of difficult questions of private right."

But the court did not yield to this ingenious attempt to turn them into a board for answering legislative conundrums. Instead of deviating from the line of their duty for the purpose of correcting errors of the legislature, they held that body to its own duty and its own responsibility. "Such a declaration," said Mr. Justice Wilde in giving his opinion, "should never be made but when the case is clear and manifest to all intelligent minds. We must assume that the legislature have done their duty, and we must respect their constitutional rights and powers." Five years later, Lemuel Shaw, who was Webster's associate counsel in the case last mentioned, being now Chief Justice of Massachusetts, in a case where Jeremiah Mason was one of the counsel, repeated with much emphasis "what has been so often suggested by courts of justice, that ... courts will ... never declare a statute void unless the nullity and invalidity are placed beyond reasonable doubt."

A rule thus powerfully attacked and thus explicitly maintained, must be treated as having been deliberately meant, both as regards its substance and its form. As to the form of it, it is the more calculated to strike the attention because it marks a familiar and important discrimination, of daily application in our courts, in situ-

ations where the rights, the actions, and the authority of different departments, different officials, and different individuals have to be harmonized. It is a distinction and a test, it may be added, that come into more and more prominence as our jurisprudence grows more intricate and refined. In one application of it, as we all know, it is constantly resorted to in the criminal law in questions of self-defence, and in the civil law of tort in questions of negligence,—in answering the question what might an individual who has a right and perhaps a duty of acting under given circumstances, reasonably have supposed at that time to be true? It is the discrimination laid down for settling that difficult question of a soldier's responsibility to the ordinary law of the land when he has acted under the orders of his military superior. "He may," says Dicey, in his "Law of the Constitution," "as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it. ... Probably," he goes on, quoting with approval one of the books of Mr. Justice Stephen, "... it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons. ... The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds."2 This is the distinction adverted to by Lord Blackburn in a leading modern case in the law of libel.3 "When the court," he said, "come to decide whether a particular set of words ... are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal ... might not unreasonably hold such words to be libellous." It is the same discrimination upon which the verdicts of juries are revised every day in the courts, as in a famous case where Lord Hare applied it a few years ago, when refusing to set aside a verdict.4 It must appear, he said, "that reasonable men could not fairly find as the jury have done. ... It has been said, indeed, that the difference

2 It was so held in Riggs v. State, 3 Cold. 85 (Tenn., 1860), and United States v. Clark, 31 Fed. Rep. 710 (U. S. Circ. Ct., E. Dist. Michigan, 1887, Brown, J.). I am indebted for these cases to Professor Beale's valuable collection of Cases on Criminal Law (Cambridge, 1893). The same doctrine is laid down by Judge Hare in 2 Hare, Am Const. Law, 920.
4 Belt v. Lawes, Thayer's Cas., IV. 177, n.
It must indeed be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense, and competent knowledge are always to be attributed to that body. The conduct of public affairs must always go forward upon conventions and assumptions of that sort. "It is a postulate," said Mr. Justice Gibson, "in the theory of our government . . . that the people are wise, virtuous, and competent to manage their own affairs." 1 "It would be indecent in the extreme," said Marshall, C. J., 2 "upon a private contract between two individuals to enter into an inquiry respecting the corruption of the sovereign power of a State." And so in a court's revision of legislative acts, as in its revision of a jury's acts, it will always assume a duly instructed body; and the question is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indolent, thoughtless, reckless, incompetent,—but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs,—what such persons may reasonably think or do, what is the permissible view for them. If, for example, what is presented to the court be a question as to the constitutionality of an Act alleged to be ex post facto, there can be no assumption of ignorance, however probable, as to anything involved in a learned or competent discussion of that subject. And so of the provisions about double jeopardy, or giving evidence against one's self, or attainer, or jury trial. The reasonable doubt, then, of which our judges speak is that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question. The rationally permissible opinion of which we have been talking is the opinion reasonably allowable to such a person as this.

1 Chic. &c. Ry. Co. v. Minnesota, 134 U. S. 418. The question was whether a statute providing for a commission to regulate railroad charges, which excluded the parties from access to the courts for an ultimate judicial revision of the action of the commission, was constitutional.


3 There is often a lack of discrimination in judicial utterances on this subject,—as if it were supposed that the legislature had to conform to the judge's opinion of reasonableness in some other sense than that indicated above. The true view is indicated by Judge Cooley in his Principles of Const. Law, ad ad., 57, when he says of a particular question: "Primarily the determination of what is a public purpose belongs to the legislature, and its action is subject to no review or restraint so long as it is not manifestly colorable. All cases of doubt must be solved in favor of the validity of legislative action, for the obvious reason that the question is legislative, and only becomes judicial when there is a plain excess of legislative authority. A court can only arrest the proceedings and declare a levy void when the absence of public interest in the purpose for which

the funds are to be raised is so clear and palpable as to be perceptible to any mind at first blush." And again, on another question, by the Supreme Court of the United States, Waite, C. J., in Terry v. Anderson, 95 U. S. p. 653: "In all such cases the question is one of reasonableness, and we have therefore only to consider whether the time allowed in this Statute [of Limitations] is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed." See Pickering Phipps v. Ry. Co., 66 Law Times Rep. 271 (1892), and a valuable opinion by Ladd, J., in Perry v. Keene, 36 N. H. 514 (1876).

4 Edin v. Raub, 12 S. & R. p. 355

5 Fletcher v. Peck, 6 Cr., p. 131.
The ground on which courts lay down this test of a reasonable doubt for juries in criminal cases, is the great gravity of affecting a man with crime. The reason that they lay it down for themselves in reviewing the civil verdict of a jury is a different one, namely, because they are revising the work of another department charged with a duty of its own,—having themselves no right to undertake that duty, no right at all in the matter except to hold the other department within the limit of a reasonable interpretation and exercise of its powers. The court must not, even negatively, undertake to pass upon the facts in jury cases. The reason that the same rule is laid down in regard to revising legislative acts is neither the one of these nor the other alone, but it is both. The courts are revising the work of a co-ordinate department, and must not, even negatively, undertake to legislate. And again, they must not act unless the case is so very clear, because the consequences of setting aside legislation may be so serious.

If it be said that the case of declaring legislation invalid is different from the others because the ultimate question here is one of the construction of a writing; that this sort of question is always a court's question, and that it cannot well be admitted that there should be two legal constructions of the same instrument; that this sort of question is always a court's question, and that it cannot well be admitted that there should be two legal constructions of the same instrument; that there is a right way and a wrong way of construing it, and only one right way; and that it is ultimately for the court to say what the right way is,—this suggestion appears, at first sight, to have much force. But really it begs the question. Lord Blackburn's opinion in the libel case related to the construction of a writing. The doctrine which we are now considering is this, that in dealing with the legislative action of a co-ordinate department, a court cannot always, and for the purpose of all sorts of questions, say that there is but one right and permissible way of construing the constitution. When a court is interpreting a writing merely to ascertain or apply its true meaning, then, indeed, there is but one meaning allowable; namely, what the court adjudges to be its true meaning. But when the ultimate question is not that, but whether certain acts of another department, officer, or individual are legal or permissible, then this is not true. The class of cases which we have been considering, the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.


It may be suggested that this is not the way in which the judges in fact put the matter; e.g., that Marshall, in McCulloch v. Maryland, seeks to establish the court's own opinion of the constitutionality of the legislation establishing the United States Bank. But in recognizing that this is very often true, we must remember that where the court is sustaining an Act, and finds it to be constitutional in its own opinion, it is fit that this should be said, and that such a declaration is all that the case calls for; it disposes of the matter. But it is not always true; there are many cases where the judges sustain an Act because they are in doubt about it; where they are not giving their own opinion that it is constitutional, but are merely leaving untouched a determination of the legislature; as in the case where a Massachusetts judge concurred in the opinion of his brethren that a legislative Act was "competent for the legislature to pass, and was not unconstitutional," "upon the single ground that the Act is not so clearly unconstitutional, its invalidity so free from reasonable doubt, as to make it the duty of the judicial department, in view of the vast interests involved in the result, to declare it void." The constant declaration of the judges that the question for them is not one of the mere and simple preponderance of reasons for or against, but of what is very plain and clear, clear beyond a reasonable doubt,—this declaration is really a steady announcement that their decisions in support of the constitutionality of legislation do not, of course, import their own opinion of the true construction of the constitution, and that the strict meaning of their words, when they hold an Act constitutional, is merely this,—not unconstitutional beyond a reasonable doubt. It may be added that a sufficient explanation is found here of some of the decisions which have alarmed many people in recent years,—as if the courts were turning out but a broken reed. Many more such opinions are to be expected, for, while legislatures are often faithless to their trust, judges sometimes have to confess the limits of their own power.

It all comes back, I think, to this. The rule under discussion

1 4 Wheat. 316.
2 Per Thomas, J., the Opinion of Justices, 8 Gray, p. 21.
3 "It matters little," says a depressed, but interesting and incisive writer, in commenting, in 1832, upon the Legal Tender decisions of the Supreme Court of the United States, "for the court has fallen, and it is not probable it can ever again act as an effective check upon the popular will, or should it attempt to do so, that it can prevail." The "Consolidation of the Colonies," by Brooks Adams, 55 Atlantic Monthly, 397.
has in it an implied recognition that the judicial duty now in question touches the region of political administration, and is qualified by the necessities and proprieties of administration. If our doctrine of constitutional law—which finds itself, as we have seen, in the shape of a narrowly stated substantive principle, with a rule of administration enlarging the otherwise too restricted substantive rule—admits now of a juster and simpler conception, that is a very familiar situation in the development of law. What really took place in adopting our theory of constitutional law was this: we introduced for the first time into the conduct of government through its great departments a judicial sanction, as among these departments,—not full and complete, but partial. The judges were allowed, indirectly and in a degree, the power to revise the action of other departments and to pronounce it null. In simple truth, while this is a mere judicial function, it involves, owing to the subject-matter with which it deals, taking a part, a secondary part, in the political conduct of government. If that be so, then the judges must apply methods and principles that beset their task. In such a work there can be no permanent or fitting modus vivendi between the different departments unless each is sure of the full co-operation of the others, so long as its own action conforms to any reasonable and fairly permissible view of its constitutional power. The ultimate arbiter of what is rational and permissible is indeed always the courts, so far as litigated cases bring the question before them. This leaves to our courts a great and stately jurisdiction. It will only imperil the whole of it if it is sought to give them more. They must not step into the shoes of the law-maker, or be unmindful of the hint that is found in the sagacious remark of an English bishop nearly two centuries ago, quoted lately from Mr. Justice Holmes:—'

"Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawmaker, to all intents and purposes, and not the person who first wrote or spoke them."'

1 By Professor Gray in 6 Harv. Law Rev. 33 n., where he justly refers to the remark as showing "that gentlemen of the short robe have sometimes grasped fundamental legal principles better than many lawyers."

2 Bishop Hoadly's Sermon preached before the King, March 31, 1717, on "The Nature of the Kingdom or Church of Christ." London: James Knapton, 1717. It should be remarked that Bishop Hoadly is speaking of a situation where the supposed legislator, after once issuing his enactment, never interposes. That is not strictly the case in hand; yet we may recall what Dicey says of amending the constitution of the

V. Finally, let me briefly mention one or two discriminations which are often overlooked, and which are important in order to a clear understanding of the matter. Judges sometimes have occasion to express an opinion upon the constitutionality of a statute, when the rule which we have been considering has no application, or a different application from the common one. There are at least three situations which should be distinguished: (1) where judges pass upon the validity of the acts of a coordinate department; (2) where they act as advisers of the other departments; (3) where as representing a government of paramount authority, they deal with acts of a department which is not coordinate.

(1) The case of a court passing upon the validity of the act of a coordinate department is the normal situation, to which the previous observations mainly apply. I need say no more about that.

(2) As regards the second case, the giving of advisory opinions, this, in reality, is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority. A single exceptional and unsupported opinion upon this subject, in the State of Maine, made at a time of great political excitement, and a doctrine in the State of Colorado, founded upon considerations peculiar to the constitution of that State, do not

United States: "The sovereign of the United States has been raised to serious action but once during the course of ninety years. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who clumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but, for all that, a federal constitution is apt to be unchangeable."


2 Opinion of Justices, 20 Me., p. 353 (1850). Counts, Kent, J., in 18 Me., p. 573 (1850): "It is true, unquestionably, that the opinions given under a requisition like this have no judicial force, and cannot bind or control the action of any officer of any department. They have never been regarded as binding on the body asking for them." And so Tapley, J., ibid., p. 615: "Never regarding the opinions thus formed as conclusive, but open to review upon every proper occasion," and Libby, J., in 22 Me., p. 562-3 (1881): "Inasmuch as any opinion now given can have no effect if the matter should be judicially brought before the court by the proper process, and lest, in declining to answer, I may entail the performance of a constitutional duty, I will very briefly express my opinion upon the question submitted." Walton, J., concurred; the other judges said nothing on this point.

3 In re Senate Bill, 12 Colo. 465,—an opinion which seems to me, in some respects, ill considered.
call for any qualification of the general remark, that such opinions, given by our judges,—like that well-known class of opinions given by the judges in England when advising the House of Lords, which suggested our own practice,—are merely advisory, and in no sense authoritative judgments. Under our constitutions such opinions are not generally given. In the six or seven States where the constitutions provide for them, it is the practice to report these opinions among the regular decisions, much as the responses of the judges in Queen Caroline's Case, and in MacNaghten's Case, in England, are reported, and sometimes cited, as if they held equal rank with true adjudications. As regards such opinions, the scruples, cautions, and warnings of which I have been speaking, and the rule about a reasonable doubt, which we have seen emphasized by the courts as regards judicial decisions upon the constitutionality of laws, have no application. What is asked for is the judge's own opinion.

(3) Under the third head come the questions arising out of the existence of our double system, with two written constitutions, and two governments, one of which, within its sphere, is of higher authority than the other. The relation to the States of the paramount government as a whole, and its duty in all questions involving the powers of the general government to maintain that power as against the States in its fullness, seem to fix also the duty of each of its departments; namely, that of maintaining this paramount authority in its true and just proportions, to be determined by itself. If a State legislature passes a law which is impeached in the due course of litigation before the national courts, as being in conflict with the supreme law of the land, those courts may have to ask themselves a question different from that which would be applicable if the enactments were those of a co-ordinate department. When the question relates to what is admitted not to belong to the national power, then whoever construes a State constitution, whether the State or national judiciary, must allow to that legislature the full range of rational construction. But when the question is whether State action be or be not conformable to the paramount constitution, the supreme law of the land, we have a different matter in hand. Fundamentally, it involves the allotment of power between the two governments,—where the line is to be drawn. True, the judiciary is still debating whether a legislature has transgressed its limit; but the departments are not co-ordinate, and the limit is at a different point. The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in all its departments, to allow to that constitution nothing less than its just and true interpretation; and having fixed this, to guard it against any inroads from without.

I have been speaking of the national judiciary. As to how the State judiciary should treat a question of the conformity of an Act of their own legislature to the paramount constitution, it has been plausibly said that they should be governed by the same rule that the Federal courts would apply. Since an appeal lies to the Federal courts, these two tribunals, it has been said, should proceed on the same rule, as being parts of one system. But under the Judiciary Act an appeal does not lie from every decision; it only lies when the State law is sustained below. It would perhaps be sound on general principles, even if an appeal were allowed in all cases, here also to adhere to the general rule that judges should follow any permissible view which the co-ordinate legislature has adopted. At any rate, under existing legislation it seems proper in the State court to do this, for the practical reason that this is necessary in order to preserve the right of appeal.

The view which has thus been presented seems to me highly important. I am not stating a new doctrine, but attempting to restate more exactly and truly an admitted one. If what I have said be sound, it is greatly to be desired that it should be more emphasized by our courts, in its full significance. It has been often remarked that private rights are more respected by the legislatures of some countries which have no written constitution, than by ours. No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the

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1 Macqueen's Pract. Ho. of Lords, pp. 49, 50.
courts will correct it.\footnote{A singular result of the importance of constitutional interpretation in the American government... is this, that the United States legislature has been very largely occupied in purely legal discussions... Legal issues are apt to dwarf and obscure the more substantially important issue of principle and policy, distracting from these latter the attention of the nation as well as the skill of congressional debaters.—T. B. A. Bryce, Am. Com., 1st ed., 377. On page 378 he cites one of the best-known writers on constitutional law, Judge Hare, as saying that "In the refined and subtle discussion which ensues, right is too often lost sight of, or treated as if it were synonymous with might. It is taken for granted that what the constitution permits it also approves, and that measures which are legal cannot be contrary to morals." See also Ib. 410.} If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs. The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent. This process has already been carried much too far in some of our States. Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest public importance to put the matter in its true light.\footnote{La volonté populaire: tel est, dans les pays libres de l'ancien et du Nouveau Monde, la source et la fin de tout pouvoir. Tant qu'elle est saine, les nations prospèrent malgré les imperfections et les lacunes de leurs institutions; si le bon sens fait défaut, si les passions l'emportent, les constitutions les plus parfaites, les lois les plus sages, sont impuissantes. La maxime d'un ancien: quid legis sine moribus? est, en somme, le dernier mot de la science politique. —Le Système Judiciaire de la Grande Bretagne, by le Comte de Franqueville, l. 25 (Paris: J. Rothschild, 1893).}

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\textbf{THE PATH OF THE LAW.}\footnote{An Address delivered by Mr. Justice Holmes, of the Supreme Judicial Court of Massachusetts, at the dedication of the new hall of the Boston University School of Law, on January 8, 1897. Copyrighted by O. W. Holmes, 1897.}
SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING

From very early days down to the present time the essential nature of trusts and other equitable interests has formed a favorite subject for analysis and discussion. The classical discussions of Bacon and Coke are familiar to all students of equity, and the famous definition of the great chief justice (however inadequate it may really be) is quoted even in the latest textbooks on trusts. That the subject has had a peculiar fascination for modern legal thinkers is abundantly evidenced by the well-known articles of Langdell and Ames, by the oft-repeated observations of Maitland in his Lectures on Equity, by the very divergent treatment of Austin in his Lectures on Jurisprudence, by the still bolder thesis of Salmond in his volume on Jurisprudence, and by the discordant utterances of Mr. Hart and Mr. their extent, and what is the field which they occupy? They must not violate the law. Legal and equitable rights must, therefore, exist side by side, and the latter cannot interfere with, or in any manner affect, the former."

See also (1887) 1 Harv. L. Rev. 55, 60: "Upon the whole, it may be said that equity could not create rights in rem if it would, and that it would not if it could," Compare ibid. 58; and Summary of Eq. Plead. (2nd ed., 1883) secs. 45, 182-184.

4 See Ames, "Purchase for Value Without Notice" (1887), 1 Harv. L. Rev. 1, 9: "The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing. What the act of the trustee really owns is the obligation of the trustee; for an obligation is a true subject matter of property as any physical res. The most striking difference between property in a thing and property in an obligation is in the mode of enjoyment. The owner of a horse or a house is the owner of the horse and the house, and to the owner the horse enjoys the fruits of ownership without the aid of any other person. The only way in which the owner of an obligation can realize his ownership is by compelling its performance by the obligor. Hie ce, in the one case, the owner is said to have a right in re, and in the other, a right in personam. In other respects the common rules of property apply equally to ownership of things and ownership of obligations. For example, what may be called the passive rights of ownership are the same in both cases. The general duty resting on all mankind not to destroy the property of another, is as cogent in favor of an obligee as it is in favor of the owner of a horse. And the violation of that duty is as pore a tort in the one case as in the other."

5 Leitz on Eq. (1509), 17, 18, 112: "The thesis that I have to maintain is this, that equitable estates and interests are not jura in re. For reasons that we shall perceive by and by, they have come to look very like jura in re; but just for this very reason it is the more necessary for us to observe that they are essentially jura in personam, not rights against the world at large, but rights against certain persons."

See also Maitland, Trust and Corporation (1904), reprinted in 3 Collected Papers, 321, 325.

6 (5th ed.) Vol. 1, p. 378: "By the provisions of that part of the English law which is called equity, a contract to sell at once vixis jus in re or ownership in buyer, and the seller has only jus in re aliena. To complete the transaction the legal interest of the seller must be passed to the buyer, in legal form. To this purpose the buyer has only jus in personam: a right to compel the seller to pass his legal interest; but speaking generally, he has dominium or jus in re, and the instrument is a conveyance."

7 (1st ed., 1907) p. 263: "If we have regard to the essence of the matter rather than to the form of it, a trustee is not an owner at all, but
Whitlock in their very recent contributions to our periodical literature.

It is believed that all of the discussions and analyses referred to are inadequate. Perhaps, however, it would have to be admitted that even the great intrinsic interest of the subject itself and the noteworthy divergence of opinion existing among thoughtful lawyers of all times would fail to afford more than a comparatively slight excuse for any further discussion considered as a mere end in itself. But, quite apart from the presumably practical consideration of endeavoring to "think straight" in relation to all legal problems, it is apparent that the true analysis of trusts and other equitable interests is a matter that should appeal to even the most extreme pragmatists of the law. It may well be that one's view as to the correct analysis of such interests would control the decision of a number of specific questions. This is obviously true as regards the solution of many difficult and delicate problems in constitutional law and in the conflict of laws. So, too, in certain questions in the law of perpetuities, the intrinsic nature of equitable interests is of great significance, as attested by the well-known Gamm case and others more or less similar. The same thing is apt to be true of a number of special questions relating to the subject of bona fide purchase for value. So on indefinitely.

But all this may seem like misplaced emphasis; for the suggestions last made are not peculiarly applicable to equitable interests: the same points and the same examples seem valid in relation to all possible kinds of jural interests, legal as well as equitable,—and that too, whether we are concerned with "property," "contracts," "torts," or any other title of the law. Special reference has therefore been made to the subject of trusts and other equitable interests only for the reason that the striking divergence of opinion relating thereto conspicuously exemplifies the need for dealing somewhat more intensively and systematically than is usual with the nature and analysis of all types of jural interests. Indeed, it would be virtually impossible to consider the subject of trusts at all adequately without, at the very threshold of considering and discriminating the various fundamental conceptions that are involved in practically every legal problem. In this connection the suggestion may be ventured that the usual discussions of trusts and other jural interests seem inadequate (and at times misleading) for the very reason that they are not founded on a sufficiently comprehensive and discriminating analysis of jural relations in general. Putting the matter in another way, the tendency—and the fallacy—has been to treat the specific problem as if it were far less complex than it really is; and this commendable effort to treat as simple that which is really complex has, it is believed, furnished a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems. In short, it is submitted that the

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a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person. In legal theory, however, he is not a mere agent, but an owner. He is a person to whom the property of someone else is fictitiously attributed by the law, to the intent that the rights and powers thus vested in a nominal owner shall be used by him on behalf of the real owner.

* See Walter G. Hart (author of "Digest of Law of Trusts"). The Place of Trust in Jurisprudence (1912), 28 Law Quart. Rev., 290, 296. His position is substantially that of Ames and Maitland.

At the end of this article Sir Frederick Pollock, the editor, puts the query: "Why is Trust not entitled to rank as a head sui generis?"

* See A. N. Whitlock. Classification of the Law of Trusts (1913). 1 Calif. Law Rev., 215, 218: "It is submitted," says the writer, "that the cestue has in fact something more than a right in personam, that such a right might be more properly described as a right in personam ad rem, or, possibly, a right in rem per personam."

Surely such nebulous and eumorphous expressions as these could hardly fail to make "confusion worse confounded."

* See Beale, Equitable Interests in Foreign Property, 20 Harv. L. Rev. (1907), 382; and compare the important cases, Fall v. Eastin (1905), 25 Neb., 104; S. C. (1909), 215 U. S., 1, 14-15 (especially concuring opinion of Holmes, J.); Selvage, Batie & Co. v. Walsh (1912), 226 U. S., 112; Bank of Africa Limited v. Cohen (1909), 2 Ch. 129, 143.
right kind of simplicity can result only from more searching and more discriminating analysis.

If, therefore, the title of this article suggests a merely philosophical inquiry as to the nature of law and legal relations—a discussion regarded more or less as an end in itself—the writer may be pardoned for repudiating such a connotation in advance. On the contrary, in response to the invitation of the editor of this journal, the main purpose of the writer is to emphasize certain oft-neglected matters that may aid in the understanding and in the solution of practical, every-day problems of the law. With this in mind, the present article and another soon to follow will discuss, as of chief concern, the basic conceptions of the law—the legal elements that enter into all types of jurial interests. A later article will deal specially with the analysis of certain typical and important interests of a complex character—more particularly trusts and other equitable interests. In passing, it seems necessary to state that both of these articles are intended more for law school students than for any other class of readers. For that reason, it is hoped that the more learned reader may pardon certain parts of the discussion that might otherwise seem unnecessarily elementary and detailed. On the other hand, the limits of space inherent in a periodical article must furnish the excuse for as great a brevity of treatment as is consistent with clearness, and for a comparatively meager discussion—or even a total neglect—of certain matters the intrinsic importance of which might otherwise merit greater attention. In short, the emphasis is to be placed on those points believed to have the greatest practical value.

LEGAL CONCEPTIONS CONTRASTED WITH NON-LEGAL CONCEPTIONS.

At the very outset it seems necessary to emphasize the importance of differentiating purely legal relations from the physical and mental facts that call such relations into being. Obvious as this initial suggestion may seem to be, the arguments that one may hear in court almost any day and likewise a considerable number of judicial opinions afford ample evidence of the invertebrate and unfortunate tendency to confuse and blend the legal and the non-legal quantities in a given problem. There are at least two special reasons for this.

For one thing, the association of ideas involved in the two sets of relations—the physical and the mental on the one hand, and the purely legal on the other—is in the very nature of the case, extremely close. This fact has necessarily had a marked influence upon the general doctrines and the specific rules of early systems of law. Thus, we are told by Pollock and Maitland:

"Ancient German law, like ancient Roman law, sees great difficulties in the way of an assignment of a debt or other benefit of a contract to men do not see how there can be a transfer of a right unless that right is embodied in some corporeal thing. The history of the incorporeal things has shown us this; they are not completely transferred until the transferee has obtained seisin, has turned his beasts onto the pasture, presented a clerk to the church or hanged a thief upon the gallows. A covenant or a warranty of title may be so bound up with land that the assignee of the land will be able to sue the covenantor or warrantor."15

In another connection, the same learned authors observe:

"The realm of mediaeval law is rich with incorporeal things. Any permanent right which is of a transferable nature, at all events if it has what we may call a territorial ambit, is thought of as a thing that is very like a piece of land. Just because it is a thing it is transferable. This is no fiction invented by the speculative jurists. For the popular mind these things are things. The lawyer's business is not to make them things but to point out that they are incorporeal. The layman who wishes to convey the advowson of a church will say that he conveys the church; it is for Eracton to explain to him that what he means to transfer is not that structure of wood and stone which belongs to God and the saints, but a thing incorporeal, as incorporeal as his own soul or the anima mundi."14

A second reason for the tendency to confuse or blend non-legal and legal conceptions consists in the ambiguity and looseness of our legal terminology. The word "property" furnishes a striking example. Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again—with far greater discrimination and accuracy—the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one

14 ibid, 124.
meaning to the other. At times, also, the term is used in such a "blended" sense as to convey no definite meaning whatever.

For the purpose of exemplifying the looser usage just referred to, we may quote from Wilson v. Ward Lumber Co.:

"The term 'property', as commonly used denotes any external object over which the right of property is exercised. In this sense it is a very wide term, and includes every class of acquisitions which a man can own or have an interest in."

Perhaps the ablest statement to exemplify the opposite and more accurate usage is that of Professor Jeremiah Smith (then Mr. Justice Smith) in the leading case of Eaton v. B. C. & M. R. R. Co.:

"In a strict legal sense, land is not 'property', but the subject of property. The term 'property', although in common parlance frequently applied to a tract of land or a chattel, in its legal signification means only the rights of the owner in relation to it. 'It denotes a right over a determinate thing'. 'Property is the right of any person to possess, use, enjoy, and dispose of a thing'. Selden, J., in Wychemer v. People, 13 N. Y., 378, p. 433; 1 Blackstone's com., 138; 2 Austin's Jurisprudence, 3rd ed., 817, 818. * * * The right of indefinite user (or of using indefinitely) is an essential quality of absolute property, without which absolute property can have no existence. * * * This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin on Jurisprudence, 3rd ed., 836; Wells, J., in Walker v. O. C. W. R. R., 103 Mass., 10, p. 14."

Another useful passage is to be found in the opinion of Sherwood, J., in St. Lewis v. Hall:

"Sometimes the term is applied to the thing itself, as a horse, or a tract of land; these things, however, though the subjects of


16 (1893) 116 Mo., 527, 533-534. That the last sentence quoted is not altogether adequate as an analysis of property will appear, it is hoped, from the latter part of the present discussion.

See also, as regards the term, 'property,' the opinion of Doe, C. J., in

Smith v. Fairth (1894). 68 N. H., 123, 144-145. ("By considering the property dissolved into the legal rights of which it consists" etc.)

property, are, when coupled with possession, but the indicia, the visible manifestation of invisible rights, 'the evidence of things not seen."

"Property, then, in a determinate object, is composed of certain constituent elements, to wit: The unrestricted right of use, enjoyment, and disposal, of that object."

In connection with the ambiguities latent in the term "property", it seems well to observe that similar looseness of thought and expression lurks in the supposed (but false) contrast between "corporeal" and "incorporeal" property. The second passage above quoted from Pollock and Maitland exhibits one phase of this matter. For further striking illustration, reference may be made to Blackstone's well-known discussion of corporeal and incorporeal hereditaments. Thus, the great commentator tells us:

"But an hereditament, says Sir Edward Coke, is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatever may be inherited, be it corporeal or incorporeal, real, personal, or mixed."

It is clear that only legal interests as such can be inherited; yet in the foregoing quotation there is inextricable confusion between the physical or "corporeal" objects and the corresponding legal interests, all of which latter must necessarily be "incorporeal," or "invisible," to use the expression of Mr. Justice Sherwood. This ambiguity of thought and language continues throughout Blackstone's discussion; for a little later he says:

"Hereditaments, then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses, such as may be seen and handled by the body; incorporeal are not the objects of sensation, can neither be seen nor handled; are creatures of the mind, and exist only in contemplation."

Still further he says:

"An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal), or concerning, or annexed to, or exercisable within, the same.* * *

"Incorporeal hereditaments are principally of ten sorts: advowsons, tithe, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents."

17 2 Black. Com. (1765), 16-43.
Since all legal interests are "incorporeal"—consisting, as they do, of more or less limited aggregates of abstract legal relations—such a supposed contrast as that sought to be drawn by Blackstone can but serve to mislead the unwary. The legal interest of the fee simple owner of land and the comparatively limited interest of the owner of a "right of way" over such land are alike so far as "incorporeality" is concerned; the true contrast consists, of course, primarily in the fact that the fee simple owner's aggregate of legal relations is far more extensive than the aggregate of the easement owner.

Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional. The term, "transfer," is a good example. If X says that he has transferred his watch to Y, he may conceivably mean, quite literally, that he has physically handed over the watch to Y; or, more likely, that he has "transferred" his legal interest, without any delivery of possession,—the latter, of course, being a relatively figurative use of the term. This point will be reached again, when we come to treat of the "transfer" of legal interests. As another instance of this essentially metaphorical use of a term borrowed from the physical world, the word "power" may be mentioned. In legal discourse, as in daily life, it may frequently be used in the sense of physical or mental capacity to do a thing; but, more usually and aptly, it is used to indicate a "legal power," the connotation of which latter term is fundamentally different. The same observations apply, mutatis mutandis, to the term "liberty."

Passing to the field of contracts, we soon discover a similar inveterate tendency to confuse and blur legal discussions, by failing to discriminate between the mental and physical facts involved in the so-called "agreement" of the parties, and the legal "contractual obligation" to which those facts give rise. Such ambiguity and confusion are peculiarly incident to the use of the term "contract." One moment the word may mean the agreement of the parties; and then, with a rapid and unexpected shift, the writer or speaker may use the term to indicate the contractual obligation created by law as a result of the agreement. Further instances of this sort of ambiguity will be noticed as the discussion proceeds.

OPERATIVE FACTS CONTRASTED WITH EVIDENTIAL FACTS.

For the purpose of subsequent convenient reference, it seems necessary at this point to lay emphasis upon another important distinction inherent in the very nature of things. The facts important in relation to a given jural transaction may be either operative facts or evidential facts. Operative, constitutive, causal, or "dispositive" facts are those which, under the general legal rules that are applicable, suffice to change legal relations, that is, either to create a new relation, or to extinguish an old one, or to perform both of these functions simultaneously. For

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90 Compare Waldo, C. J., in White v. Multnomah Co. (1886), 13 Ore., 317, 323: "A 'right' has been defined by Mr. Justice Holmes to be the legal consequence which attaches to certain facts. (The Common Law, 214). Every fact which forms one of the group of facts of which the right is the legal consequence appertains to the substance of the right."

The present writer's choice of the term "operative" has been suggested by the following passage from Thayer, Prelim. Treat. Evid. (1893), p. 393: "Another discrimination to be observed is that between documents which constitute a contract, fact, or transaction, and those which merely certify and evidence something outside of themselves,—a something valid and operative, independent of the writing."

Compare also Holland, Jurisp. (10th ed., 1906), 151: "A fact giving rise to a right has long been described as a 'title'; but no such well-worn equivalent can be found for a fact through which a right is transferred, or for one by which a right is extinguished. A new nomenclature was accordingly invented by Bentham, which is convenient for scientific use, although it has not found its way into ordinary language. He describes this whole class of facts as 'Dispositive'; distinguishing as 'Investigative' those by means of which a right comes into existence, as 'Distributive' those through which it terminates, and as 'Translative' those through which it passes from one person to another."

The word "ultimate," sometimes used in this connection, does not seem to be so pointed and useful a term as either "operative" or "constitutive."
example, in the creation of a contractual obligation between A and B, the affirmative operative facts are, inter alia, that each of the parties is a human being, that each of them has lived for not less than a certain period of time, (is not "under age"), that A has made an "offer," that B has "accepted" it, etc. It is sometimes necessary to consider, also, what may, from the particular point of view, be regarded as negative operative facts. Thus, e.g., the fact that A did not wilfully misrepresent an important matter to B, and the fact that A had not "revoked" his offer, must really be included as parts of the totality of operative facts in the case already put.

Taking another example,—this time from the general field of torts—if X commits an assault on Y by putting the latter in fear of bodily harm, this particular group of facts: immediately create in Y the privilege of self-defense,—that is, the privilege of using sufficient force to repel X's attack; or, correlatively, the otherwise existing duty of Y to refrain from the application of force to the person of X is, by virtue of the special operative facts, immediately terminated or extinguished.

In passing, it may not be amiss to notice that the term, "facts in issue," is sometimes used in the present connection. If, as is usual, the term means "facts put in issue by the pleadings," the expression is an unfortunate one. The operative facts alleged by the pleadings are more or less general in character; and if the pleadings be sufficient, only such general operative facts are "put in issue." The operative facts of real life are, on the other hand, very specific. That being so, it is clear that the real and specific facts finally relied on are comparatively seldom put in issue by the pleadings. Thus, if, in an action of tort, the declaration of A alleges that he was, through the carelessness, etc., of B, bitten by the latter's dog, the fact alleged is general in character, and it matters not whether it was dog Jim or dog Dick that did the biting. Even assuming, therefore, that the bating was done by Jim, (rather than by Dick), it could not be said that this specific fact was put in issue by the pleadings. Similarly, and more obviously, the pleading in an ordinary action involving so-called negligence, is usually very generic in character,21 so that any one of various possible groups of specific operative facts would suffice, so far as the defendant's obligation ex delicto is concerned. It therefore could not be said that any one of such groups had been put in issue by the pleadings. A common fallacy in this connection is to regard the specific operative facts established in a given case as being but "evidence" of the generic (or "ultimate") operative facts alleged in the pleadings.22

An evidential fact is one which, on being ascertained, affords some logical basis—not conclusive—for inferring some other fact. The latter may be either a constitutive fact or an intermediate evidential fact. Of all the facts to be ascertained by the tribunal, the operative are, of course, of primary importance; the evidential are subsidiary in their functions.23 As a rule there is little danger of confusing evidential facts with operative facts. But there is one type of case that not infrequently gives rise to this sort of error. Suppose that in January last a contractual obligation was created by written agreement passing between A and B. In an action now pending between these parties, the physical instrument is offered for inspection by the tribunal. If one were thoughtless, he would be apt to say that this is a case where part of the operative facts creating the original obligation are directly presented to the senses of the tribunal. Yet a moment's reflection will show that such is not the case. The document, in its

21 Compare, however, Illinois Steel Co. v. Ostrowski (1902), 194 Ill., 376, 384, correctly sustaining a declaration alleging the operative facts specifically instead of generally, as required by the more approved forms of pleading.

22 Both operative and evidential facts must, under the law, be ascertained in some one or more of four possible modes: 1. By judicial admissions (what is not disputed); 2. By judicial notice, or knowledge (what is known or easily knowable); 3. By judicial perception (what is ascertained directly through the senses; cf. "real evidence"); 4. By judicial inference (what is ascertained by reasoning from facts already ascertained by one or more of the four methods here outlined).
then existing shape, had, as regards its operative effect, spent its
force as soon as it was delivered in January last. If, therefore,
the unaltered document is produced for inspection, the facts thus
ascertained must, as regards the alleged contractual agreement, be
purely evidential in character. That is to say, the present existence
of the piece of paper, its specific tenor, etc., may, along with
other evidential facts (relating to absence of change) tend to
prove the various operative facts of last January,—to wit, that
such paper existed at that time; that its tenor was then the same
as it now is; that it was delivered by A to B, and so forth.

It now remains to observe that in many situations a single conven
tient term is employed to designate (generically) certain mis
cellaneous groups of operative facts which, though differing widely as to their individual "ingredients," have, as regards a
given matter, the same net force and effect. When employed
with discrimination, the term "possession" is a word of this char
acter; so also the term "capacity," the term "domicile," etc. But
the general tendency to confuse legal and non-legal quantities is
manifest here as elsewhere; so that only too frequently these
words are used rather nebulously to indicate legal relations as
such.28

FUNDAMENTAL JURAL RELATIONS CONTRASTED
WITH ONE ANOTHER.

One of the greatest hindrances to the clear understanding, the
incisive statement, and the true solution of legal problems fre
quently arises from the express or tacit assumption that all legal
relations may be reduced to "rights" and "duties," and that these
latter categories are therefore adequate for the purpose of anal
yzing even the most complex legal interests, such as trusts,
options, escrows, "future" interests, corporate interests, etc. Even
if the difficulty related merely to inadequacy and ambiguity of

28 As an example of this, compare Lord Westbury, in Bell v. Kennedy
(1868), L. R. 1 H. L. (Sc.), 307: "Domicile, therefore, is an idea of the
law. It is the relation which the law creates between an individual and a
particular locality or country."

Contrast the far more accurate language of Chief Justice Shaw in
Abington v. Bridges (1840), 23 Pick., 170: "The fact of domicile is
even one of the highest importance to a person; it determines his civil
and political rights and privileges, duties and obligations. ** **

29 In this connection, the words of one of the great masters of the
common law are significant. In his notable Preliminary Treatise on
Evidence (1898), p. 190, Professor James Bradley Thayer said:
"As our law develops it becomes more and more important to give
definiteness to its phraseology; discriminations multiply, new situations
and complications of fact arise, and the old outfit of ideas, discriminations,
and phrases has to be carefully revised. Law is not so unlike all other
subjects of human contemplation that clearness of thought will not help
us powerfully in grasping it. If terms in common legal use are used
exactly, it is well to know it; if they are used inaccurately, it is well to know
that, and to remark just how they are used."

Perhaps the most characteristic feature of this author's great con
structive contribution to the law of evidence is his constant insistence on
the need for clarifying our legal terminology and making careful "dis
criminations" between conceptions and terms that are constantly being
reduced as if they were one and the same. See, e.g., ibid., p.: xxvii, 185,
189-190, 278, 306, 351, 355, 390-393. How great the influence of those
discriminations has been is well known to all students of the law of
evidence.

The comparatively recent remarks of Professor John Chipman Gray,
in his Nature and Sources of the Law (1909), Pref., p. viii, are also to the
point:
"The student of Jurisprudence is at times troubled by the thought that
he is dealing not with things, but with words, that he is busy with the
shape and size of counters in a game of logomachy, but when he fully
realizes how these words have been passed and are still being passed as
money, not only by fools and on fools, but by and on some of the acutest
minds, he feels that there is work worthy of being done, if only it can be
done worthily."

No less significant and suggestive is the recent and characteristic utter
ance of one of the greatest jurists of our time, Mr. Justice Holmes. In
Hyde v. United States (1911), 225 U. S., 347, 391, the learned judge very
aptly remarked: "It is one of the misfortunes of the law that ideas become
encycled in phrases and thereafter for a long time cease to provoke further
analysis."

See also, Field, J., in Morgan v. Louisiana (1876), 93 U. S., 217, 223,
and Peckham, J., in Phoenix Ins. Co. v. Tennessee (1895), 161 U. S., 174,
177, 178.
The strictly fundamental legal relations are, after all, *sui generis*; and thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of "opposites" and "correlatives," and then proceeding to exemplify their individual scope and application in concrete cases. An effort will be made to pursue this method:

- Jural
- Jural
- Opposites
- Correlatives

Rights and Duties. As already intimated, the term "rights" tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of usage is occasionally recognized by the authorities. As said by Mr. Justice Strong in *People v. Dikehan*:

> "The word 'right' is defined by lexicographers to denote, among other things, property, interest, power, prerogative, immunity, privilege (Walker's Dict. word 'Right'). In law it is most frequently applied to property in its restricted sense, but it is often used to designate power, prerogative, and privilege."

Recognition of this ambiguity is also found in the language of Mr. Justice Jackson, in *United States v. Patrick*:

> "The words 'right' or 'privilege' have, of course, a variety of meanings, according to the connection or context in which they are used. Their definition, as given by standard lexicographers, include 'that which one has a legal claim to do,' 'legal power,' 'authority,' 'immunity granted by authority,' 'the investiture with special or peculiar rights.'"

And, similarly, in the language of Mr. Justice Sneed, in *Lonas v. State*:

> "The state, then, is forbidden from making and enforcing any law which shall abridge the *privileges and immunities* of citizens of the United States. It is said that the words *rights*, *privileges* and *immunities* are abusively used, as if they were synonymous.

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26 (1852) 7 How. Pr., 124, 130.

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The word *rights* is generic, common, embracing whatever may be lawfully claimed.  

It is interesting to observe, also, that a tendency toward discrimination may be found in a number of important constitutional and statutory provisions. Just how accurate the distinctions in the mind of the draftsman may have been it is, of course, impossible to say.  

Recognizing, as we must, the very broad and indiscriminate use of the term, "right," what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning. That clue lies in the correlative "duty," for it is certain that even those who use the word and the conception "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative. As said in *Lake Shore & M. S. R. Co. v. Kurtz*:

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See also, for similar judicial observations, *Atchison & Neb. N. Co. v. Bally* (1872), 6 Neb., 37, 40. ("The term right in civil society is defined as that which a man is entitled to have, or to receive from others within the limits prescribed by law."); *San Francisco v. S. S. Water Co.* ( ), 48 Cal., 331 ("We are to ascertain the rights, privileges, powers, duties and obligations of the Spring Valley Water Co., by reference to the general law.").

Compare also Gilbert, Evid. (4th ed., 1777), 126: "The men of one county, city, hundred, town, corporation, or parish are evidence in relation to the rights privileges, immunities and affairs of such town, city, etc."  

29 See *Rutros v. Cordowners' Co.* (1859), 6 C. B. N. S., 388, 609 (construing the Thames Conservancy Act, 1857, 20 and 21 Vict. c. cxlvii.); 179: "None of the powers by this act conferred *** shall extend to, take away, alter or abridge any right, claim, privilege, franchise, exemption, or immunity to which any owners *** of any lands *** are now by law entitled."); *Fesler v. Mitchell* (1872), L. R. 7 Q. B., 690, 695 ("The other question remains to be disposed of, as to whether the case comes within the proviso of s. 50 of 21 and 22 Vict. c. 98, that 'no market shall be established in pursuance of this section so as to interfere with any rights, powers, or privileges enjoyed within the district by any person without his consent.'"); Cal. Civ. Code, sec. 648: "Building and loan associations may be formed under this title with or without guarantee or other capital stock, with all the rights, powers, and privileges, and subject to all the restrictions and liabilities set forth in this title."); Tenn. Const. of 1834, Art. 9, sec. 7: "The legislature shall have no power to pass any law granting to any individual or individuals, rights, privileges and immunities or exemptions, other than ***").

30 (1894) 10 Ind. App., 60; 37 N. E., 303, 304.
A duty or a legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated.²²

In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove the best. The latter has the advantage of being a monosyllable. In this connection, the language of Lord Watson in Studd v. Cook²² is instructive:

"Any words which in a settlement of moveables would be recognized by the law of Scotland as sufficient to create a right or claim in favor of an executor * * * must receive effect if used with reference to lands in Scotland."

Privileges and "No-Rights." As indicated in the above scheme of jural relations, a privilege is the opposite of a duty, and the correlative of a "no-right." In the example last put, unless X has a right or claim that Y, the other man, should stay off the land, he himself has the privilege of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off. As indicated by this case, some caution is necessary at this point, for, always, when it is said that a given privilege is the mere negation of a duty, what is meant, of course, is a duty having a content or tenor precisely opposite to that of the privilege in question. Thus, if, for some special reason, X has contracted with Y to go on the former's own land, it is obvious that X has, as regards Y, both the privilege of entering and the duty of entering. The privilege is perfectly consistent with this sort of duty.—²²

²² See also Howley Park Golf, etc., Co. v. L. & N. W. Ry. (1913), A. C. 11, 25, 27 (per Viscount Haldane, L. C.): There is an obligation (of lateral support) on the neighbor, and in that sense there is a correlative right on the part of the owner of the first piece of land;" per Lord Shaw: "There is a reciprocal right to lateral support for their respective lands and a reciprocal obligation upon the part of each owner. * * * No diminution of the right on the one hand or of the obligation on the other can be effected except as the result of a plain contract. * * *"

Compare, to similar effect, Galbraith, etc., Ry. Co. v. Harrison (1901), 76 S. W., 452, 453 (Tex. Civ. App.).

²² (1883) 8 App. Cas., at p. 597.

for the latter is of the same content or tenor as the privilege;—but it still holds good that, as regards Y, X's privilege of entering is the precise negation of a duty to stay off. Similarly, if A has not contracted with B to perform certain work for the latter, A's privilege of not doing so is the very negation of a duty of doing so. Here again the duty contrasted is of a content or tenor exactly opposite to that of the privilege.

Passing now to the question of "correlatives," it will be remembered, of course, that a duty is the invariable correlative of that legal relation which is most properly called a right or claim. That being so, if further evidence be needed as to the fundamental and important difference between a right (or claim) and a privilege, surely it is found in the fact that the correlative of the latter relation is a "no-right," there being no single term available to express the latter conception. Thus, the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter.

In view of the considerations thus far emphasized, the importance of keeping the conception of a right (or claim) and the conception of a privilege quite distinct from each other seems evident; and more than that, it is equally clear that there should be a separate term to represent the latter relation. No doubt, as already indicated, it is very common to use the term "right" indiscriminately, even when the relation designated is really that of privilege;²² and only too often this identity of terms has involved for the particular speaker or writer a confusion or blurring of ideas. Good instances of this may be found even in unexpected places. Thus Professor Holland, in his work on Jurisprudence, referring to a different and well known sort of ambiguity inherent in the Latin "ius," the German "Recht," the Italian "Diritto," and the French "Droit,"—terms used to express "not only a right," but also "Law" in the abstract,—very aptly observes:

"If the expression of widely different ideas by one and the same term resulted only in the necessity for * * * clumsy para-

²² For merely a few out of numberless judicial instances of this loose usage, see Pearce v. Scotch (1882), L. R. 9 Q. B., 162, 167; Quinn v. Leathem (1901), A. C. 495 (passim); Allen v. Flood (1898), A. C. 1 (passim); Leddu v. Nat. Carbonic Acid Gas Co. (1910), 220 U. S., 61, 75; Smith v. Cornell Univ. (1894), 45 N. Y. Supp., 640, 643; Foran v. Kern Valley Bk. (1910), 107 Pac., 568. See also post, n. 38.
phrases, or obviously inaccurate paraphrases, no great harm would be done: but unfortunately the identity of terms seems irresistibly to suggest an identity between the ideas expressed by them."

Curiously enough, however, in the very chapter where this appears,—the chapter on "Rights,"—the notions of right, privilege and power seem to be blended, and that, too, although the learned author states that "the correlative of * * * legal right is legal duty," and that "these pairs of terms express * * * in each case the same state of facts viewed from opposite sides." While the whole chapter must be read in order to appreciate the seriousness of this lack of discrimination a single passage must suffice by way of example:

"If * * * the power of the State will protect him in so carrying out his wishes, and will compel such acts or forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a 'legal right' so to carry out his wishes."-

The first part of this passage suggests privileges, the middle part rights (or claims), and the last part privileges.

Similar difficulties seem to exist in Professor Gray's able and entertaining work on The Nature and Sources of Law. In his chapter on "Legal Rights and Duties" the distinguished author takes the position that a right always has a duty as its correlative,57 and he seems to define the former relation substantially according to the more limited meaning of "claim." Legal privileges, powers, and immunities are prima facie ignored, and the impression conveyed that all legal relations can be comprehended under the conceptions, "right" and "duty." But, with the greatest hesitation and deference, the suggestion may be ventured that a number of his examples seem to show the inadequacy of such mode of treatment. Thus, e.g., he says:

"The eating of shrimp salad is an interest of mine, and, if I can pay for it, the law will protect that interest, and it is therefore a right of mine to eat shrimp salad which I have paid for, although I know that shrimp salad always gives me the colic."58

This passage seems to suggest primarily two classes of relations: first, the party's respective privileges, as against A. B. C. and D and others in relation to eating the salad, or, correlative, the respective "no-rights" of A. B. C. D and others that the party should not eat the salad; second, the party's respective rights (or claims) as against A. B. C. D and others that they should not interfere with the physical act of eating the salad, or, correlative, the respective duties of A, B, C and D others that they should not interfere.

These two groups of relations seem perfectly distinct; and the privileges could, in a given case exist even though the rights mentioned did not. A. B. C. and D, being the owners of the salad, might say to X: "Eat the salad, if you can; you have our license to do so, but we don't agree not to interfere with you." In such a case the privileges exist, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast to the dish that X couldn't eat the contents, no right of X would have been violated.59

Perhaps the essential character and importance of the distinction can be shown by a slight variation of the facts. Suppose that X, being already the legal owner of the salad, contracts with Y that he (X) will never eat this particular food. With A, B, C, D and others in relation to eating the salad, or, correlative, the respective "no-rights" of A. B. C. D and others that the party should not eat the salad; second, the party's respective rights (or claims) as against A. B. C. D and others that they should not interfere with the physical act of eating the salad, or, correlative, the respective duties of A, B, C and D others that they should not interfere.

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C, D and others no such contract has been made. One of the 
relations now existing between X and Y is, as a consequence, 
fundamentally different from the relation between X and A. As 
regards Y, X has no privilege of eating the salad; but as regards 
either A or any of the others, X has such a privilege. It is to 
be observed incidentally that X's right that Y should not eat the 
food persists even though X's own privilege of doing so has been 
extinguished.40

On grounds already emphasized, it would seem that the line of 
reasoning pursued by Lord Lindley in the great case of Quinn v. Leatham41 is deserving of comment:

"The plaintiff had the ordinary rights of the British subject. He was at liberty to earn his living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved the liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him."

A "liberty" considered as a legal relation (or "right" in the 
loose and generic sense of that term) must mean, if it have any 
definite content at all, precisely the same thing as privilege,42 and 
certainly that is the fair connotation of the term as used the first 
three times in the passage quoted. It is equally clear, as already 
indicated, that such a privilege or liberty to deal with others at 
will might very conceivably exist without any peculiar con- 
comitant rights against "third parties" as regards certain kinds of 
interference.43 Whether there should be such concomitant rights 
(or claims) is ultimately a question of justice and policy; and it 
should be considered, as such, on its merits. The only correlative 
legally imposed by the privileges or liberties in question are the 
"no-rights" of "third parties." It would therefore be a non

40 It may be noted incidentally that a statute depriving a party of 
privileges as such may raise serious constitutional questions under the 
Fourteenth Amendment. Compare, e.g., Lindsey v. Nat. Carbonic Gas Co. 
41 (1901) A. C., 495, 534.
42 See post, pp. 38-44.
43 Compare Allen v. Flood (1898). A. C., 1.
Thus far it has been assumed that the term "privilege" is the most appropriate and satisfactory to designate the mere negation of duty. Is there good warrant for this?

In Mackeldy's Roman Law* it is said:

"Positive laws either contain general principles embodied in the rules of law * * * or for special reasons they establish something that differs from those general principles. In the first case they contain a common law (jus commune), in the second a special law (jus singulare s. exorbitans). The latter is either favorable or unfavorable * * * according as it enlarges or restricts, in opposition to the common rule, the rights of those for whom it is established. The favorable special law (jus singulare) as also the right created by it * * * in the Roman law is termed benefit of the law (beneficium juris) or privilege (privilegium) * * *.*

First a special law, and then by association of ideas, a special advantage conferred by such a law. With such antecedents, it is not surprising that the English word "privilege" is not infrequently used, even at the present time, in the sense of a special or peculiar legal advantage (whether right, privilege, power or immunity) belonging either to some individual or to some particular class of persons. There are, indeed, a number of judicial opinions under the circumstances stated requiring no cause or excuse. He may act from mere caprice, but his right on his own land is absolute, so long as he does not interfere with the rights of others." Lord Ashbourne, p. 112: "The plaintiff had, in my opinion, a right to pursue their lawful calling. * * * It would be, I think, an unsatisfactory state of the law that allowed the willful invader of such a right without lawful leave or justification to escape from the consequences of his action."; *Quinn v. Lothrop* (1901), A. C. 495, 533; *Lindley v. Natural Carbonic Gas Co.* (1910), 220 U. S., 61, 74; *Robertson v. Rochester Folding Box Co.* (1922), 171 N. Y., 538 (Parker, C. J., p. 544: "The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published."); *Webb, St. L. & P. R. R. Co. v. Stackles* (1883), 105 Ill., 564, 389.

In *Purdy v. State* (1901), 43 Fla., 538, 540, the anomalous expression "right of privilege" is employed.


41 *See also Rector, etc. of Christ Church v. Philadelphia* (1860), 24 How., 300, 301, 302.

42 *See also to an older usage, the term "privilege" was frequently employed to indicate a "franchise." The latter being really a miscellaneous complex of special rights, privileges, powers, or immunities, etc. Thus, in an early book, *Termes de la Ley*, there is the following definition: "'Privi-

recognizing this as one of the meanings of the term in question.** That the word has a wider signification even in ordinary non-technical usage is sufficiently indicated, however, by the fact that the term "special privileges" is so often used to indicate a contrast to ordinary or general privileges. More than this, the dominant specific connotation of the term as used in popular speech seems to be more negation of duty. This is manifest in the terse and oft-repeated expression, "That is your privilege,"--meaning, of course, "You are under no duty to do otherwise."

Such being the case, it is not surprising to find, from a wide survey of judicial precedents, that the dominant technical meaning of the term is, similarly, negation of legal duty. There are two very common examples of this, relating respectively to "privileged communications" in the law of libel and to "privileges against self-crimination" in the law of evidence. As regards the first case, it is elementary that if a certain group of operative facts are present, a privilege exists, which, without such facts, would not be recognized. It is, of course, equally clear that even
though all such facts be present as last supposed, the superadded fact of malice will, in cases of so-called "conditional privilege," extinguish the privilege that otherwise would exist. It must be evident also, that whenever the privilege does exist, it is not special in the sense of arising from a special law, or of being conferred as a special favor on a particular individual. The same privilege would exist, by virtue of general rules, for any person whatever under similar circumstances. So, also, in the law of evidence, the privilege against self-crimination signifies the mere negation of a duty, to testify,—a duty which rests upon a witness in relation to all ordinary matters; and, quite obviously, such privilege arises, if at all, only by virtue of general laws.‡

As already intimated, while both the conception and the term "privilege" find conspicuous exemplification under the law of libel and the law of evidence, they nevertheless have a much wider significance and utility as a matter of judicial usage. To make this clear, a few miscellaneous judicial precedents will now be noticed. In Downman's Case,§ decided in the year 1583, and reported by Coke, the court applied the term to the subject of waste:

"And as the objection which was made, that the said privilege to be without impediment of waste cannot be without deed, etc. To that it was answered and resolved, that if it was admitted that a deed in such case should be requisite, yet without question all the estates limited would be good, although it is admitted, that the clause concerning the said privilege would be void."

In the great case of Allen v. Flood¶ the opinion of Mr. Justice Hawkins furnishes a useful passage for the purpose now in view:

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‡ As regards the general duty to testify, specific performance may usually be had under duress of potential or actual contempt proceedings; and, apart from that, failure to testify might subject the wrongdoer either to a statutory liability for a penalty in favor of the injured party litigant or, in case of actual damage, to a common law action on the case.

§ The subject of witnesses is usually thought of as a branch of the so-called adjective law, as distinguished from the so-called substantive law. But, as the writer has had occasion to emphasize on another occasion (The Relations between Equity and Law, 11 Mich L. Rev., 507, 554, 556, 559), there seems to be no intrinsic or essential difference between those jural relations that relate to the "substantive" law and those that relate to the "adjective" law. This matter will be considered more fully in a later part of the discussion.

¶ (1833) 9 Coke, 1.

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"Every person has a privilege * * * in the interests of public justice to put the criminal law in motion against another whom he bona fide, and upon reasonable and probable cause, believes to have been guilty of a crime. * * * It must not, however, be supposed that hatred and ill-will existing in the mind of a prosecutor must of necessity destroy the privilege, for it is not impossible that such hatred and ill-will may have very natural and pardonable reasons for existing. * * *"

Applying the term in relation to the subject of property, Mr. Justice Foster, of the Supreme Court of Maine, said in the case of Puller v. Luntzen:*

"It is contrary to the policy of the law that there should be any outstanding titles, estates, or powers, by the existence, operation or exercise of which, at a period of time beyond lives in being and twenty-one years and a fraction thereafter, the complete and unfettered enjoyment of an estate, with all the rights, privileges and powers incident to ownership, should be qualified or impeded."

As a final example in the present connection, the language of Baron Alderson in Hilton v. Eckerley may be noticed:

"Prima facie it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying them on according to his discretion and choice."

The closest synonym of legal "privilege" seems to be legal "liberty." This is sufficiently indicated by an unusually discriminating and instructive passage in Mr. Justice Cave's opinion in Allen v. Flood:

"The personal rights with which we are most familiar are:

1. Rights of reputation;
2. Rights of bodily safety and freedom;
3. Rights of property; or, in other words, rights relating to mind, body and estate. *

"In my subsequent remarks the word 'right' will, as far as possible, always be used in the above sense; and it is the more
necessary to insist on this as during the argument at your Lordship's bar it was frequently used in a much wider and more indefinite sense. Thus it was said that a man has a perfect right to fire off a gun, when all that was meant, apparently, was that a man has a freedom or liberty to fire off a gun, so long as he does not violate or infringe any one's rights in doing so, which is a very different thing from a right, the violatior-n or disturbance of which can be remedied or prevented by legal process.\(^6\)

While there are numerous other instances of the apt use of the term "liberty," both in judicial opinions\(^6\) and in conveyancing documents,\(^6\) it is by no means so common or definite a word as "privilege." The former term is far more likely to be used in the sense of physical or personal freedom (i.e., absence of physical restraint), as distinguished from a legal relation; and very frequently there is the connotation of general political liberty, as distinguished from a particular relation between two definite individuals. Besides all this, the term "privilege" has the advantage of giving us, as a variable, the adjective "privileged." Thus, it is frequently convenient to speak of a privileged act, a privileged transaction, a privileged conveyance, etc.

The term "license," sometimes used as if it were synonymous with "privilege," is not strictly appropriate. This is simply another of those innumerable cases in which the mental and physical facts are so frequently confused with the legal relation which

\(^{6}\) For the reference to Mr. Justice Cave's opinion, the present writer is indebted to Salmond's work on Jurisprudence. Citing this case and one other, Starry v. Graham (1899), 1 Q. B. 406. 411, the learned author adopts and uses exclusively the term "liberty" to indicate the opposite of "duty," and apparently overlooks the importance of privilege in the present connection. Curiously enough, moreover, in his separate Treatise on Torts, his discussion of the law of defamation gives no explicit intimation that privilege in relation to that subject represents merely liberty, or "no-duty."

Sir Frederick Pollock, in his volume on Jurisprudence (2nd ed., 1904), 62, seems in effect to deny that legal liberty represents any true legal relation as such. Thus, he says, inter alia: "The act may be right in the popular and rudimentary sense of not being forbidden, but freedom has not the character of legal right until we consider the risk of unauthorised interference. It is the duty of all of us not to interfere with others' lawful freedom. This brings the so-called primitive rights into the sphere of legal rule and protection. Sometimes it is thought that lawful power or liberty is different from the right not to be interfered with; but for the reason just given this opinion, though plausible, does not seem correct." Compare also Pollock, Essays in Jurisp. & Ethics (1892), Ch. 1.

It is difficult to see, however, why, as between X and Y, the "privilege + no-right" situation is not just as real a jural relation as the precisely opposite "duty + right" relation between any two parties. Perhaps the habit of recognizing exclusively the latter as a jural relation springs more or less from the traditional tendency to think of the law as consisting of "commands," or imperative rules. This, however, seems fallacious. A rule of law that permits is just as real as a rule of law that forbids; and, similarly, saying that the law permits a given act to X as between himself and Y predicates just as genuine a legal relation as saying that the law forbids a certain act to X as between himself and Y. That this is so seems, in some measure, to be confirmed by the fact that the first sort of act would ordinarily be pronounced "lawful," and the second "unlawful." Compare Thomas v. Sorrel (1675), Vaughan, 331. 351.

\(^{6}\) Compare Dow v. Newborough (1728), Comyns, 242 ("For the use is only a liberty to take the profits, but two cannot severally take the profits of the same land, there cannot be an use upon a use." It should be observed that in this and the next case to be cited, along with the liberty
they create. Accurately used, "license" is a generic term to indicate a group of operative facts required to create a particular privilege,—this being especially evident when the word is used in the common phrase "leave and license." This point is brought out by a passage from Mr. Justice Adams' opinion in Clifford v. O'Neill.63

"A license is merely a permission to do an act which, without such permission, would amount to a trespass * * * nor will the continuous enjoyment of the privilege conferred, for any period of time cause it to ripen into a tangible interest in the land affected."64

Powers and Liabilities. As indicated in the preliminary scheme of jural relations, a legal power (as distinguished, of course, from a mental or physical power) is the opposite of legal disability, and the correlative of legal liability. But what is the intrinsic nature of a legal power as such? Is it possible to analyze the conception represented by this constantly employed and very important term of legal discourse? Too close an analysis might seem metaphysical rather than useful; so that what is here presented is intended only as an approximate explanation sufficient for all practical purposes.

A change in a given legal relation may result (1) from some superadded fact or group of facts not under the volitional control of a human being (or human beings); or (2) from some superadded fact or group of facts which are under the volitional control of one or more human beings. As regards the second class of cases, the person (or persons) whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem.

The second class of cases—powers in the technical sense—

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64 See, in accord, the oft-quoted passage from Thomas v. Sorrell (1871), Vaughan, 331, 351 ("A dispensation or license properly passes no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions, which without license, had been unlawful."). Compare also Taylor v. Waters (1817), 7 Taunt., 374, 384 ("Those cases abundantly prove that a license to enjoy a beneficial privilege in land may be granted, and, notwithstanding the statute of frauds, without writing." In this case the license (operative facts) is more or less confused with privileges (the legal relation created): Heap v. Hartley (1889), 42 Ch. D., 461, 470.

must now be further considered. The nearest synonym for any ordinary case seems to be (legal) "ability."—the latter being obviously the opposite of "inability," or "disability." The term "right," so frequently and loosely used in the present connection, is an unfortunate term for the purpose,—a not unusual result being confusion of thought as well as ambiguity of expression.65 The term "capacity" is equally unfortunate; for, as we have already seen, when used with discrimination, this word denotes a particular group of operative facts, and not a legal relation of any kind.

Many examples of legal powers may readily be given. Thus, X, the owner of ordinary personal property "in a tangible object" has the power to extinguish his own legal interest (rights, powers, immunities, etc.) through that totality of operative facts known as abandonment; and—simultaneously and correlative—to create in other persons privileges and powers relating to the abandoned object,—e. g., the power to acquire title to the later by appropriating it.66 Similarly, X has the power to transfer his interest to Y,—that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest.67
also X has the power to create contractual obligations of various kinds. Agency cases are likewise instructive. By the use of some metaphorical expression such as the Latin, *qui facit per olim, facit per se*, the true nature of agency relations is only too frequently obscured. The creation of an agency relation involves, *inter alia*, the grant of legal powers to the so-called agent, and the creation of correlative liabilities in the principal.\(^4\) That is to say, one party P has the power to create agency powers in another party A—for example, the power to convey X's property, the power to impose (so-called) contractual obligations on P, the power to discharge a debt, owing to P, the power to "receive" title to property so that it shall vest in P, and so forth. In passing, it may be well to observe that the term "authority," so frequently used in agency cases, is very ambiguous and slippery in its connotation. Properly employed in the present connection, the word seems to be an abstract or qualitative term corresponding to the concrete "authorization,"—the latter consisting of a particular group of operative facts taking place between the principal and the agent. All too often, however, the term in question is so used as to blend and confuse these operative facts with the

to sell and dispose of such articles as well as to use and enjoy it"); *Low v. Reed Printing Co.* (1894), 41 Neb. 127, 146 (Ryan, C.: "Property, in its broad sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it.").

Since the power of alienation is frequently one of the fundamental elements of a complex legal interest (or property aggregate), it is obvious that a statute extinguishing such power may, in a given case be unconstitutional as depriving the owner of property without due process of law. See the cases just cited.

\(^4\) For a leading case exhibiting the nature of agency powers, especially powers "coupled with an interest," see *Hunt v. Roumanier* (1883), 8 Wheat., 173, 201.

It is interesting to note that in the German Civil Code the provisions relating to agency are expressed in terms of powers,—e.g., sec. 168: "The expiration of the power is determined by the legal relations upon which the giving of the power is founded. The power is also revocable in the event of the continuance of the legal relation, unless something different results from the latter."

Incidentally, it may be noticed also, that as a matter of English usage, the term "power of attorney" has, by association of ideas, come to be used to designate the mere operative instrument creating the powers of an agent.

\(^6\) For examples of the loose and confusing employment of the term "authority" in agency cases—and that too, in problems of the conflict of laws requiring the closest reason,—see *Pope v. Nickerson* (1844), 3 Story, 465, 473, 476, 481, 483; *Lloyd v. Gwibert* (1855), 6 B. B. S., 100, 117; *King v. Serras* (1877), 69 N. Y., 24, 28, 30-32; *Ridson, etc., v. Works v. Furness* (1905), 1 K. B. 304; (1906) 1 K. B. 49.

For a criticism of such cases in relation to the present matter, see the writer's article *The Individual Liability of Stockholders and the Conflict of Laws* (1900), 9 Colum. L. Rev., 492, 512, n. 46, 521, n. 71; 10 Colum. L. Rev., 542-544.

\(^{10}\) The clear understanding and recognition of the agency relation as involving the creation of legal powers may be of crucial importance in many cases,—especially, as already intimated, in regard to problems in the conflict of laws. Besides the cases in the preceding note, two others may be referred to. *Milliken v. Pratt* (1878), 125 Mass., 374, presenting no analysis of the agency problem; and, on the other hand, *Freeman's Appeal* (1897), 68 Conn., 533, involving a careful analysis of the agency relation by Baldwin, J. Led by this analysis to reach a decision essentially opposite to that of the Massachusetts case, the learned judge said, inter alia: "Such was, in effect, the act by which Mrs. Mitchell undertook to do what she had no legal capacity to do, by making her husband her agent to deliver the guaranty to the bank. He had no more power to make it operative by delivery in Chicago to one of his creditors in Illinois, than he would have had to make it operative by delivery here, had it been drawn in favor of one of his creditors in Connecticut. It is not the place of delivering that controls, but the power of delivery."
the vendee's agreement has been fully performed except as to the payment of the last installment and the time for the latter has arrived, what is the interest of such vendee as regards the property? Has he, as so often assumed, merely a contractual right to have title passed to him by consent of the vendor, on final payment being made; or has he, irrespective of the consent of the vendor the power to divest the title of the latter and to acquire a perfect title for himself? Though the language of the cases is not always so clear as it might be, the vendee seems to have precisely that sort of power. Fundamentally considered, the typical escrow transaction in which the performance of conditions is within the volitional control of the grantee, is somewhat similar to the conditional sale of personality; and, when reduced to its lowest terms, the problem seems easily to be solved in terms of legal powers. Once the "escrow" is formed, the grantor still has the legal title; but the grantee has an irrevocable power to divest that title by performance of certain conditions (i.e. the addition of various operative facts), and concomitantly to vest title in himself. While such power is outstanding, the grantor is, of course, subject to a correlative liability to have his title divested. Similarly, in the case of a conveyance of land in fee simple subject to condition subsequent, after the condition has been performed, the original grantor is commonly said to have a "right of entry." If, however, the problem is analyzed, it will be seen that, as of primary importance, the grantor has two legal quantities, (1) the privilege of entering, and (2) the power, by means of such entry, to divest the estate of the grantee. The latter's estate endures, subject to the correlative liability of being divested, until such power is actually exercised.

Passing now to the field of contracts, suppose A mails a letter to B offering to sell the former's land, Whiteacre, to the latter for ten thousand dollars, such letter being duly received. The operative facts thus far mentioned have created a power as regards B and a correlative liability as regards A. B, by dropping a letter of acceptance in the box, has the power to impose potential or inchoate power ex contractu on A and himself; and, assuming that the land is worth fifteen thousand dollars, that particular legal quantity—the "power plus liability" relation between A and B—seems to be worth about five thousand dollars to B. The liability of A will continue for a reasonable time unless, in exercise of his power to do so, A previously extinguishes it by that series of operative facts known as "revocation." These last matters are usually described by saying that A's "offer" will "con-
able work on Contacts," Langdell says:  

"If the offerer stipulates that his offer shall remain open for a specified time, the first question is whether such stipulation constitutes a binding contract. ** When such a stipulation is binding, the further question arises, whether it makes the offer irrevocable. It has been a common opinion that it does, but that is clearly a mistake. ** An offer is merely one of the elements of a contract; and it is indispensable to the making of a contract that the wills of the contracting parties do, in legal contemplation, concur at the moment of making it. An offer, therefore, which the party making it has no power to revoke, is a legal impossibility. Moreover, if the stipulation should make the offer irrevocable, it would be a contract incapable of being broken; which is also a legal impossibility. The only effect, therefore, of such a stipulation is to give the offeree a claim for damages if the stipulation be broken by revoking the offer."**

The foregoing reasoning ignores the fact that an ordinary offer *ipso facto* creates a legal relation—a legal power and a legal liability,—and that it is this relation (rather than the physical and mental facts constituting the offer) that "remains open." If these points be conceded, there seems no difficulty in recognizing an unilateral option agreement supported by consideration or embodied in a sealed instrument as creating in the optionee an irrevocable power to create, at any time within the period specified, a bilateral obligation as between himself and the giver of the option. Correlatively to that power, there would, of course, be a liability against the option-giver which he himself would have no power to extinguish. The courts seem to have no difficulty in reaching precisely this result as a matter of substance; though their explanations are always in terms of "withdrawal of offer," and similar expressions savoring of physical and mental quantities.**

In connection with the powers and liabilities created respectively by an ordinary offer and by an option, it is interesting to consider the liabilities of a person engaged in a "public calling," for, as it seems, such a party's characteristic position is, one might almost say, intermediate between that of an ordinary contractual

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**Langdell's a priori premises and specific conclusions have been adopted by a number of other writers on the subject. See, for example, Ashley, Contr. (1911), 25 et seq. R. L. McWilliams, Enforcement of Option Agreements (1913), 1 Calif. Law Rev. 122.

** For a recent judicial expression on the subject, see W. C. Reese Co. v. House (1912). 162 Cal. 740, 745 per Sloss J.: "Where there is a consideration, the option cannot be withdrawn during the time agreed upon for its duration, while, if there be no consideration the party who has given the option may revoke it at any time before acceptance, even though the time limited has not expired ** such offer, duly accepted, constitutes a contract binding upon both parties and enforceable by either."

See, to the same effect, Limn v. McLean (1885), 60 Ala. 360, 364; O'Brien v. Boland (1896), 166 Mass. 481, 483 (sealed offer).

Most of the cases recognizing the irrevocable power of the optionee have arisen in equitable suits for specific performance; but there seems to be no reason for doubting that the same doctrine should be applied in a common law action for damages. See, in accord, Baker v. Shaw (1912), 68 Wash. 99 103 (dicta in an action for damages).
offerer and that of an option-giver. It has indeed been usual to assert that such a party is (generally speaking) under a present duty to all other parties; but this is believed to be erroneous. Thus, Professor Wyman, in his work on Public Service Companies, says:

"The duty placed upon every one exercising a public calling is primarily a duty to serve every man who is a member of the public. * * * It is somewhat difficult to place this exceptional duty in our legal system. * * * The truth of the matter is that the obligator resting upon one who has undertaken the performance of public duty is sui generis."* *

It is submitted that the learned writer's difficulties arise primarily from a failure to see that the innkeeper, the common carrier and others similarly "holding out" are under present liabilities rather than present duties. Correlatively to those liabilities are the respective powers of the various members of the public. Thus, for example, a travelling member of the public has the legal power, by making proper application and sufficient tender, to impose a duty on the innkeeper to receive him as a guest. For breach of the duty thus created an action would of course lie. It would therefore seem that the innkeeper is, to some extent, like one who had given an option to every travelling member of the public. He differs, as regards net legal effect, only because he can extinguish his present liabilities and the correlative powers of the travelling members of the public by going out of business. Yet, on the other hand, his liabilities are more onerous than that of an ordinary contractual offerer, for he cannot extinguish his liabilities by any simple performance akin to revocation of offer.

As regards all the "legal powers" thus far considered, possibly some caution is necessary. If, for example, we consider the ordinary property owner's power of alienation, it is necessary to distinguish carefully between the legal power, the physical power to do the things necessary for the "exercise" of the legal power, and, finally, the privilege of doing these things—that is, if such privilege does really exist. It may or may not. Thus, if X, a landowner, has contracted with Y that the former will not alienate to Z, the acts of X necessary to exercise the power of alienating to Z are privileged as between X and every party other than Y; but, obviously, as between X and Y, the former has no privilege of doing the necessary acts; or conversely, he is under a duty to Y not to do what is necessary to exercise the power.

In view of what has already been said, very little may suffice concerning a liability as such. The latter, as we have seen, is the correlative of power, and the opposite of immunity (or exemption). While no doubt the term "liability" is often loosely used as a synonym for "duty," or "obligation," it is believed, from an extensive survey of judicial precedents, that the connotation already adopted as most appropriate to the word in question is fully justified. A few cases tending to indicate this will now be noticed. In McNeer v. McNeer, Mr. Justice Magruder balanced the conceptions of power and liability as follows:

"So long as she lived, however, his interest in her land lacked those elements of property, such as power of disposition and liability to sale on execution which had formerly given it the character of a vested estate."

In Booth v. Commonwealth, the court had to construe a Virginia statute providing "that all free white male persons who are twenty-one years of age and not over sixty, shall be liable to serve as jurors, except as hereinafter provided." It is plain that this enactment imposed only a liability and not a duty. It is a liability to have a duty created. The latter would arise only when, in exercise of their powers, the parties litigant and the court officers, had done what was necessary to impose a specific duty to perform the functions of a juror. The language of the court, by Moncure, J., is particularly apposite as indicating that liability is the opposite, or negative, of immunity (or exemption):

"The word both expressed and implied is 'liable,' which has a very different meaning from 'qualified * * *. It's meaning is 'bound' or 'obliged' * * *. A person exempt from serving on juries is not liable to serve, and a person not liable to serve is exempt from serving. The terms seem to be convertible."

A further good example of judicial usage is to be found in Emery v. Clough. Referring to a gift causa mortis and the donee's liability to have his already vested interest divested by the donor's exercise of his power of revocation, Mr. Justice Smith said:

"The title to the gift causa mortis passed by the delivery, defeasible only in the lifetime of the donor, and his death perfects

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*Secs. 330-333.

**Compare, to the same effect, Keener, Quasi-Contr. (1893), p. 18.

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the title in the donee by terminating the donor's right or power of defeasance. The property passes from the donor to the donee directly, and after his death it is liable to be divested only in favor of the donor's creditors. His right and power ceased with his death.

Perhaps the nearest synonym of "liability" is "subjection" or "responsibility." As regards the latter word, a passage from Mr. Justice Day's opinion in McElfresh v. Kirkendall* is interesting:

"The words 'debts' and 'liabilities' are not synonymous, and they are not commonly so understood. As applied to the pecuniary "responsibility." As regards the latter word, a passage from Mr. Justice Day's opinion in McElfresh v. Kirkendall* is interesting:

"The words 'debts' and 'liabilities' are not synonymous, and they are not commonly so understood. As applied to the pecuniary relations of the parties, liability is a term of broader significance than debt. Liability is responsibility."

While the term in question has the broad generic connotation already indicated, no doubt it very frequently indicates that specific form of liability (or complex of liabilities) that is correlative to a power (or complex of powers)* vested in a party litigant and the various court officers. Thus was held to be the meaning of a certain California statute involved in the case of Lattin v. Gillespie.* Said Mr. Justice Harrison:

"The word 'liability' is the condition in which an individual is placed after a breach of his contract, or a violation of any obligation resting upon him. It is defined by Bouvier to be responsibility."*+  

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** (1872) 36 Ill., 224, 226.

* Compare Attorney General v. Suderly (1896), 1 Q. B., 354, 359 (per Lord Esher: "What is called a 'right of action' is not the power of bringing an action. Anybody can bring an action though he has no right at all"); Kroessin v. Keller (1895), 60 Minn., 372 (per Collins, J.: "The power to bring such actions").

* (1892) 95 Cal., 317, 319.

We are apt to think of liability as exclusively an onerous relation of one party to another. But, in its broad technical significance, this is not necessarily so. Thus X, the owner of a watch, has the power to abandon his property—that is, to extinguish his existing rights, powers, and immunities relating thereto (not, however, his privileges, for until someone else has acquired the title to the abandoned watch, X would have the same privileges as before); and correlative to X's power of abandonment there is a liability in every other person. But such a liability instead of being onerous or unwelcome, is quite the opposite. As regards another person M, for example, it is a liability to have created in his favor (though against his will) a privilege and a power relating to the watch—that is, the privilege of taking possession and the power by doing so, to vest a title in himself. See Dougherty v. Creery (1866), 30 Cal., 290, 298. Contrast with this agreeable form of liability the liability to have a duty created—for example the liability of one who has made or given an option in a case where the value of the property has greatly risen.

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* Immunities and Disabilities. As already brought out, immunity is the correlative of disability ("no-power"), and the opposite, or negation, of liability. Perhaps it will also be plain, from the preliminary outline and from the discussion down to this point, that a power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation.

A few examples may serve to make this clear. X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party. On the other hand, X has also various immunities as against Y, and all other ordinary parties. For Y is under a disability (i.e., has no power) so far as shifting the legal interest either to himself or to a third party is concerned; and what is true of Y applies similarly to every one else who has not by virtue of special operative facts acquired a power to alienate X's property. If, indeed, a sheriff has been duly empowered by a writ of execution to sell X's interest that is a very different matter: correlative to such sheriff's power would be the liability of X,—the very opposite of immunity (or exemption). It is elementary, too, that as against the sheriff, X might be immune or exempt in relation to certain parcels of property, and be liable as to others. Similarly, if an agent has been duly appointed by X to sell a given piece of property, then, as to the latter, X has, in relation to such agent, a liability rather than an immunity.

For over a century there has been, in this country, a great deal of important litigation involving immunities from powers of taxation. If there be any lingering misgivings as to the "practical" importance of accuracy and discrimination in legal conceptions and legal terms, perhaps some of such doubts would be dispelled by considering the numerous cases on valuable taxation exemptions coming before the United States Supreme Court. Thus, in Phoenix Ins. Co. v. Tennessee, Mr. Justice Peckham expressed the views of the court as follows:

In granting to the De Sota Company 'all the rights, privileges, and immunities' of the Bluff City Company, all words are used which could be regarded as necessary to carry the exemption from  

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* (1895) 161 U. S., 174, 177.
taxation possessed by the Bluff City Company; while in the next following grant, that of the charter of the plaintiff in error, the word 'immunity' is omitted. Is there any meaning to be attached to that omission, and if so, what? We think some meaning is to be attached to it. The word 'immunity' expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words. Exemption from taxation is more accurately described as an 'immunity' than as a privilege, although it is not to be denied that the latter word may sometimes and under some circumstances include such exemptions."

In *Morgan v. Louisiana*, there is an instructive discussion from the pen of Mr. Justice Field. In holdmg that on a foreclosure sale of the franchise and property of a railroad corporation an immunity from taxation did not pass to the purchaser, the learned Judge said:

"As has been often said by this court, the whole community is interested in retaining the power of taxation undiminished **. The exemption of the property of the company from taxation, and the exemption of its officers and servants from jury and military duty, were both intended for the benefit of the company, and its benefit alone. In their personal character they are analogous to exemptions from execution of certain property of debtors, made by laws of several of the states."

So far as immunities are concerned, the two judicial discussions last quoted concern respectively problems of interpretation and problems of alienability. In many other cases difficult constitutional questions have arisen as the result of statutes impairing or extending various kinds of immunities. Litigants have, from time to time, had occasion to appeal both to the clause against impairment of the obligation of contracts and to the provision against depriving a person of property without due process of law. This has been especially true as regards exemptions from taxation** and exemptions from execution.**

If a word may now be permitted with respect to mere terms as such, the first thing to note is that the word "right" is overworked in the field of immunities as elsewhere.** As indicated, however, by the judicial expressions already quoted, the best synonym is, of course, the term "exemption."** It is instructive legislature not to grant the benefit claimed by the bill.

the act of incorporation; but if it holds rights, privileges, and franchises in the nature of property, secured by contract based on valuable consideration, these will survive the dissolution of the corporation, for the benefit of those who may have a right to or just claim upon its assets."

Compare, as regard homestead exemptions, *Sloss, J., in Smith v. Bougham* (1909), 156 Cal., 359, 365: "A declaration of homestead ** attaches certain privileges and immunities to such title as may at the time be held."

** See *Choate v. Trapp* (1912), 224 U. S., 665.

** See *Borelly School, Limited v. Ward* (1911), 201 N. Y., 358; 94 N. E., 1001 (an interesting decision, with three judges dissenting). The other cases on the subject are collected in Ann. Cas., 1912 B, 259.


** Compare also *Wilson v. Gaines* (1877), 9 Baxt. (Tenn.), 546, 550-551, Turner, J.: "The use in the statutes of two only of the words of the constitution, i.e., 'rights' and 'privileges,' and the omission to employ either of the other two following in immediate succession, viz., 'immunities' and 'exemptions,' either of which would have made clear the construction claimed by complainant, evidence a purposend intention on the part of the court that the words 'immunity' and 'exemption' be used.

*Only very rarely is a court found seeking to draw a subtle distinction between an immunity and an exemption. Thus, in a recent case, *Strahan v. Wayne Co.* (June, 1913), 142 N. W., 678, 680 (Neb.), Mr. Justice Barnes said: "It has been held by the great weight of authority that dower is not immune (from the inheritance tax) because it is dower, but because it ** belonged to her unchastely during (the husband's) life. ** Strictly speaking, the widow's share should be considered as immune, rather than exempt, from an inheritance tax. It is free, rather than freed, from such tax."
to note, also, that the word "impunity" has a very similar connotation. This is made evident by the interesting discriminations of Lord Chancellor Finch in *Skelton v. Skelton*, a case decided in 1677:

"But this I would by no means allow, that equity should enlarge the restraints of the disabilities introduced by act of parliament; and as to the granting of injunctions to stay waste, I took a distinction where the tenant hath only *impunitatem*, and where he hath *jus in arboribus*. If the tenant have only a bare indemnity or *exemption* from an action (at law), if he committed waste, there it is fit he should be restrained by injunction from committing it."**

In the latter part of the preceding discussion, eight conceptions of the law have been analyzed and compared in some detail, the purpose having been to exhibit not only their intrinsic meaning and scope, but also their relations to one another and the methods by which they are applied, in judicial reasoning, to the solution of concrete problems of litigation. Before concluding this branch of the discussion a general suggestion may be ventured as to the great practical importance of a clear appreciation of the distinctions and discriminations set forth. If a homely metaphor be permitted, these eight conceptions,—rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities,—seem to be what may be called "the lowest common denominators of the law." Ten fractions (1-3, 2-5, etc.) may, superficially, seem so different from one another as to defy comparison. If, however, they are expressed in terms of their lowest common denominators (5-15, 6-15, etc.), comparison becomes easy, and fundamental similarity may be discovered. The same thing is

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**88 (1677) 2 Swanst., 170.
**89 In *Skelton v. Skelton*, it will be observed, the word "impunity" and the word "exemption" are used as the opposite of liability to the powers of a plaintiff in an action at law.

For similar recent instances, see *Vacher & Sons, Limited v. London Society of Composers* (1913), A. C. 107, 118, 125 (per Lord Macnaghten: "Now there is nothing absurd in the notion of an association or body enjoying immunity from actions at law," per Lord Atkin: "Conferring on the Association immunity as absolute," etc.).

Compare also *Bolles v. Bishop of London* (1913), 1 Ch., 127, 139, 140, per Hamilton, L. J.

For instances of the apt use of the term "disability" as equivalent to the negation of legal power, see *Poupy v. Horden* (1900), 1 Ch., 492, 493; *Sheridan v. Eilen* (1802), 24 N. Y., 281, 384.

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FUNDAMENTAL LEGAL CONCEPTIONS

of course true as regards the lowest generic conceptions to which any and all "legal quantities" may be reduced.

Reverting, for example, to the subject powers, it might be difficult at first glance to discover any essential and fundamental similarity between conditional sales of personality, escrow transactions, option agreements, agency relations, powers of appointment, etc. But if all these relations are reduced to their lowest generic terms, the conceptions of legal power and legal liability are seen to be dominantly, though not exclusively, applicable throughout the series. By such a process it becomes possible not only to discover essential similarities and illuminating analogies in the midst of what appears superficially to be infinite and hopeless variety, but also to discern common principles of justice and policy underlying the various jural problems involved. An indirect, yet very practical, consequence is that it frequently becomes feasible, by virtue of such analysis, to use as persuasive authorities judicial precedents that might otherwise seem altogether irrelevant. If this point be valid with respect to powers, it would seem to be equally so as regards all of the other basic conceptions of the law. In short, the deeper the analysis, the great become one's perception of fundamental unity and harmony in the law.**

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Wesley Newcomb Hohfeld.
A REALISTIC JURISPRUDENCE—THE NEXT STEP*

The problem of defining law; focus versus confines

The difficulty in framing any concept of "law" is that there are so many things to be included, and the things to be included are so unbelievably different from each other. Perhaps it is possible to get them all under one verbal roof. But I do not see what you have accomplished if you do. For a concept, as I understand it, is built for a purpose. It is a thinking tool. It is to make your data more manageable in doing something, in getting somewhere with them. And I have not yet met the job, or heard of it, to which all the data that associate themselves with this loosest of suggestive symbols, "law," are relevant at once. We do and have too many disparate things and workings to which we like to attach that name. For instance, legislators pass "a law," by which we mean that they officially put a new form of words on the statute books. That calls up associations with regard to attorneys and judges, and to suits being brought "under the statute." But it also calls up associations with regard to those sets of practices and expectations and people which we call political parties and machines and lobbies. The former we should want, in some way, to include under the head "law," I suspect. If we did not, we ought to stop defining and think a little further. The latter—the parties and lobbies—we might have more doubt about, even if we did stop and think. Again, it seems fairly clear that there has been something we could not well dissociate from our symbol "law" in places and times when there was no legislature and even no state—indeed when there was no organization we can call "political" that was distinct from any other organization. You cannot study the simpler forms of society nor "the law" of such forms without looking into the mechanisms of organized control at such times and places; but today you will be likely to distinguish such types of control as non-legal. Of course, you would not disregard them, if you wanted to

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know anything about "law" that was worth knowing. But you would regard them as background, or foreground, or underground, to your center of interest. They would be something that you would compare and contrast with "law," I suspect, in the present order of society. And yet I also suspect you would have your hands full if you set about to draw the line between "the two." Or again, there are gentlemen who spend a good deal of time discussing "the ends of law," or "what law ought to be." Are they talking about "law"? Certainly their postulates and conclusions, in gross and in detail, have no need to look like anything any judge ever did; and at times some of those gentlemen seem to avail themselves of that freedom; but it would be a case-hardened person who denied that what they are dealing with is closely connected with this same loose suggestive symbol. What interests me about that is when a judge is working in a "well-settled field" he is likely to pay no attention to what such gentlemen say, and to call it irrelevant speculation; whereas when he is working in an "unsettled field" he seems to pay a lot of attention to their ideas, or to ideas of much the same order. This I take to mean that for some purposes they are talking something very close to "law," under any definition; and for other purposes, they are talking something whose connection with "law" as just used is fairly remote. And this problem of the word calling up wide-scattered and disparate references, according to the circumstance, seems to me vital.

So that I am not going to attempt a definition of law. Not anybody's definition; much less my own. A definition both excludes and includes. It marks out a field. It makes some matters fall inside the field; it makes some fall outside. And the exclusion is almost always rather arbitrary. I have no desire to exclude anything from matters legal. In one aspect law is as broad as life, and for some purposes one will have to follow life pretty far to get the bearings of the legal matters one is examining. I say again, therefore, that I shall not attempt a definition. I shall not describe a periphery, a stopping place, a barrier. I shall instead devote my attention to the focus of matters legal. I shall try to discuss a point of reference; a point of reference to which I believe all matters legal can most usefully be referred, if they are to be seen with intelligence and with appreciation of their bearings. A focus, a core, a center—with the bearings and boundaries outward unlimited. Pardon my saying it so often; but I find it very hard to make people understand that I am not talking about putting or pushing anything out of the field or concept of law. People are so much used to definitions—although definitions have not always been of so much use to people. I am, therefore, going to talk about substituting a somewhat unfamiliar, but more exciting and more useful focus, for the focus that most thinking about law in the past has had.

Two references to the course that thought has taken will help to set the perspective: one, to the tenets of the nineteenth century schools of jurisprudence; one, to the development of the concepts of rights and of interests.

For the nineteenth century schools I am content to accept one of Pound's summaries.1 It fits with what reading in the field I have done; it is based upon vastly more reading in the field than I shall ever do. With regard to the analytical jurists, Pound stresses their interest in a body of established precepts whereby a definite legal result is supposed to be fitted to a definite set of facts; he stresses the centering of their definition upon the "aggregate of authoritative legal precepts applied by tribunals as such in a given time and place," and their presupposition of a state to make precepts and tribunals authoritative. The historical jurists, on the other hand, he finds making little distinction between law and other forms of social control; with them customary precepts, irrespective of whether they originate in the organs of politically organized societies, come in for heavy attention; central in their picture of law are the traditional techniques of decision and the traditional or customary notions of correctness. (All this, it may be added, without any too close analysis as to what is meant by "custom"). For the philosophical jurists, finally, Pound finds that "philosophical, political and ethical ideas as to the end of law and as to what legal precepts should be in view thereof" occupy the center of the stage.

I have no wish to put the tenets of these schools to the test, nor to pursue them further. Their value here is limited, but great within its limits: taken together, they hammer home the complexity of law. Each school was reaching for a single definition of all that was significant about law. Each school wound up with a definition which stressed some phases and either overlooked or greatly understressed others. Each had a definition with which, for its purposes, and especially in the hands of its creative thinkers, it made striking headway. But too close attention to any one of the definitions—in its exclusion aspects—for too long, would have meant ultimate barrenness. And I gather that one lesson Pound has drawn from his study of these and other schools has been to insist rather on what goes into the idea of law than on what is to be kept out of it.

1Law and Morals (1924), 25 et seq.
Precepts as the Heart and Core of Most Thinking About Law

Moreover, you will have noted running through his summary of their views the word "precepts." This is traditional. When men talk or think about law, they talk and think about rules. "Precepts" as used by Pound, for instance, I take to be roughly synonymous with rules and principles, the principles being wider in scope and proportionately vaguer in connotation, with a tendency toward idealization of some portion of the status quo at any given time. And I think you will find as you read Pound that the precepts are central to his thinking about law. Along with rules and principles—along with precepts proper, may I say?—he stresses for instance "standards" as a part of the subject matter of law. These standards seem to be those vague but useful pictures with which one approaches a wide and varied field of conduct to measure the rights of a particular situation: a conception of what a reasonable man would do in the circumstances, or of what good faith requires, and similar pictures. They differ from rules, though not from principles, partly in their vagueness; they differ from both in being not propositions in themselves, but normative approaches to working out the application of some one term in a major proposition. The principle, let us say, would read: a man must answer for what good faith requires. But a standard (like a concept; like any class-term, loose or sharp) functions chiefly or exclusively as part of a precept. Consequently, it belongs in much the same world. It, too, centers on precepts. But Pound mentions more as law than precepts and standards. Along with the standards he stresses also ideals as to "the end" of law. These I take to be in substance standards on a peculiarly vague and majestic scale; standards, perhaps, to be applied to rules rather than to individual transactions. Finally, he stresses—and we meet here a very different order of phenomena—"the traditional techniques of developing and applying" precepts. Only a man gifted with insight would have added to the verbal formulae and verbalized (though vague) conceptual pictures thus far catalogued, such an element of practices, of habits and techniques of action, of behavior. But only a man partially caught in the traditional precept-thinking of an age that is passing would have focussed that behavior on, have given it a major reference to, have belittled its importance by dealing with it as a phase of, those merely verbal formulae: precepts. I have no wish to argue the point. It will appeal, or it will not, and argument will be of little service.

*Not only ideals, but standards, not only standards, but concepts, not only concepts, but rules, involve of course generalized mental pictures which play a part in shaping both rules and the actions of courts. But as traditionally dealt with, this ideal element, even where observed, is promptly related in the first instance to rules.

Remedies, Rights and Interests: A Developing Insight

Indeed, those limitations appear throughout the current analysis of law in terms of interests, rights and remedies. The growth of that analysis requires a short digression, but one that I believe worth making. It has to do with the subject matter of the rules and pre-
cepts of which men regarded the legal system as made up. Both with us and in the Roman system that subject matter has in the course of time undergone striking changes.

In the earlier stages the rules were thought of almost exclusively as rules of remedies. Remedies were few and specific. There were a few certain ways to lug a man into court and a few certain things that you or the court could do with him when you got him there. We are concerned here not with why that was (why "can" a court give injunctive relief today?) but only with that it was. The question for the man of that day took this shape: on what facts could one man make use of any specific one of the specific ways of making the court bother another man? And the rules of law were rules about that. They clustered around each remedy. In those terms people thought. They thought about what they could see and do. Their crude minds dealt only with what they could observe. What they observed, they described.

I am presupposing the presence of "rules of law," i.e., at least assuming law as a semi-specialized activity of control distinguished from other mechanisms of control; and also presupposing generalization to have set in. Just how far this first assumption reaches I am sure I do not know; I should like to regard any special assembly held for the purpose of adjusting disputes, by say village elders otherwise without official position or authority (cf. GUTMAN, Das Recht etc., DAS SPRICHWORTEN, as one instance of its practice. The one assumption presupposes that prior decision has begun to be dealt with as precedent; that Themis is not merely an oracle, but marks a norm. But I am insisting that it be a norm of law. Vico grudgingly points out that Maine’s Themis is not a pure creation of the judge maker; before the Themis was a societal life in which norms were both explicit and implicit. I hesitate, however, to call the implicit norms either "rules" or "legal," and see nothing but confusion to be had from so doing. I see only practices, more or less definite, more or less conscious, plus a generalized attitude that whatever is practice is right, and whatever varies widely enough is wrong. Certainly the process of making the implicit norm express calls for difficult creative work (two pieces of gold as the reward, on the shield of Achilles!) though any man can recognize the result once arrived at as right, if it is right (the crowd will award the gold!). Certainly also the "explicit-making" permits a twisting. Finally, once the judgment is made, it is both clearer to see, firmer in outline, more rigid, and perhaps more authoritative than it was before. If authoritative in all because of mere made it, or the circumstances of its making, moreover, it has certainly begun the differentiation out of the general social matrix into the specific character of legality. (Malinowski's analysis of Crime and Custom in Savage Society (1926) is somewhat similar; but it moves in terms of dominant authoritative ness of the norm, not of the functionary. If, when appealed to, a norm will prevail over an inconsistent norm of common practice, he thinks of it as legal. An illuminating discrimination.)

Here and in the following I am talking about the thinking of what my friend T. R. Powell calls the "postmortemizers," those who hash over events that are past, and write books about them, or build taught lairs. Such persons typically show a wider range of thought than the practical man of similar utility, but a greater naiveté. The practical man seems to think in two water-tight compartments: one of his mind grinds out the ideals of the day, as gospel, over pippins and cheese or from the rostrum; that half belongs to the postmortemizers. The other half deals cannily with existing institutions, of whatever holiness, to shape (at times it verges on twisting) them to the needs of the practical man or of his client. This side of the practical man's mind must have been at work in every legal system from the days of the most formal rigidity. (Compare the whole preparation and sequence of the lawsuit in Dassein's Njala-Saga.) And some persons—conscious creators—must have taken thought of the relation of interest and remedy since there has been law. (Compare the protection of the Church in the old English laws.) But the tone and ideas of the postmortemizers have changed from age to age, and while not altering the basic attitudes of the practical man, have changed his words and his stock of ideas, his tools, seemingly with powerful effects on his results.

For present purposes the dubious distinction taken by the German thinkers: "objective Recht," "rather law" than "right," and "subjective Recht" (close to our pre-Hofheidenian "right") can be disregarded. It fits the discussion in that the subjective Recht is viewed first of all as a deduction from the rule of law, and then as an independent something.
the proceeds, and wait two to twenty months, you will probably get a judgment for a sum considerably less than what the performance would have been worth—which, if the other party is solvent and has not secreted his assets, you can in further due course collect with six percent interest for delay. To argue thus would be to confuse the remedy (which you can see) with the substantive right (which you cannot see, but which you know is there—somewhere; people tell you so). The substantive right in this body of thought has a shape and scope independent of the accidents of remedies. And herein lies the scientific advance involved in the concept. You are freed of any necessity of observing what courts do, and of limiting your discussion to that. You get back into the ultimate realities behind their doing. Obviously you can think more clearly among those ultimate realities. They are not so much obscured by inconsistency and divergence of detail. They are not answerable to fact.

Most lay thinking, it may be noted in passing, is on this level today. Typical is the current acceptance of a paper rule or statute as meaning something simply because it has paper authority—indeed, as meaning all it says, or all it is supposed to have been intended to say, simply because it has paper authority.

Far be it from me to dispute that the concepts of substantive rights and of rules of substantive law have had great value. They moved definitely and sharply toward fixing the attention of thinkers on the idea that procedure, remedies, existed not merely because they existed, nor because they had value in themselves, but because they had a purpose. From which follows immediate inquiry into what the purpose is, and criticism, if the means to its accomplishment be poor. They moved, moreover, to some extent, toward sizing up the law by situations, instead of under the categories of historically conditioned, often archaic remedy-law: a new base for a new synthesis; a base for law reform.

The Ambiguities in the Concepts of Rules and Rights

But that should not obscure the price that was paid for the advance. A price first, as already described, of moving discussion away from the checkup of fact. To a legal reformer in his campaigning, in his getting of new views across, this may have value, if the fact in question be existing positive law. He may move more comfortably if he can keep people from observing that his moves mean change. To a scientist, observing, or to a reformer engaged not in selling his reform, one would be understood to deny practical consequences to this mode of thinking, in our case results, in constitutional law, limitation of actions, etc., or to urge that describing the remedy describes the whole situation, today. It does describe the most important, and a much neglected aspect of the situation.

in propagating, in putting ideas over, but in inquiring what is before him, where he wants to get, and how to get there, this obfuscation of the facts is another matter.

Secondly, a price was paid, of ambiguity—indeed of multiplicity. "Rules" is a term sufficiently ambiguous. A rule may be prescriptive: "this is what ought to be; what the judges ought to do in such cases." Or it may be descriptive: "this is what is; what the judges actually do in such cases." Or it may be both at once: "this is both what they do and what they ought to do." 9

And when theorists discuss, they will move from one of these meanings into another without notice, and with all and any gradations of connotations. In the particular case of rules "of law" a further ambiguity affects the word "rule": whether descriptive or prescriptive, there is little effort to make out whose action and what action is prescribed or described. The statement "this is the rule" typically means: "I find this formula of words in authoritative books." 10 Does this connote: Courts are actually proceeding according to this formula?; or Courts always rehearse this formula in this connection? Does it connote: People are conducting themselves in the light of this formula?; or even: People are conducting themselves as this formula suggests that they ought to. The theorist will rarely trouble to tell you how many (if any) of these connotations are implicit in his statement: "this is the rule." But he will reason, on the next page, from some one of such implications. Which means: confusion, profuse and inevitable. The confusion is stirred blacker with the concept "right" poured in. "Right" adds nothing to descriptive power. But it gives a spacious
appearance of substance to prescriptive rules. They seem to be about some thing. So that to clothe one's statement about what rules of law are in terms of rights, is to double the tendency to disregard the limitations actually put on rules or rights by practice and by remedies. At the vital core of thought about law, at the very place where one thought impinges on another, or where one part of law impinges on another, one sees the impingement in terms of idealized somethings which may not, which mostly do not, reflect men's actions. In terms of words, and not in terms of conduct; in terms of what apparently is understandable without checking up in life. So that one makes the assumption—without the urge to inquiry—that one is dealing with reality when he talks of rights, and proceeds to use these unchecked words for further building.

There is another confusion, found in dealing with rules, and strengthened by the associated idea of rights, within the field of doctrine itself. Having come to regard words as sound bases for further thinking, the tendency is well nigh inevitable to simplify the formulations more and more: to rub out of the formulations even the discrepancies in paper doctrine which any growing system of law contains in heaping measure; doubly so because the word "rights" introduces sub rosa at this point the additional notion of "rightness" (in the sense of what ought to be)—before which unwanted discrepancies must fall. I am speaking here of the effects of the idea of rightness on the rejection of some of the existing purely doctrinal materials in favor of other equally doctrinal materials, the ease of conflicts in and within legal doctrine—a matter of vast concern to a lawyer, though perhaps of no great moment to a political scientist.

But the same tendency carries over quite as well into the confusion of legal with non-legal materials, where it concerns political scientist and lawyer in common; and here the idea of "rights" seems to be the heavy tool of confusion, with no help at all from the idea of "rules." "Right" eternally suggests its connotation of inherent "rightness"—social, political, economic, and especially moral. It takes more careful self-analysis than most have been interested in giving to keep the non-legal "right" (which was a reason for claiming or striving toward or awarding a legal right) distinguished from the "legal right" which was conceived, I take it, as something not quite a mere description of an available remedy, but at least an official recognition that some kind of remedy could be had. The threat of ambiguous middle is obvious. The natural rights theorists did little to make it less. 86

86 Wherever the plaintiff has a [legal] right to recover, he can recover at law. This plaintiff has a [social, moral, economic] right to recover. Therefore this plaintiff can recover in this action at law. This may improve the law. It has. It is not, for that, any the better thinking for a scientist to see.

This third confusion (but, be it noted, neither the second nor the first) was cleared up by the controversy that centered about hering. Since that controversy we take some care to limit our term "rights" to legal rights ("substantive," if nothing more be said), and are thereby aided in keeping the legal separate from the social factors at work in a situation. The term interests, on the other hand, comes in to focus attention on the presence of social factors, and to urge that substantive rights themselves, like remedies, exits only for a purpose. Their purpose is now perceived to be the protection of the interests. To be sure, we do not know what interests are. Hence, behind substantive rights (which we need not check against anything courts do) we now have interests (which we need not check against anything at all, and about whose presence, extent, nature and importance, whether the interests be taken absolutely or taken relatively one to another, no two of us seem to be able to agree). The scientific advance should again be obvious. Complete subjectivity has been achieved.

At this stage of the development, then, one arrives at a double chain of purposes. One starts with the interest. That is a social fact or factor of some kind, existing dependent of the law. And it has value independent of the law. Indeed, its protection is the purpose of substantive legal rights, of legal rules, of precepts of substantive law. "Security of transactions" is such an interest. The rules and rights of contract law exist to protect and effectuate it. The rules and rights are not ends, but means. But they are means which in another aspect (like most means) themselves become ends: remedies exist as means to effectuate the substantive rights, to realize the substantive rules. Obviously the means may be inadequate, badly chosen, wasteful, even self-defeating, at either stage. They may be so, cumulatively, at both stages. The rule that consideration is necessary to make an offer irrevocable for three days, even when the offer is fully intended, business like, signed, in writing, and expressed to be irrevocable for three days, may be thought not adapted to further security of transactions. The rule that certain oral and essential terms of an agreement are without force, if the balance of the agreement has been committed to writing, and looks on its face to be complete, raises considerable doubts as to its furtherance of security of transactions—sufficiently so as to have made our rules on the subject rather intricate and uncertain, and our judicial practices at times highly uncertain.
The rules standardizing the remedies in contracts for the sale of goods, limiting the remedy to a suit before a jury, and for damages, and measuring the damages in the great body of cases by arbitrary standards which presuppose a frictionless market, may be thought to give inadequate remedy, even if the basis of supposed substantive rules and rights be thought wholly adequate to its purposes. The means, I say, may be inadequate; but the analysis invites discovery of the inadequacy. Hence, whatever one thinks of the sufficiency in the large of the analysis in the threefold terms of interests, substantive rights and rules, and remedies, one can but pay homage to the sureness with which it forces law on the attention as something man-made, something capable of criticism, of change, of reform—and capable of criticism, change, and reform not only according to standards found inside law itself (inner harmony, logical consistence of rules, parts and tendencies, elegantia juris) but also according to standards vastly more vital found outside law itself, in the society law purports both to govern and to serve.

On the other hand, the set-up in these terms has carried over its full measure of confusion, as I have tried to indicate above. And the confusion thus carried over is not—like the virtues of the analysis—familiar, well understood, and regularly taken account of. Which brings me again to the suggestion made above, that the use of precepts, or rules, or of rights which are logical counterparts of rules—of words, in a word—as the center of reference in thinking about law, is a block to clear thinking about matters legal. I want again to make sure that I am not misunderstood. (1) I am not arguing that "rules of substantive law" are without importance. (2) I am not arguing that it is not humanly possible to use the interests-rights and rules-remedies analysis and still think clearly and usefully about law. (3) Least of all, am I attempting to urge the exclusion of substantive rights and rules from the field of "law." Instead of these things, I am arguing (1) that rules of substantive law are of far less importance than most legal theorizers have assumed in most of their thinking and writing, and that they are not the most useful center of reference for discussion of law; (2) that the presence of the term "rights and rules" in the interest set-up (a) has persistent tendency to misfocus attention on that term; (b) that the avoidance of that tendency is a great gain in clarity; and (c) that to both attempt such avoidance and retain the term is to cumber all discussion with embarrassing and quite unnecessary baggage; (3) that substantive rights and rules should be removed from their present position at the focal point of legal discussion, in favor the area of contact between judicial (or official) behavior and the behavior of laymen; that the substantive rights and rules should be studied not as self-existent, nor as a major point of reference, but themselves with constant reference to that area of behavior-contacts. Let me take up the second and third of these positions together, and turn then to the first.

The Interests-Rights-Remedies Analysis: Words v. Practice

I see no value to be gained from the interests-rights and rules-remedies set up except to bring out, to underscore, that law is not all, nor yet the major part of, society; and to force attention to the relations and interactions of law and the rest of society; and as a matter of method, to provide words which keep legal and non-legal aspects of the situation and the interactions distinct. And it would seem to go without demonstration that the most significant (I do not say the only significant) aspects of the relations of law and society lie in the field of behavior, and that words take on importance either because and insofar as they are behavior, or because and insofar as they demonstrably reflect or influence other behavior. This statement seems not worth making. Its truth is absurdly apparent. For all that, it reverses, it upsets, the whole traditional approach to law. It turns accepted theory on its head. The traditional approach is in terms of words; it centers on words; it has the utmost difficulty in getting beyond words. If nothing be said about behavior, the tacit assumption is that the words do reflect behavior, and if they be the words of rules of law, do influence behavior, even influence behavior effectively and precisely to conform completely to those words. Here lies the key to the middle. The "rules" are laid down; in the type-case they are "ought" rules, prescriptive rules: the writer's prescriptions, the writer's oughts, individually proclaimed oughts—the true rule is that judges should give judgment for the plaintiff on these facts. From this we jump without necessary notice into equivalent oughts except that judges should give judgment for the plaintiff on these facts. Here, again without notice and without inquiry, we assume that practice of the judges conforms to the accepted oughts on the books; that the verbal formulations of oughts describe precisely the is-es of practice; that they do give such judgment on such facts. A toothed bird of a situation, in law or any other walk of life. Where is men's ideology about their doing, about what is good prac-
tice—where is that ideology or has it ever been an adequate description of their working practice?

This is the first tacit imputation of factuality to the rules of ought. A second such imputation follows forthwith—again without explicitness, again without inquiry, again (save in odd instances) without challenge or suggestion or doubt. The paper rule of ought which has now been assumed to describe the judges’ working rule of ought (i.e., to correspond with the judges’ practice of decision) is now further assumed to control the practice of the interested laymen, to govern people’s conduct. Pray for the storm-tossed mariner on a night like this! What hope is there for clarity of reasoning with such a waste of billowing to build on?

Do I suggest that (to cut in at one crucial point) the “accepted rules,” the rules the judges say that they apply, are without influence upon their actual behavior? I do not. I do not even say that, sometimes, these “accepted rules” may not be a very accurate description of the judges’ actual behavior. What I say is that such accuracy of description is rare. The question is how, and how much, and in what direction, do the accepted rule and the practice of decision diverge? More: how, and how much, in each case? You cannot generalize on this, without investigation. Your guesses may be worth something, in the large. They are worth nothing at all, in the particular. The one thing we know now for certain is, that different rules have totally different relations to the behavior of judges, of other officials, and of the particular persons “governed” (optimistic word!) by those different rules. The approach here argued for admits, then, out of hand, some relation between any accepted rule and judicial behavior; and then proceeds to deny that that admission involves anything but a problem for investigation in the case in hand; and to argue that the significance of the particular rule will appear only after the investigation of the vital, focal, phenomenon: the behavior. And if an empirical science of law is to have any realistic basis, any responsibility to the facts, I see no escape from moving to this position. Thus, and only thus, is the real gain sought by the interests—rights and rules—remedies analysis to be made tangible. I do not deny, be it noted, that those who have cast their thinking in that set-up are from time to time aware of the importance of what is here urged. “Law-in-books and law-in-action.” Indeed, whenever challenged on the point, any one of them will proceed to remodel his emphasis ad hoc; he will, for a moment, fix his stress on the remedy, even on the effects of the remedy, as used, in life. But it is an ad hoc remodelling. It is forgotten when the immediate issue is passed. It is no part of the standard equipment of investigation, discussion, synthesis; it is a part only of the equipment of defense. When used apart from combat, as a result of a worker’s own curiosity or of some sudden fact-stimulus from outside, it flares like a shooting star, and disappears. Always the night of words will close again in beauty over the wild, streaked disturbance.

**Interests: What Are They?**

This emphasis on behavior, on the observable, on attempts at objective cross-check on the data under discussion, on attempts to find words which describe and do not mis describe those data, ought to bear fruit in the discussion of interests, as well. The attribution of “interest” quality to anything of necessity involves a value-judgment over and above those value-judgments inherent in any scientific inquiry. At that point the behavior approach ceases to promise objective agreement, except in this—that isolation of the value-judgment, in presentation, from the observed phenomena on which it in part rests, would clarify much discussion. Above all, such an approach to interests would move in terms of demonstrating the existence of groupings of behavior claimed to be significant, as the part of scientific decency when any “interest” is set up for discussion. The present approach tends instead to set up the broadest of formulæ about interests, and to attribute them to situations in magisterial unconcern for the specific facts. I have paid my respects briefly above to some aspects of “security of transactions.” I would not be understood thereby to deny that those three words are highly useful, or that they refer to very significant aspects of our life. But I am very eager to be understood as questioning how much is accomplished, for any given specific problem, by resting merely on the magic of those words. I think my friend Patterson has wisely described the interest-concept, in its present stage of development, as merely a red flag to challenge investigation in certain general directions—as leaving in any concrete situation most of the fact gathering and most of the fact weighing still to be done. “Security of transactions,” in the contract cases I have put above would, to him, mean the most useful raising of a query: what kind of transactions is involved? Better, what kinds of transactions are involved? How many? What results, at present? What disappointments? What effects would any proposed change have? What possible undesired effects, in the hands of interested parties? And

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*As, e.g., that it is worth while finding out; that it is worth while checking conclusions constantly by facts; and striving to state conclusions which stay within the observed facts; probably also that it is worth while to publish such conclusions for discussion irrespective of what prejudices they may affront, or what accepted values they may disturb.
so on. "Security of transactions" would settle nothing. It would, as facts become clear, suggest one line of policy which has come in many phases of the law to be regarded as important; but it would leave the importance of that line of policy in any case to be illuminated by the facts relevant to the situation in that instant case. No elimination of the subjective value-judgment, then; but an illumination by objective data of the basis and bearings of a subjective value-judgment. Insofar, a comparison of facts with facts, and not of words with words. Not a comparison of a mere formula of words about an interest with a formula of words said to be a "rule of law," a precept with no man knows what unexamined meaning in life. Nay, rather the objective data, the specific data, claimed to represent an interest, compared with the actual doings of the judges and the actual effects of their doings on the data claimed to represent an interest. If the judges' sayings have demonstrable effects, add those to the comparison. What else is relevant? Better: is anything else anything like so relevant?

I have said above that this can be done under the more cumbersome three-fold analytical set-up. I have said that it semi-occasionally

Throughout this paper I am speaking primarily from the viewpoint of the postmortemizer, the observer, the orderer, the scientist. But in passing let me pay my respects to four other lines of work in which the utility of the suggested approach seems equally striking. (a) That of the practicing lawyer. In his moments of action, in his actual handling of a case or situation, the measure of his success is the measure in which he actually uses this approach. (The question of how far he uses it consciously, how far intuitively, is immaterial.) His job is neither to guide a specific client through the difficulties of action in a concrete situation, or to bring the person of a specific tribunal to a specific setting. The desired results and not formulae, are his focus, and he uses formulae as he uses his knowledge of both judicial tradition and individual peculiarity: as tools to reach his desired result. He can be more effective, as any other practical man or artist can, if his technique be consciously studied. This is not to say that all that goes to make up his technique can be laid down or be consciously imparted. Still less is it to urge that he is himself a trustworthy reporter of his own technique. But what I have said of the logician suggests the making express of a matter implicit throughout the paper. To say that the area of behavior contact is the most useful point of reference for all matters legal is not to say that a specialist may not do the most useful work, conceivably, without even reaching to that point of reference. A careful study of the formal logic of judicial opinions would be a useful study. But I would urge that even its usefulness would be hugely increased by an equally careful study of the instrumentalism, the psychological, and the psychosocial approach. All the closer to the present set-up, all the tendency to be stop with, or slightly modify, the first of these hypothetical tendencies. Under the behavior-contact approach each would be welcomed, but the last in that drive toward completeness the last before the significance of the others would be thought even measurably understood.

(b) That of the legislator. Here is a man who wants results. How can one doubt the added utility to be derived from his wrestling with the observable facts of official action and lay action as those facts exist? Indeed, the successful practitioner and the successful politician are precisely the men whose grasp of the realities of law puts the word-beclouded theorist to shame. (c) That of the philosopher of law—on the side of the "ends of law" and social values. He takes his data for philosophizing from somewhere. The worthwhileness of his philosophy is to a considerable degree conditioned on those data. If they be data of life, his problems become more real, his check-up easier, his basis of thinking more actual. This means at least, when he comes to the application of his chosen values to the criticism of "positive law," that he would bridge to the law-in-action of his day, not merely to the law as a theory. If he be a pure mystic, this may be immaterial; otherwise the gain seems inevitable.

For the devotee of formal logic in the law the picture is somewhat different. He has been concerned with words, with propositions, probably almost wholly with propositions which move within the realm of ought—of doctrine—presumably the accepted doctrine of the system. Once he has his propositions, he runs free of the

A REALISTIC JURISPRUDENCE—THE NEXT STEP

has been done. I have said that it is rarely done, and that the definite tendency of that set-up is to block off the doing of it. I venture to predict that without the shift of emphasis, of focus, to behavior, that tendency will continue cheerfully in evidence.

Meaning of Rules and Rights Under the Behavior Analysis

What now, is the place of rules and rights, under such an approach? To attempt their excision from the field of law would be to fly in the face of fact. I should like to begin by distinguishing real "rules" and rights from paper rules and rights. The former
are conceived in terms of behavior; they are but other names, convenient shorthand symbols, for the remedies, the actions of the courts. They are descriptive, not prescriptive, except in so far as there may occasionally be implied that courts ought to continue in their practices. Real rules, then, if I had my way with words, would be legal scientists be called the practices of the courts, and not "rules" at all. And statements of "rights" would be statements of likelihood that in a given situation a certain type of court action loomed in the offing. Factual terms. No more. This use of "rights," at least, has already considerable standing among the followers of Hohfeld. This concept of "real rule" has been gaining favor since it was first put into clarity by Holmes. "Paper rules" are what have been treated, traditionally, as rules of law: the accepted doctrine of the time and place—what the books there say "the law" is. The "real rules" and rights—what the courts will do in a given case, and nothing more pretentious—are then predictions. They are, I repeat, on the level of isness and not of oughtness; they seek earnestly to go no whit, in their suggestion, beyond the remedy actually available. Like all shorthand symbols, they are dangerous in connotation, when applied to situations which are not all quite alike. But their intent and effort is to describe. And one can borrow for them Max Weber's magnificent formulation in terms of probability: a right (or practice, or "real rule") exists to the extent that a likelihood exists that A can induce a court to squeeze, out of B, A's damages; more: to the extent that the likely collections will cover A's damage. In this aspect substantive rights and "rules," as distinct from adjective, simply disappear—on the descriptive level. The measure of a "rule," the measure of a right, becomes what can be done about the situation. Accurate statement of a "real rule" or of a right includes all procedural limitations on what can be done about the situation. What is left, in the realm of description, are at the one end the facts, the groupings of conduct (and demonstrable expectations) which may be claimed to constitute an interest; and on the other the practices of courts in their effects upon the conduct and expectations of the laymen in question. Facts, in the world of isness, to be compared directly with other facts, also in the world of isness.

A reversion, do you say, to the crude and out-moded thinking of rules in terms of remedies only, to confining legal thinking to the vagaries of tradition-bound procedure? Not quite. It is a reversion to the realism of that primitive point of view. But a sophisticated reversion to a sophisticated realism. Gone is the ancient assumption that law is because law is; there has come since, and remains, the inquiry into the purpose of what courts are doing, the criticism in terms of searching out purposes and criticizing means. Here value-judgments reenter the picture, and should. Observing particular, concrete facts of conduct and of expectation which suggest the presence of "an interest," one arrives at his value conclusion that something in those facts calls for protection at the hands of state officials. What protection is called for, and called for in terms of what action of the state officials? Again a matter of judgment—but a matter of judgment which at least foots on reality and comes to results in terms of action. With that hypothetical action, the actual conduct of those officials can be directly compared. Room for error, in plenty, in diagnosing interests, and in imagining the forms of official conduct suited to their protection. But realism in discussion; realism at each end of the comparison; a narrowing as far as the present state of knowledge will permit, of the field for obstructing eyes with words that masquerade as things without a check-up.

The Place and Treatment of Paper Rules

Are "rules of law" in the accepted sense eliminated in such a course of thought? Somewhat obviously not. Whether they be pure paper rules, or are the accepted pattern of the law officials, they remain present, and their presence remains an actuality—an actuality of importance—but an actuality whose precise importance, whose bearing and influence become clear. First of all they appear as what they are: rules of authoritative ought, addressed to officials, telling officials what the officials ought to do. To which telling the officials either pay no heed at all (the pure paper rule; the dead-letter statute; the obsolete case) or listen partly (the rule "construed" out of recognition; the rule to which lip-service only is paid, while practice runs another course) or listen with all care (the rule with which the official practice pretty accurately coincides). I think that every such official precept-on-the-books (statute, doctrine laid down in the decision of a court, administrative regulation) tacitly contains an element of pseudo-

18 Eliminating such an implication would to my mind be pure gain. The question of desirability of continuing a given practice, when it comes up for discussion at all, is better made express.
Thus the problem of official formulations of rules and rights becomes complex. First, as to formulations already present, already existent: the accepted doctrine. There, I repeat, one lifts an eye canny and skeptical as to whether judicial behavior is in fact what the paper rule purports (implicitly) to state. One seeks the real practice on the subject, by study of how the cases do in fact eventuate. One seeks to determine how far the paper rule is real, how far merely paper. One seeks an understanding of actual judicial behavior, in that comparison of rule with practice; one follows also the use made of the paper rule in argument by judges and by counsel, and the apparent influence of its official presence on decisions. One seeks to determine when it is stated, but ignored; when it is stated and followed; when and why it is expressly narrowed or extended or modified, so that a new paper rule is created. One observes the level of silent application or modification or escape, in the "interpretation" of the facts of a case, in contrast to that other and quite distinct level of express wrestling with the language of the paper rule. One observes how strongly ingrained is the tradition of requiring a good paper justification, in terms of officially accepted paper rules, before any decision, however appealing on the facts, can be regarded as likely of acceptance. And by the same token, one observes the importance of the official formulae as tools of argument and persuasion; one observes both the stimuli to be derived from, and the limitations set by, their language. Very rapidly, too, one perceives that neither are all official formulae alike in these regards, nor are all courts, nor are all times and circumstances for the same formula in the same court. The handling of the official formulae to influence court behavior then comes to appear as an art, capable only to a limited extent of routinization or (to date) of accurate and satisfying description. And the discrepancy, great or small, between the official formula and what actually results, obtains the limelight attention it deserves.

**Paper Rules and New Control**

I am tempted, however, to regard the new formulation of official rules as even more vitally affected by the approach here suggested than is the dealing with existing formulations. For such new formulation is always with a purpose. The effectuation of this purpose (one recalls "the protection of an interest," supra) must be sought by means of verbal formulation. In part the need is based on our legal tradition; our officials move to a great extent on the stimulus of and in the light of verbally formulated rules. In part, moreover, verbal formulations, and especially those in regard to new, planned change in action, are an inherently essential tool of communication in a complex society; they are peculiarly important in a society which depends in good part upon written records to maintain continuity of practice between successive incumbents of an office, and between succes-

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13 This hopefully over-simplifies. There may be as many divergent purposes as are participants. Almost regularly the formulator's purpose and the purpose he publicly assigns are in part disparate.

14 This factor has by no means the exclusive importance the devotees of paper rules tend to attribute to it. The keener observers constantly stress this: what other meaning has the emphasis on the traditional techniques "for developing and applying precepts"; the practice of the office, or of the Constitution, which shift emphasis, and often create or abrogate whole institutions; the "interpreting away" of a rule; the importance of experience in the office, of the "trained" incumbent. And so forth.

15 On the other hand the factor of verbally formulated rules has enough importance to explain why they have so long been considered the core of even the substance of law. They are not the sole machinery for producing regularity. Habit, practice, unverbalized experience and tradition, are vital to regularity. But they are a factor in producing it—to the extent that officials react to words, and read words, alike. They are, moreover, the main device for checking regularity, for letting outsiders get an idea that officials are staying within the due limits of discretion. And they are, as indicated, a most vital element in introducing change in regularity. Where official behavior occurs "in our" regularity, the older views tend to define it the character of law (the assumed irregularity or caprice of cadis-justice, and the like). On this I differ. I should of course stress as the more perfect illustration of the concept regular official behavior; but I regard the behavior as more vital than the regularity, and the mere paper expression of desired regularity—save so far as it expresses an ideal—well, as paper.
A REALISTIC JURISPRUDENCE—THE NEXT STEP

means nothing. Hence: not the elimination of rules, but the setting of words and paper in perspective.

The Place and Treatment of Concepts

Like rules, concepts are not to be eliminated; it cannot be done. Behavior is too heterogeneous to be dealt with except after some artificial ordering. The sense impressions which make up what we call observation are useless unless gathered into some arrangement. Nor can thought go on without categories.

A realistic approach would, however, put forward two suggestions on the making of such categories. The first of them rests primarily upon the knowledge that to classify is to disturb. It is to build emphases, to create stresses, which obscure some of the data under observation and give fictitious value to others—a process which can be excused only insofar as it is necessary to the accomplishing of a purpose. The data to be singled out in reference to that purpose are obviously those which appear most relevant. But true relevancy can be determined only as the inquiry advances. For this reason a realistic approach to any new problem would begin by scepticism as to the adequacy of the received categories for ordering the phenomena effectively toward a solution of the new problem. It is quite possible that the received categories as they already stand are perfect for the purpose. It is, however, altogether unlikely. The suggestion then comes to this: that with the new purpose in mind one approach the data afresh, taking them in as raw a condition as possible, and discovering how far and how well the available traditional categories cover the most relevant of the raw data. And that before proceeding one undertake such modifications in the categories as may be necessary or look promising. In view of the tendency toward over-generalization in the past this is likely to mean the making of smaller categories—which may be either sub-groupings inside the received categories, or may cut across them.

The other suggestion of a realistic approach rests on the observation that categories and concepts, once formulated and once they have entered into thought processes, tend to take on an appearance of solidity, reality and inherent value which has no foundation in experience. More than this: although originally formulated on the model of at least some observed data, they tend, once they have entered into the organization of thinking, both to suggest the presence of corresponding data when these data are not in fact present, and to twist any fresh observation of data into conformity with the terms of the categories. This has been discussed above in its application to rules; it holds true, however, of any concept. It is peculiarly troublesome in regard to legal concepts, because

cessive generations. But since the ultimate effectuation of a purpose is in terms of action, of behavior, the verbal formulation, to be an efficient tool, must be such as will produce the behavior desired. This turns on the relevant prevailing practices and attitudes of the relevant persons. In one familiar doctrinal illustration, language used in a statute “will be read” in the light both of the existing common law, and of prior judicial construction of that language. But that is a matter of the top, the most superficial, level. Below that are the more vital practices prevalent as to handling official rules, described roughly above; practices, i.e., of courts and of lawyers.

But in regard to the new (and especially the statutory) formulation, the behavior problem goes much deeper than such practices of the legal elect. The ways of appellate courts in handling existing official rules presuppose the cracking of the toughest nut the statutory draftsman has to crack: the case is already in court; someone is already making an appeal to the official formula. Whereas one of the statutory draftsman’s major problems is to look into existent behavior beforehand, to make sure that his formula, when it becomes an official rule, will not merely bask in the sun upon the books. He must so shape it as to induce its application (with all the discrepancies that may entail) or else (for any purpose save that of pacifying clamorous constituents content with words) his blow is spent in air.

Only as a second job does he have to wrestle with making his formula so impinge upon judicial tradition that the results in action will be those desired if a case gets into court. Again there is little to be gained by laboring the point. It seems patent that only a gain in realism and effectiveness of thinking can come from consistently (not occasionally) regarding the official formulation as a tool, not as a thing of value in itself; as a means without meaning save in terms of its workings, and of meaning in its workings only when these last are compared with the results desired. In the terms used above: as prima facie pure paper until the contrary is demonstrated; and as at best a new piece of an established but moving environment, one single element in a complex of practices, ideas and institutions without whose study the one element...
of the tendency of the crystallized legal concept to persist after the fact model from which the concept was once derived has disappeared or changed out of recognition. A simple but striking instance is the resistance opposed by the “master-servant” concept to each readjustment along the lines of a new industrial labor situation. The counsel of the realistic approach here, then, would be the constant back-checking of the category against the data, to see whether the data are still present in the form suggested by the category-name. This slows up thinking. But it makes for results which means something when one gets them.

**Background of the Behavior Approach**

All this is nothing new in social science. It is of a piece with the work of the modern ethnographer. He substitutes painstaking objective description of practice, for local report of what the practice is, or for (what is worse) a report either of local practice or of local ideology pleasantly distorted by the observer’s own home-grown conventions. It is of a piece with the development of objective method in psychology. It fits into the pragmatic and instrumental developments in logic. It seeks to capitalize the methodological worries that have been working through in these latter years to new approaches in sociology, economics, political science. The only novel feature is the application to that most conventionalized and fiction-ridden of disciplines, the law. In essence the historical school of jurists from the one side, and Bentham and later lithering from the other, were approaching the lines of theorizing here put forth. Holmes’ mind had travelled most of the road two generations back. What has been done in the last decades that has some touch of novelty, is for theorists to go beyond theorizing, to move, along such lines as these, into the gathering and interpretation of facts about legal behavior: Ehrlich, Nussbaum, Hedemann, Brandeis, Frankfurter, Moore, Clark, Douglas, Moley, Yntema, Klaus, Handler, Lambert—Moore, Clark, Douglas, Moley, Yntema, Klaus, Handler, Lambert. I name only to show that neither a single country nor a single school is involved, and to make clear that the point of view has moved beyond the stage of chatter and has proved itself in operation. That out of the way, I should like to glance at a few further implications of the approach.

**Administrative Action as Law**

Three of them appear together. First, to focus on the area of contact between judicial behavior and the behavior of the “governed” is to stress interactions. Second, central as are the judges’ actions in disputed cases, there is a vast body of other officials whose actions are of no less importance; quantitatively their actions are of vastly greater importance, though it may well be that the judge’s position gives him a leverage of peculiar power. In what has preceded I have somewhat lightly argued as if judge and court were the be-all and end-all of the legal focus. It is time to reformulate, to grow at once more accurate and more inclusive. The actions of these other officials touch the interested layman more often than do those of the judge; increasingly so, and apparently increasing at a rising rate of increase as the administrative machine gains in force and function. More often than not, administrative action is, to the layman affected, the last expression of the law on the case. In such a situation, I think it highly useful to regard it as the law of the case. I see no gain whatever, and much loss, from setting up a fictitious unity in the law, when some officials do one thing, some another, and the courts now and again a third. Realistically, the law is then not one, but at least three, and by no means three-in-one. If what the courts do ultimately prevails and is translated into administrative practice, that is that. If such an event is predictable in advance, I find it vastly more useful to think of that event as the emerging unity of the law, which until it happens may be an ought, and is already an opportunity (at a price) for him with gumption and money to reach for it, but is not yet the probable law for the ordinary case. What—more
than one law, on a single point, in a single jurisdiction, according to the
whim or practice of an official, or according to the funds or temperament
or political complexion of the layman affected? Just that. What else
expresses the facts? Why blink and squint because the paper tradition
is annoyed? As long as there are words to describe the court rule which
will ultimately prevail (in a case where it will!), and to describe the sit-
duation differently before and after the victory, what is gained in a science
of observation by using the same words to describe both conditions—
except a sure confusion.294

Hence I argue that the focus, the center of law, is not merely what
the judge does, in the impact of that doing on the interested layman, but
what any state official does, officially.2 Lawyers are curious. As to a
court of first instance, though it be a justice's court, they would have no
difficulty seeing this. They could even see that a wrong decision below,
appealed from and reversed, would be part of the troubles of a litigant,
would reduce his effective rights—how often do they jockey the case
to bring about a settlement, by trading on just such friction-factors! But
to say that the decision of the eighteen hundred dollar clerk in Bureau B
that certain expenses are not deductible from my income tax return is
the law in my case, gives a lawyer's ideology the same shock that it gives
to a political scientist to urge that for purposes of that decision, that
official is the State. One needs again to wash the matter down with
Holmes' "cynical acid" and see what is left. In the same manner, if the
official's decision is adverse and erroneous, I should include as a subtra-
tion from my effective rights, if I proceeded to get a reversal, the ill-will
and subsequent trouble I might incur at the hands of that official; as a
part of the law, if I won; and its predictability as a determining part
of the law, if I decided not to fight.

A REALISTIC JURISPRUDENCE—THE NEXT STEP

Laymen's Behavior as a Part of Law

Interactions between official behavior and laymen's behavior, first;
and second, the recognition of official behavior of all officials as part of
the core of law. Third, and an immediate part of both, the recognition
of what Nicholas Spykman so strongly and properly stresses: that the
word "official" tacitly presupposes, connotes, reaches out to include, all
those patterns of action (ordering, initiative) and obedience (including
passivity) on the part both of the official and of all laymen affected
which make up the official's position and authority as such. Something
of this sort is the idea underlying "consent of the governed," "ultimate
dependence upon public opinion," and the like; but these older phrasings
have no neatness of outline; they do not even suggest the need of sharp-
edged drawing, which I take to be the reason why they act as a soporific,
while the Spykman formulation acts as a stimulant to the curiosity and
imagination. In a passing it is well to note that here, too, Max Weber's
method of formulation becomes classic: the official exists as such precise
ly asofar as such patterns of action and obedience prevail.26 I agree
whole-heartedly that these patterns are an essential part of any phe-
nomena we call law. The more whole-hearted because Spykman's
formulation brings out with fresh emphasis the difference between paper
rules and resultant behavior, and the extent to which the behavior which
results (if any) from the official formulation of a rule depends on the
patterns of thought and action of the persons whose behavior is in
question.

The Need for Narrower, More Concrete Study

How far these patterns can be presupposed, how far they require
specific examination, depends on the individual case. Here as through-
out we run into the need for reexamining the majestic categories of the
romantic period of jurisprudence. The old categories are imposing in
their purple, but they are all too big to handle. They hold too many
heterogeneous items to be of any use. What is true of some law simply
will not hold of other law. What is true of some persons as to some law
will not hold of other persons, even as to the same or similar law.29 I
care not how reclassification be made, so long as it is in terms of ob-
servation and of organizing the data usable, and with back-check to the
facts. But reclassification is called for. From another angle, what we

294 On the normative side of law no confusion or doubt would exist in this case.
The "right rule" would be the same all along. But that is no reason for obscuring
the divergence in the results, on the level of description and prediction. We need,
precisely for such purposes, to sever the normative from the descriptive aspects
of law. Moreover, results affect norms, quite as much as norms affect results. If
the outcome were going to be the overthrow of the judicial by the administrative
practice, in the case put, the norm would pending outcome be in considerable do-
ubt. And one of the (quite incidental) advantages of the approach contended for is
that to make explicit, understandable, and non-shocking the facts and facts of occurrence
of such doubts as to norm.

29 If we were dealing with a society which lacked political organization, this
obviously would be a bad terminology. But another of the futilities of overgeneral-
ization in the law has been the attempt to find one set of terms to cover the in-
stitutions of disparate societies. Before political organization we had control and
often specialized or semi-specialized control institutions. But in describing a
politically organized society it is exceedingly convenient to limit the term to the
officials of Merton's "Stock." A convenient term for the closest similar "law" of the
sub-group in such a society is "by-law." Sociologically the two are often more similar
and 15 AM. EC. Rev. 672 et seq.

29 In the same way (borrowing Spykman again) to the extent that the official's
behavior plays into these interlocking patterns of action it becomes "official" rather
than personal behavior, and so of direct interest here. "Purely" personal behavior
of an official approaches incomensurability; but substantially personal behavior may
take up a great bulk of a given official's time.

need is patience to look and see what is there; and to do that we must become less ambitious as to how much we are going to look at all at once.

An illustration may make the point clearer. Some "rules" are aimed at controlling and affecting the behavior of persons whose whole set and interest is opposed to making the adjustment desired; others are aimed at affecting behavior of persons who are not only willing to adjust, but have an existing effective machinery for accomplishing the adjustment. A type of the first is almost any phase of professional crime; a type of the second, perhaps, would be some change in the law affecting city real estate transactions which happens to be desired by the dealers. Most cases are compounded of both elements. If city real estate alone is involved, much might be said at first blush for law reform being peculiarly easy and quick, because the practice is firmly entrenched of never entering a real estate deal without consulting a lawyer. But other practices are also entrenched, such as relying upon first mortgage finance from a particular type of concern which in turn insists upon a title policy which in turn is under control of companies whose interest runs counter to certain types of law reform. The troubles of Torrens titles in New York City are an instance. They are substantially unmarketable; no mortgage company will loan on them because no title company will insure them. That is, however, an instance of attempted "helpful-device" legal innovation. It is a different problem from the "ordering-and-forbidding" legal innovation. Barring questions of constitutionality, and barring the political question of how far legislation running counter to the desires of a well organized and powerful group can be achieved at all, it is obvious that enforcement of a new prescribed style of doing business upon New York City title companies would be prima facie a promising problem of legal engineering, precisely because their business is localized, well organized, and run by relatively few business units. Unlike the professional criminal, they could not dive underground and survive. The problem of detection would therefore be one of detecting not persons, but infractions by known units; and their deals could almost certainly be forced into the open. The major policing problem would therefore in all likelihood become one of anticipating and barring out in advance "evasions" undertaken by changing the methods of business under advice of counsel: i.e., a problem of initially or subsequently so framing the official formulae of ordering and forbidding that transactions could not be accomplished (at a profit, after deducting fines, etc.) except along lines of the general purposes of the legislation. True,

A REALISTIC JURISPRUDENCE—THE NEXT STEP

unless the engineering were so successful that a somewhat comparably profitable new turn to the business developed, the legislator would have to reckon not only with initial, but with persistent and highly skilled resistance—which might even take the line it once did with the railroads, of seeking to capture the governmental machine. And it is of course this type of resistance which would in fact (contrary to our hypothesis) keep the constitutional issue in the forefront of the fight. The parallels and the divergencies from regulation or prohibition of liquor traffic would be instructive. As one moves to bank robberies or jewelry thefts, the parallels begin to fade out and the divergencies to sharpen. I have purposely chosen an illustration from a field in which I am blankly ignorant, in order to bring out the lines of thought and inquiry which open, under the approach, even before the gathering of data is begun. It is obvious that the set or attitude of those affected or sought to be affected by any piece of "law" is at the heart of the problem of control; it should be equally obvious that the style of organization of those persons, their group ways of action—whether among themselves or with regard to society at large—is equally vital. Behavior effects depend upon present behavior conditions.

The Narrow Application of Most Rules—and Its Implications

This leads directly into the next point: most pieces of law affect only a relatively small number of persons ever or at all, with any directness—or are intended to. Where that is the case, the organization, attitude, present and probable behavior of the persons sought to be affected is what needs major consideration, from the angle of getting results (or of understanding results). Indeed, the very identification of those persons may be a precondition calling for much study. Which is a somewhat absurdly roundabout way of saying that unless those matters are studied, the rules drawn, and the administrative behavior adapted to the persons in question, results will be an accident. "To the persons in question," and, indeed, "to those persons under the conditions in question." It cannot be too strongly insisted that our attitude toward "rules" of law, treating them as universal in application, involves a persistent twisting of observation. "Rules" in the realm of action mean what rules do; "rules" in the realm of action are what they do. The possible application and applicability are not without importance, but the actual application and applicability are of controlling importance. To think of rules as universals—especially, to think of them as being applicable to "all persons who bring themselves within their terms"—is to muffle one's eyes in a constitutional fiction before beginning a survey of the scene. To be sure, constitutions purport to require rules of law.
to be "equal and general." But most rules, however general as to the few they cover, are highly special, when viewed from the angle of how many citizens there are. And most rules "applying" to "all who come within their terms" (all those who set up barber shops, or are tempted to commit murder, or to bribe officials, or to embezzle from banks or certify checks without the drawer having funds, or to adopt a child, or run a manufacturing establishment employing five or more persons) do not and will not, realistically considered, ever be "applicable" in any meaningful sense of the term, to most people in the community. Such rules are indeed open. Persons do move in and out of the sphere of their applicability. But that sphere is much more clearly seen, when viewed (as compared with the community) as narrow, as special, as peculiar. Obviously even more special is the sphere of real application: of official behavior with reference to application. (And is it not clear that this most special sphere is the one of greatest consequence to the persons on whose behavior any results depend: the objects of the "regulation"?)

I know of no consequence of the approach here contended for—the approach in terms of organized behavior interacting with organized behavior—no consequence more illuminating than this immediate opening up for study of the sub-group and institutional structure both of "governors" and of "governed." Its opening up for study as a first essential to any understanding at all, as making the study of law a study in first instance of particularized situations and what happens in or can be done about them.

In practice this comes to: "equal in the choice of the very limited class to be affected." Equality of rule is impossible in a specialized society. It is true that some of the lines of discrimination which are under our system excluded from consideration, are suggested by the word "equality." But it is not particularly significant, save historically.

I have stressed elsewhere that the vital problem in such cases is that of creating in the conduct of the relevant persons new practices (folkways) which conform to the purposes sought via the new legal rules. Proc. Conv. Soc. Wom. (1928), at 132 et seq. And that the effectiveness of legal rules, old or new, is not to be measured simply by how often officials act in accordance with them. Ibid. and 15 Am. Ec. Rev. 682. Indeed the ideal effectiveness is not achieved until officials do not have to act at all. But if the rules are of the kind which coincide roughly with ancient, established lay practice (mores) it becomes a serious problem how far we have in such cases effectiveness of the legal rule, or of the occasional official behavior with reference to the rule. Contrast the extreme opposite case: an entire organized line of activity all units of which are prepared to move or not to move along lines newly prescribed, according to the outcome in court of a deliberately chosen test case. It is behavior of officials alone, but behavior of officials in its interaction with that of the relevant laymen.

One matter does need mention here, however: the eternal dilemma of the law, indeed of society; and of the law because the law purports peculiarly among our institutions to "represent" the whole. There is, amid the walter of self-serving groups, clamoring and struggling over this machine that will give power over others, the recurrent emergence of some wholeness, some sense of responsibility which outruns enlightened self-interest, and results in action apparently headed (often purposely) for the common good. To affirm this is to confuse no Hegel.
lian mysticism of the State. It leaves quite open any question of the existence of some "life principle" in a society. It merely notes that, lacking such a self-sanation in terms of the whole, the whole would not indefinitely continue as a whole. And to deny that would be folly. It would be to carry emancipation from the idle ideology of "representation of the whole" into blindness to the half-truth around which that once-precious ideology was built. But to deny the emancipation, to worship the half truth without dire and specific concern for the details of the welter, would be a folly quite as great.\

What Law is Thought to Be: Folk-Law

In all the emphasis placed upon behavior I may have created the impression that a "realistic" approach would make itself unrealistic by disregarding what people think law is. Not so. But a realistic approach would cut at once into analysis and subdivision of the terms "people," "think," and "law" in such a phrase. For the great mass of persons not particularly concerned, I suspect that "law" in this aspect, so far as it concerns themselves, means "what I ought to do" and is not much distinguished from those selective slight idealizations of current practice we think of as morals. At times the issue certainly gets closer: "I want this welter, would be a folly quite as of what people think law is, is what people conce-
Beyond the stage of dreams. Moreover, as has so often been pointed out, both the feasibility of accomplishing a policy and the cost of its accomplishment are in a world of limited possibilities vital elements in arriving at a judgment of the worthwhileness of the policy itself.

**Conclusion**

In conclusion, then, may I repeat that I have been concerned not at all with marking a periphery of law, with defining "it," with excluding anything at all from its field. I have argued that the trend of the most fruitful thinking about law has run steadily toward regarding law as an engine (a heterogeneous multitude of engines) having purposes, not values in itself; and that the clearer visualization of the problems involved moves toward ever-decreasing emphasis on words, and ever-increasing emphasis on observable behavior (in which any demonstrably probable attitudes and thought-patterns should be included). Indeed that the focus of study, the point of reference for all things legal has been shifting, and should now be consciously shifted to the area of contact, of interaction, between official regulatory behavior and the behavior of those affecting or affected by official regulatory behavior; and that the rules and precepts and principles which have hitherto tended to keep the limelight should be displaced, and treated with severe reference to their bearing upon that area of contact—in order that paper rules may be revealed for what they are, and rules with real behavior correspondences come into due importance. That the complex phenomena which are lumped under the term "law" have been too broadly treated in the past, and that a realistic understanding, possible only in terms of observable behavior, is again possible only in terms of study of the way in which persons and institutions are organized in our society, and of the cross-bearings of any particular part of law and of any particular part of the social of the social organization.

Included in the field of law under such an approach is everything currently included, and a vast deal more. At the very heart, I suspect, is the behavior of judges, peculiarly, that part of their behavior which marks them as judges—those practices which establish the continuity of their office with their predecessors and successors, and which make their official contacts with other persons; but that suspicion on my part may be a relic of the case law tradition in which we American lawyers have been raised. Close around it on the one hand lies the behavior of other government officials. On the other, the sets of accepted formulae which judges recite, seek light from, try to follow. Distinguishing here the formulae with close behavior-correspondences from others; those of frequent application from those of infrequent. Close around these again, lie various persons' ideas of what the law is; and especially their views of what it or some part of it ought to accomplish. At first hand contact with officials' behavior, from another angle, lies the social set-up where the official's acts impinge directly on it; and behind that the social set-up which resists or furthers or reflects the impingement of his acts. Farther from the center lies legal and social philosophy—approaching that center more directly in proportion as the materials with which it deals are taken directly from the center. Part of law, in many aspects, is all of society, and all of man in society. But that is a question of periphery and not of center, of the reach of a specific problem in hand, not of a general discussion. As to the overlapping of the field as thus sketched with that of other social sciences, I should be sorry if no overlapping were observable. The social sciences are not staked out like real estate. Even in law the sanctions for harmless trespass are not heavy.

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ulation to meet the new need. Probably an administrative power so large as this should be entrusted to the President himself. As a safeguard against official abuses of private rights and duties, it might be required that the regulation should be laid before Congress and not become operative unless Congress fails to take action within sixty days of its session or some other fixed period. This plan would have the merit of not depriving Congress of the power to do its own revision of the copyright law and it would certainly hasten revision. At present Congress can shelve copyright reform for years. Under the proposed scheme, it will have to do something within sixty days; it must either reject the administrative regulation flatly or substitute a reform of its own.

Such a wide official power would have staggered all of us a few years ago. It does not seem very strange today. We have seen Congress entrusting the President and other high officials with all sorts of authority to affect our lives. No doubt, all this concerns war, and copyright is a matter of peace. Yet the same device of "provisional legislation" is utilized with conspicuous success before Pearl Harbor for such important purposes as redistributing seats in the House of Representatives (in 1939 and 1941), enabling the Supreme Court to prescribe Rules of Civil Procedure for the District Courts (in 1934), and authorizing the President to reorganize departments and bureaus (in 1939). My suggestion does go beyond these precedents, since it relates to substantive private rights rather than to governmental or judicial machinery. It remains to be seen whether the dilemma I have described is so objectionable that Congress will consent to entrust the President with the power to keep copyright law up to date.

48. Heller, Strengthening the Congress (National Planning Assn. Pamphlet No. 39, Jan., 1945) 22: "Recommendation VI. Congress should expand use of provisional legislation (or legislative veto). Provisional legislation is a Congressional authorization with specified policy limitations, empowering the executive to propose actions a given period in advance of their effective date, during which Congress retains the right to veto them. In the absence of Congressional veto, the executive proposals go into effect."


50. 48 Stat. 1064 (1934), 26 U. S. C. §§ 723(b), 723(c) (1940).


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SOME REFLECTIONS ON THE READING OF STATUTES

FELIX FRANKFURTER

A single volume of 380 octavo pages contains all the laws passed by Congress during its first five years, when measures were devised for getting the new government under way; 85 acts were passed in the 1789 session, 66 in 1790, 94 in 1791, 38 in 1792, 63 in 1793. For the single session of the 70th Congress, to take a pre-depression period, there are 993 enactments in a monstrous volume of 1014 pages—quarto not octavo—with a comparable range of subject matter.

Do you wonder that one for whom the Statutes at Large constitute his staple reading should have sympathy, at least in his moments of baying at the moon, with the touching Congressman who not so long ago proposed a "Commission on Centralization" to report whether "the Government has departed from the concept of the founding fathers" and what steps should be taken "to restore the Government to its original purposes and sphere of activity"? Inevitably the work of the Supreme Court reflects the great shift in the center of gravity of law-making. Broadly speaking, the number of cases disposed of by opinions has not changed from term to term. But even as late as 1875 more than 40% of the controversies before the Court were common-law litigation, fifty years later only 5%, while today cases not resting on statutes are reduced almost to zero. It is therefore accurate to say that courts have ceased to be the primary makers of law in the sense in which they "legislated" the common law. It is certainly true of the Supreme Court that almost every case has a statute at its heart or close to it.

This does not mean that every case before the Court involves questions of statutory construction. If only literary perversity or jaundiced partisanship could sponsor a particular rendering of a statute there is no problem. When we talk of statutory construction we have in mind cases in which there is a fair contest between two readings, neither of which comes without respectable title

* Sixth Annual Benjamin N. Cardozo Lecture delivered before the Association of the Bar of the City of New York, March 18, 1947. This address is reprinted with permission from 2 The Record of The Ass'n of the Bar of the City of New York No. 6 (1947).

1. It gives me pleasure to make acknowledgment to my learned friends, Philip Elman, Louis Henkin and Philip Kurland, Esqs. They have no responsibility for what I have said; they are merely subjected to my gratitude.
Difficulties of Construction

Though it has its own preoccupations and its own mysteries, and above all its own jargon, judicial construction ought not to be torn from its wider, non-legal context. Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute is not an equation or a formula representing a clearly unimaginative adherence to well-worn professional phrases. To be sure, laws can measurably be improved with improvement in the mechanics of drafting. The area for judicial construction may be contracted. A large area is bound to remain.

The difficulties are inherent not only in the nature of words, of composition, and of legislation generally. They are often intensified by the subject matter of an enactment. The imagination which can draw an income tax statute to cover the myriad transactions of a society like ours, capable of producing the necessary revenue without producing a flood of litigation, has not yet revealed itself. Moreover, government sometimes solves problems by shelving them temporarily. The legislative process reflects that attitude. Statutes as well as constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding. "The prohibition contained in the Fifth Amendment refers to infamous crimes—a term obviously inviting interpretation in harmony with conditions and opinions prevailing from time to time." And Mr. Justice Cardozo once remarked, "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective."

The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction. The process of construction, therefore, is not an exercise in logic or dialectic: The aids of formal reasoning are not irrelevant; they may simply be inadequate. The purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone. To speak of it as a practical problem is not to indulge a fashion in words. It must be that, not something else. Not, for instance, an opportunity for a judge to use words as "empty vessels into which he can pour anything he will"—his caprices, fixed notions, even statesmanlike beliefs in a particular policy. Nor, on the other hand, is the process a ritual to be observed by unimaginative adherence to well-worn professional phrases. To be sure, it is inescapably a problem in the keeping of the legal profession and subject to all the limitations of our adversary system of adjudication. When the judge, selected by society to give meaning to what the legislature has done, examines the statute, he does so not in a laboratory or in a classroom. Damage has been done or exactions made, interests are divided, passions have been aroused, sides have been taken. But the judge, if he is worth his salt, must be above the battle. We must assume in him not only personal impartiality but intellectual disinterestedness. In matters of statutory construction also it makes a great deal of difference whether you start with an answer or with a problem.

The Judge's Task

Everyone has his own way of phrasing the task confronting judges when the meaning of a statute is in controversy. Judge Learned Hand speaks of the art of interpretation as "the proliferation of purpose." Who am I not to be satisfied with Learned Hand's felicities? And yet that phrase might mislead judges intellectually less disciplined than Judge Hand. It might justify interpretations by judicial libertines, not merely judicial libertarians. My own rephrasing of what we are driving at is probably no more helpful, and is much longer than Judge Hand's epigram. I should say that the troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye.

2. Anderson v. Dunn, 6 Wheat. 204, 226 (U. S. 1821).
Chief Justice White was happily endowed with the gift of finding the answer to problems by merely stating them. Often have I envied him this faculty but never more than in recent years. No matter how one states the problem of statutory construction, for me at least it does not carry its own answer. Though my business throughout most of my professional life has been with statutes, I come to you empty-handed. I bring no answers. I suspect the answers to the problems of an art are in its exercise. Not that one does not inherit, if one is capable of receiving it, the wisdom of the wise. But I confess unashamedly that I do not get much nourishment from one does not inherit, if one is capable of receiving it, the wisdom of the wise. However, the art of painting and the art of interpretation are very different arts. Law, Holmes told us, is not an inheritance; one does not inherit, if one is capable of receiving it, the wisdom of the wise. Though my business throughout most of my professional life has been with statutes, I come to you empty-handed. I bring no answers. I need hardly add that for him "learned opinions of the three Justices in this field is the essential similarity of their attitude and of their appraisal of the relevant. Their opinions do not disclose a private attitude for or against extension of governmental authority by legislation, or towards the policy of particular legislation, which consciously or imperceptibly affected their judicial function in construing laws. It would thus be a shallow judgment that found in Mr. Justice Holmes' dissent in the Northern Securities case an expression of his disapproval of the policy behind the Sherman Law. His habit of mind—to be as accurate as one can—had a natural tendency to confine what seemed to him familiar language in a statute to its familiar scope. But the proof of the pudding is that his private feelings did not lead him to invoke the rule of indefiniteness to invalidate legislation of which he strongly disapproved, or to confine language in a constitution within the restrictions which he gave to the same language in a statute. The reservations I have just made indicate that such differences as emerge in the opinions of the three Justices on statutory construction, are differences that characterize all of their opinions, whether they are concerned with interpretation or constitutionality, with admiralty or patent law. They are differences of style. In the case of each, the style is the man. If it be suggested that Mr. Justice Holmes is often swift, if not cavalier, in his treatment of statutes, there are those who level the same criticism against his opinions generally. It is merited in the sense that he wrote, as he said, for those learned in the art. I need hardly add that for him "learned was not a formal term comprehending the whole legal fraternity. When dealing with problems of statutory construction also he illumined whole areas of doubt and darkness with insights enduringly expressed, however briefly. To say "We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean," is worth more than most of the dreary writing on how to construe penal legislation. Again when he said that "the meaning of a sentence is to be felt rather than to be proved," he expressed the wholesome truth that the final rendering of the meaning of a sentence is an act of judgment. He would shudder at the

thought that by such a statement he was giving comfort to the school of visceral jurisprudence. Judgment is not drawn out of the void but is based on the correlation of imponderables all of which need not, because they cannot, be made explicit. He was expressing the humility of the intellectual that he was, whose standards of exactitude distrusted pretensions of certainty, believing that legal controversies that are not frivolous almost always involve matters of degree, and often degree of the nicest sort. Statutory construction implied the exercise of choice, but precluded the notion of capricious choice as much as choice based on private notions of policy. One gets the impression that in interpreting statutes Mr. Justice Holmes reached meaning easily, as was true of most of his results, with emphasis on the language in the totality of the enactments and the felt reasonableness of the chosen construction. He had a lively awareness that a statute was expressive of purpose and policy, but in his reading of it he tended to hug the shores of the statute itself, without much re-enforcement from without.

Mr. Justice Brandeis, on the other hand, in dealing with these problems as with others, would elucidate the judgment he was exercising by proof or detailed argument. In such instances, especially when in dissent, his opinions would draw on the whole arsenal of aids to construction. More often than either Holmes or Cardozo, Brandeis would invoke the additional weight of some "rule" of construction. But he never lost sight of the limited scope and function of such rules. Occasionally, however, perhaps because of the nature of a particular statute, the minor importance of its incidence, the pressure of judicial business or even the temperament of his law clerk, whom he always treated as a co-worker, Brandeis disposed of a statute even more dogmatically, with less explicit elucidation, than did Holmes.

For Cardozo, statutory construction was an acquired taste. He preferred common law subtleties, having great skill in bending them to modern uses. But he came to realize that problems of statutory construction had their own exciting subtleties and gave ample employment to philosophic and literary talents. Cardozo's elucidation of how meaning is drawn out of a statute gives proof of the wisdom and balance which, combined with his learning, made him a great judge. While the austere style of Brandeis seldom mitigated the dry aspect of so many problems of statutory construction, Cardozo managed to endow these with the glow and softness of his writing. The differences in the tone and color of their style as well as in the moral intensity of Brandeis and Cardozo made itself felt when they wrote full-dress opinions on problems of statutory construction. Brandeis almost compels by demonstration; Cardozo woo by persuasion.

Scope of the Judicial Function

From the hundreds of cases in which our three Justices construed statutes one thing clearly emerges. The area of free judicial movement is considerable. These three remembered that laws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends. The difficulty is that the legislative ideas which laws embody are both explicit and immanent. And so the bottom problem is: What is below the surface of the words and yet fairly a part of them? Words in statutes are not unlike words in a foreign language in that they too have "associations, echoes, and overtones." Judges must retain the associations, hear the echoes, and capture the overtones. In one of his very last opinions, dealing with legislation taxing the husband on the basis of the combined income of husband and wife, Holmes wrote: "The statutes are the outcome of a thousand years of history. . . They form a system with echoes of different moments, none of which is entitled to prevail over the other." By admitting that there is some substance to the good Bishop's statement, one does not subscribe to the notion that they are law-givers in any but a very qualified sense.

Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction. "If there is no meaning in it," said Alice's King, "that saves a world of trouble, you know, as
we needn't try to find any." Legislative words presumably have meaning and so we must try to find it.

This duty of restraint, this humility of function as merely the translator of another's command, is a constant theme of our Justices. It is on the lips of all judges, but seldom, I venture to believe, has the restraint which it expresses, or the duty which it enjoins, been observed with so consistent a realization that its observance depends on self-conscious discipline. Cardozo put it this way: "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it." It was expressed more fully by Mr. Justice Brandeis when the temptation to give what might be called a more liberal interpretation could not have been wanting. "The particularization and detail with which the scope of each provision, the amount of the tax, the manner of its imposition, and the incidence of the tax, were specified, preclude an extension of any provision by implication to any other subject. . . . What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion.

The vital difference between initiating policy, often involving a decided break with the past, and merely carrying out a formulated policy, indicates the relatively narrow limits within which choice is fairly open to courts and the extent to which interpreting law is inescapably making law. To say that, because of this restricted field of interpretive declaration, courts make law just as do legislatures is to deny essential features in the history of our democracy. It denies that legislation and adjudication have had different lines of growth, serve vitally different purposes, function under different conditions, and bear different responsibilities. The judicial process of dealing with words is not at all Alice in Wonderland's way of dealing with them. Even in matters legal some words and phrases, though very few, approach mathematical symbols and mean substantially the same to all who have occasion to use them. Other law terms like "police power" are not symbols at all but labels for the results of the whole process of adjudication. In between lies a gamut of words with different denotations as well as connotations. There are varying shades of compulsion for judges behind different words, differences that are due to the words themselves, their setting in a text, their setting in history. In short, judges are not unfettered glossators. They are under a special duty not to over-emphasize the episodic aspects of life and not to undervalue its organic processes—its continuities and relationships. For judges at least it is important to remember that continuity with the past is not only a necessity but even a duty.

There are not wanting those who deem naive the notion that judges are expected to refrain from legislating in construing statutes. They may point to cases where even our three Justices apparently supplied an omission or engrafted a limitation. Such an accusation cannot be rebutted or judged in the abstract. In some ways, as Holmes once remarked, every statute is unique. Whether a judge does violence to language in its total context is not always free from doubt. Statutes come out of the past and aim at the future. They may carry implicit residues or mere hints of purpose. Perhaps the most delicate aspect of statutory construction is not to find more residues than are implicit nor purposes beyond the bound of hints. Even for a judge most sensitive to the traditional limitation of his function, this is a matter for judgment not always easy of answer. But a line does exist between omission and what Holmes called "misprision or abbreviation that does not conceal the purpose." Judges may differ as to the point at which the line should be drawn, but the only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.

In those realms where judges directly formulate law because the chosen lawmakers have not acted, judges have the duty of adaptation and adjustment of old principles to new conditions. But where policy is expressed by the primary law-making agency in a democracy, that is by the legislature, judges must respect such expressions by adding to or subtracting from the explicit terms which the lawmakers use no more than is called for by the shorthand method. Judges may differ as to the point at which the line should be drawn, but the only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.

Let me descend to some particulars.

The text.—Though we may not end with the words in construing a disputed statute, one certainly begins there. You have a right to think that a hoary platitude, but it is a platitude not acted upon in many arguments. In any event, it may not take you to the end of the road. The Court no doubt must listen to the voice of Congress. But often Congress cannot be heard clearly because its

speech is muffled. Even when it has spoken, it is as true of Congress as of others that what is said is what the listener hears. Like others, judges too listen with what psychologists used to call the apperception mass, which I take it means in plain English that one listens with what is already in one's head. One more caution is relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say.

We must, no doubt, accord the words the sense in which Congress used them. That is only another way of stating the central problem of decoding the symbols. It will help to determine for whom they were meant. Statutes are not archaeological documents to be studied in a library. They are written to guide the actions of men. As Mr. Justice Holmes remarked upon some Indian legislation “The word was addressed to the Indian mind.”17 If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read by judges with the minds of the specialists.

And so we assume that Congress uses common words in their popular meaning, as used in the common speech of men. The cases speak of the “meaning of common understanding,” “the normal and spontaneous meaning of language,” “the common and appropriate use,” “the natural straightforward and literal sense,” and similar variants. In McBoyle v. United States,18 Mr. Justice Holmes had to decide whether an aeroplane is a “motor vehicle” within the meaning of the Motor Vehicle Theft Act. He thus disposed of it: “No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction. . . . But in everyday speech ‘vehicles’ calls up a picture of a thing moving on land.”

Sometimes Congress supplies its own dictionary. It did so in 1871 in a statute defining a limited number of words for use as to all future enactments. It may do so, as in recent legislation, by a section within the statute containing detailed definitions. Or there may be indications from the statute that words in it are the considered language of legislation. “If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute. But, as we have said, the usage of Congress simply shows that it has spoken with careful precision, that its words mark the exact spot at which it stops.”19 Or words may ac-

18. 263 U. S. 25, 26 (1911).

Words of art bring their art with them. They bear the meaning of their habitat whether it be a phrase of technical significance in the scientific or business world, or whether it be loaded with the recondite connotations of feudalism. Holmes made short shrift of a contention by remarking that statutes used “familiar legal expressions in their familiar legal sense.”20 The peculiar idiom of business or of administrative practice often modifies the meaning that ordinary speech assigns to language. And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.

The context.—Legislation is a form of literary composition. But construction is not an abstract process equally valid for every composition, not even for every composition whose meaning must be judicially ascertained. The nature of the composition demands awareness of certain presuppositions. For instance, the words in a constitution may carry different meanings from the same words in a statute precisely because “it is a constitution we are expounding.” The reach of this consideration was indicated by Mr. Justice Holmes in language that remains fresh no matter how often repeated:

“[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”21

And so, the significance of an enactment, its antecedents as well as its later history, its relation to other enactments, all may be relevant to the construction of words for one purpose and in one setting but not for another. Some words are confined to their history; some are starting points for history. Words are intellectual and moral currency. They come from the legislative
mint with some intrinsic meaning. Sometimes it remains unchanged. Like

currency, words sometimes appreciate or depreciate in value.

Frequently the sense of a word cannot be got except by fashioning a mosa
cic of significance out of the innuendoes of disjointed bits of statute. Car
dozo phrased this familiar phenomenon by stating that "the meaning of a

statute is to be looked for, not in any single section, but in all the parts to
gether and in their relation to the end in view." And to quote Cardozo once

more on this phase of our problem: "There is need to keep in view also the

structure of the statute, and the relation, physical and logical, between its several

parts."

The generating consideration is that legislation is more than composition. It

is an active instrument of government which, for purposes of interpreta-
tion, means that laws have ends to be achieved. It is in this connection that

Holmes said "words are flexible." Again it was Holmes, the last judge to give

quarter to loose thinking or vague yearning, who said that "the general purpose

is a more important aid to the

structure of the statute, and the relation, physical and logical, between its several

parts."%2

The difficulty in many instances where a problem of meaning arises is

that the enactment was not directed towards the troubling question. The

problem might then be stated, as once it was by Mr. Justice Cardozo, "which

choice is it the more likely that Congress would have made?" While its

context the significance and limitations of this question are clear, thus to

frame the question too often tempts inquiry into the subjective and might

seem to warrant the court in giving answers based on an unmanifested legis-

lative state of mind. But the purpose which a court must effectuate is not

the obvious meaning of a statute, but the apparent purpose of a statute, as read

in the light of other external manifestations of purpose. That is what the judge must seek and effectuate,

and he ought not to be led off the trail by tests that have overtones of subjective
design. We are not concerned with anything subjective. We do not
delve into the mind of legislators or their draftsmen, or committee members.

Against what he believed to be such an attempt Cardozo once protested:

"The judgment of the court, if I interpret the reasoning aright, does not rest

upon a ruling that Congress would have gone beyond its power if the purpose

that it professed was the purpose truly cherished. The judgment of the court

rests upon the ruling that another purpose, not professed, may be read beneath

the surface, and by the purpose so imputed the statute is destroyed. Thus the

process of psychoanalysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body ... "

The difficulty in many instances where a problem of meaning arises is

that the enactment was not directed towards the troubling question. The

problem might then be stated, as once it was by Mr. Justice Cardozo, "which

choice is it the more likely that Congress would have made?" While its

context the significance and limitations of this question are clear, thus to

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lative state of mind. But the purpose which a court must effectuate is not

the obvious meaning of a statute, but the apparent purpose of a statute, as read

in the light of other external manifestations of purpose. That is what the judge must seek and effectuate,

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functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. In such cases, for example, it is not to be assumed as a matter of course that when Congress adopts a new scheme for federal industrial regulation, it deals with all situations falling within the general mischief which gave rise to the legislation. The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of congressional legislation regulating not only interstate commerce in such but also activities intertwined with it, justify the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.

Search for Purpose

How then does the purpose which a statute expresses reveal itself, particularly when the path of purpose is not straight and narrow? The English courts say: look at the statute and look at nothing else. Lord Reading so advised the House of Lords when a bill was before it as to which the Attorney General had given an interpretative explanation during its passage in the House of Commons: "Neither the words of the Attorney General nor the words of an ex-Lord Chancellor, spoken in this House, as to the meaning intended to be given to language used in a Bill, have the slightest effect or relevance when the matter comes to be considered by a Court of Law. The one thing which stands out beyond all question is that in a Court of Law you are not allowed to introduce observations made either by the Government or by anybody else, but the Court will only give consideration to the Statute itself. That is elementary, but I think it is necessary to bring it to the attention of the Judges. If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded. The rigidity of English courts in interpreting language merely by reading it disregards the fact that enactments are, as it were, organisms which exist in their environment. One wonders whether English judges are confined psychologically as they purport to be legally. The judges deem themselves limited to reading the words of a statute. But can they really escape placing the words in the context of their minds, which after all are not automata applying legal logic but repositories of all sorts of assumptions and impressions? Such a modest if not mechanical view of the task of construction disregards legal history. In earlier centuries the judges recognized that the exercise of their judicial function to understand and apply legislative policy is not to be hindered by artificial canons and limitations. The well known resolutions in Heydon's Case, have the flavor of Elizabethan English but they express the substance of a current volume of U. S. Reports as to the considerations relevant to statutory interpretation. To be sure, early English legislation helped ascertainment of

31. 94 H. L. 232 (5th ser. 1934).
32. (1922) 2 A. C. 339, 383.
purpose by explicit recitals; at least to the extent of defining the mischief against which the enactment was directed. To take a random instance, an act in the reign of Edward VI reads: "Forasmuch as intolerable Hurts and Troubles to the Commonwealth of this Realm doth daily grow and increase through such Abuses and Disorders as are had and used in common Alehouses and other Houses called Tipling houses": (2) it is therefore enacted by the King our Sovereign Lord, etc.34 Judicial construction certainly became more artificial after the practice of elucidating recitals ceased. It is to be noted that Macaulay, a great legislative draftsman, did not think much of preambles. He believed that too often they are jejune because legislators may agree on what ought to be done, while disagreeing about the reasons for doing it. At the same time he deemed it most important that in some manner governments should give reasons for their legislative course.35 When not so long ago the Parliamentary mechanism was under scrutiny of the Lord Chancellor’s Committee, dissatisfaction was expressed with the prevailing practice of English courts not to go outside the statutes. It was urged that the old practice of preambles be restored or that a memorandum of explanation go with proposed legislation.36

At the beginning, the Supreme Court reflected the early English attitude. With characteristic hardheadedness Chief Justice Marshall struck at the core of the matter with the observation "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived."37 This commonsensical way of dealing with statutes fell into disuse, and more or less catchpenny canons of construction did service instead. To no small degree a more wooden treatment of legislation was due, I suspect, to the fact that the need for keeping vividly in mind the occasions for drawing on all aids in the process of distilling meaning from legislation was comparatively limited. As the area of regulation steadily widened, the impact of the legislative process upon the judicial brought into being, and compelled consideration of, all that convincingly illumines an enactment, instead of merely what it is called, with delusive simplicity, "the end result." Legislatures themselves provided illumination by general definitions, special definitions, explicit recitals of policy, and even directions of attitudes appropriate for judicial construction. Legislative reports were increasingly drawn upon, statements by those in charge of legislation, reports of investigating committees, recommendations of agencies entrusted with the enforcement of laws, etc. When Mr. Justice Holmes came to the Court, the U. S. Re-

ports were practically barren of references to legislative materials. These swarm in current volumes. And let me say in passing that the importance that such materials play in Supreme Court litigation carry far-reaching implications for bench and bar.

The change I have summarized was gradual. Undue limitations were applied even after courts broke out of the mere language of a law. We find Mr. Justice Holmes saying, "It is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage."38 And as late as 1935 he referred to earlier bills relating to a statute under review, with the reservation "If it be legitimate to look at them."39

Such hesitations and restraints are in limbo. Courts examine the forms rejected in favor of the words chosen. They look at later statutes "considered to throw a cross light" upon an earlier enactment.40 The consistent construction by an administrative agency charged with effectuating the policy of an enactment carries very considerable weight. While assertion of authority does not demonstrate its existence, long-continued, uncontested assertion is at least evidence that the legislature conveyed the authority. Similarly, while authority conferred does not atrophy by disuse, failure over an extended period to exercise it is some proof that it was not given. And since "a page of history is worth a volume of logic,"41 courts have looked into the background of statutes, the mischief to be checked and the good that was designed, looking sometimes far afield and taking notice also as judges of what is generally known by men.

Unhappily, there is no table of logarithms for statutory construction. No item of evidence has a fixed or even average weight. One or another may be decisive in one set of circumstances, while of little value elsewhere. A painstaking, detailed report by a Senate Committee bearing directly on the immediate question may settle the matter. A loose statement even by a chairman of a committee, made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical.

Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature. Unless indeed no doubt can be left that the legislature has in

34. 6 Edw. VI, c. 25 (1552).
35. Lord Macaulay's Legislative Minutes 145 et seq. (Darke ed. 1946).
fact used a private code, so that what appears to be violence to language is merely respect to special usage. In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment. Only if its premises are emptied of their human variables, can the process of statutory construction have the precision of a syllogism. We cannot avoid what Mr. Justice Cardozo deemed inherent in the problem of construction, making "a choice between uncertainties. We must be content to choose the lesser." But to the careful and disinterested eye, the scales will hardly escape appearing to tip slightly on the side of a more probable meaning.

**Canons of Construction**

Nor can canons of construction save us from the anguish of judgment. Such canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements. All our three Justices have at one time or another leaned on the crutch of a canon. But they have done so only rarely, and with a recognition that these rules of construction are not in any true sense rules of law. So far as valid, they are what Mr. Justice Holmes called them, axioms of experience. In many instances, these canons originated as observations in specific cases from which they were abstracted, taken out of the context of actuality, and, as it were, codified in treatises. We owe the first known systematic discussion of statutory interpretation in England to the scholarship of Professor Samuel E. Thorne, Yale's Law Librarian. According to Professor Thorne, it was written probably prior to 1667. The latest American treatise on the subject was published in 1943. It is not unfair to say that in the four intervening centuries not much new wisdom has been garnered. But there has been an enormous quantitative difference in expounding the wisdom. "A Discourse upon the Exposition & Understanding of Statutes" is a charming essay of not more than thirty pages. Not even the freest use of words would describe as charming the latest edition of Sutherland's Statutory Construction, with its three volumes of more than 1500 pages.

Insofar as canons of construction are generalizations of experience, they all have worth. In the abstract, they rarely arouse controversy. Difficulties emerge when canons compete in soliciting judgment, because they conflict rather than converge. For the demands of judgment underlying the art of interpretation, there is no vade-mecum.

But even generalized restatements from time to time may not be wholly wasteful. Out of them may come a sharper rephrasing of the conscious factors of interpretation; new instances may make them more vivid but also disclose more clearly their limitations. Thereby we may avoid rigidities which, while they afford more precise formulas, do so at the price of cramming the life of law. To strip the task of judicial reading of statutes of rules that partake of the mysteries of a craft serves to reveal the true elements of our problem. It defines more accurately the nature of the intellectual responsibility of a judge and thereby subjects him to more relevant criteria of criticism. Rigorous analysis also sharpens the respective duties of legislature and courts in relation to the making of laws and to their enforcement.

**Fair Construction and Fit Legislation**

The quality of legislative organization and procedure is inevitably reflected in the quality of legislative draftsmanship. Representative Monroney told the House last July that "ninety-five percent of all the legislation that becomes law passes the Congress in the shape that it came from our committees. Therefore if our committee work is sloppy, if it is bad, if it is inadequate, our legislation in ninety-five percent of the cases will be bad and inadequate as well." And Representative Lane added that "... in the second session of the 78th Congress 993 bills and resolutions were passed, of which only 86 were subject to any real discussion." But what courts do with legislation may in turn deeply affect what Congress will do in the future. Emerson says somewhere that mankind is as lazy as it dares to be. Loose judicial reading makes for loose legislative writing. It encourages the practise illustrated in a recent cartoon in which a senator tells his colleagues "I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means." A modern Pascal might be tempted at times to say of legislation what Pascal said of students of theology when he charged them with "a looseness of thought and language that would pass nowhere else in making what are professedly very fine distinctions." And it is conceivable that he might go on and speak, as did Pascal, of the "insincerity with which terms are carefully chosen to cover opposite meanings."

But there are more fundamental objections to loose judicial reading. In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all,

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44. 92 CONG. REC. 10040 (1946).
45. 92 CONG. REC. 10034 (1946).
they must not be encouraged in irresponsible or undisciplined use of language. In the keeping of legislatures perhaps more than any other group is the well-being of their fellow-men. Their responsibility is discharged ultimately by words. They are under a special duty therefore to observe that "Exactness in the use of words is the basis of all serious thinking. You will get nowhere without it. Words are clumsy tools, and it is very easy to cut one's fingers with them, and they need the closest attention in handling; but they are the only tools we have, and imagination itself cannot work without them. You must master the use of them, or you will wander forever guessing at the mercy of mere impulse and unrecognized assumptions and arbitrary associations, carried away with every wind of doctrine."  

Perfection of draftsmanship is as unattainable as demonstrable correctness of judicial reading of legislation. Fit legislation and fair adjudication are attainable. The ultimate reliance of society for the proper fulfilment of both these august functions is to entrust them only to those who are equal to their demands.

are now consumed by the metaphysics and the frustrations of conflict of laws
are diverted to the formulation and justification of specific legislative programs.
Here is challenge enough. Here is the "grand objective" in an attainable, or at
least approachable, form. Here is a means of bringing the full capability of the
mind to bear upon the problem of "integration of the diversity of laws." In America
at least, conflict of laws, that "much maligned branch of the law," will
richly deserve its disgrace so long as we leave the instrument for intelligent
resolution of conflicting policies to rust in desuetude, while we waste our energies
in the futile search for an elixir vitae that will relieve us from the necessity of
facing the real problem and from the pain that must ensue when the policy of
one state is made to yield to that of another.6

6 Yntema, op. cit. supra note 4, at 312 (AALS Readings, at 42).
7 Id., at 297 (AALS Readings, at 31).
8 Id., at 300 (AALS Readings, at 32).
9 "But the full faith and credit clause is the foundation of any hope we may have for a
truly national system of justice, based on the preservation but better integration of the local
jurisdictions we have. If I have any message to the legal profession ... it is this: that you
must not suffer this lawyer's clause to become the orphan clause of the Constitution." Jackson,
op. cit. supra note 77, at 34 (AALS Readings, at 254).

Professor Wechsler, disagreeing with Judge Learned Hand as to the
justification for judicial review of legislative action, argues that
courts have the power, and duty, to decide all constitutional cases in
which the jurisdictional and procedural requirements are met. The
author concludes that in these cases decisions must rest on reason-
ning and analysis which transcend the immediate result, and discusses
instances in which he believes the Supreme Court has not been faithful
to this principle.

On three occasions in the last few years Harvard has been
hospitable to the discussion of that most abiding problem of
our public law: the role of courts in general and the Supreme
Court in particular in our constitutional tradition; their special
function in the maintenance, interpretation and development of
the organic charter that provides the framework of our govern-
ment, the charter that declares itself the "supreme law."
I have in mind, of course, Mr. Justice Jackson's undelivered
Godkin lectures, the papers and comments at the Marshall con-
fERENCE2, and Judge Learned Hand's addresses from this very
rostrum but a year ago.6 It does not depreciate these major con-
tributions if I add that they comprise only a fragment of the

† This paper was delivered on April 7, 1959, as the Oliver Wendell Holmes Lectu-
re at the Harvard Law School. It is reproduced without substantial change, ex-
cept for the addition of the footnotes. The reader is asked to bear in mind that it
was written for the eye and not the ear.
* Harlan Fiske Stone Professor of Constitutional Law, Columbia University
School of Law, A.B., College of the City of New York, 1918; L.L.B., Columbia,
1921.
† JACkson, The Supreme Court in the American System of Government
(1955).
* Government Under Law (Sutherland ed. 1956).
serious, continuous attention that the subject is receiving here as well as elsewhere in the nation, not to speak of that less serious attention that is not without importance to a university community, however uninstructive it may be.

I should regard another venture on a theme so fully ventilated as a poor expression of appreciation for the hospitality accorded me, were I not persuaded that there is a point to make and an exercise to be performed that will not constitute mere reiteration; and that the point and exercise have special relevancy to the most important of our current controversies. Before I put my point and undertake the exercise it is appropriate, however, that I make clear where I stand upon the larger, underlying questions that have been considered on the previous occasions I have noted, particularly by Judge Hand last year. They have a bearing, as will be apparent, on the thesis that I mean to put before you later on.

I. THE BASIS OF JUDICIAL REVIEW

Let me begin by stating that I have not the slightest doubt respecting the legitimacy of judicial review, whether the action called in question in a case which otherwise is proper for adjudication is legislative or executive, federal or state. I must address myself to this because the question was so seriously mooted by Judge Hand; and though he answered it in favor of the courts' assumption of the power of review, his answer has overtones quite different from those of the answer I would give.

Judge Hand's position was that "when the Constitution emerged from the Convention in September, 1787, the structure of the proposed government, if one looked to the text, gave no ground for inferring that the decisions of the Supreme Court, and a fortiori of the lower courts, were to be authoritative upon the Executive and the Legislature"; that "on the other hand it was probable, if indeed it was not certain, that without some arbiter whose decision should be final the whole system would have collapsed, for it was extremely unlikely that the Executive or the Legislature, having once decided, would yield to the contrary holding of another 'Department,' even of the courts"; that "for centuries it has been an accepted canon in interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand"; that it was therefore "altogether in keeping with established practice for the Supreme Court to assume an authority to keep the states, Congress, and the President within their prescribed powers"; and, finally and explicitly, that for the reason stated "it was not a lawless act to import into the Constitution such a grant of power." 

Though I have learned from past experience that disagreement with Judge Hand is usually nothing but the sheerest folly, I must make clear why I believe the power of the courts is grounded in the language of the Constitution and is not a mere interpolation. To do this you must let me quote the supremacy clause,

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Judge Hand concedes that under this clause "state courts would at times have to decide whether state laws and constitutions, or even a federal statute, were in conflict with the federal constitution" but he adds that "the fact that this jurisdiction was confined to such occasions, and that it was thought necessary specifically to provide such a limited jurisdiction, looks rather against than in favor of a general jurisdiction." 

Are you satisfied, however, to view the supremacy clause in this way, as a grant of jurisdiction to state courts, implying a denial of the power and the duty to all others? This certainly is not its necessary meaning; it may be construed as a mandate to all of officialdom including courts, with a special and emphatic admonition that it binds the judges of the previously independent states. That the latter is the proper reading seems to me persuasive when the other relevant provisions of the Constitution are brought into view.

Article III, section 1 declares that the federal judicial power "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."
This represented, as you know, one of the major compromises of the Constitutional Convention and relegated the establishment of lower federal courts to the discretion of the Congress. None might have been established, with the consequence that, according to the Federalist, none would have been remitted to state courts.

Article III, section 2 goes on, however, to delineate the scope of the federal judicial power, providing that it "shall extend [inter alia] to all Cases, in Law and Equity, arising under this Constitution . . ." and, further, that the Supreme Court "shall have appellate jurisdiction" in such cases "with such Exceptions, and under such Regulations as the Congress shall make." Surely this means, as section 4 of the Judiciary Act of 1789 provided, that if a state court passes on its judgments are less or differently constrained than the court that it reviews. Yet I cannot escape, what is for me the most astonishing conclusion, that this is the precise result of Judge Hand's reading of the text, as distinct from the interpolation he approves on other grounds.

It is true that Hamilton in the seventy-eighth Federalist does not mention the supremacy clause in his argument but rather urges the conclusion as implicit in the concept of a written constitution as a fundamental law and the accepted function of the courts as law interpreters. Marshall in Marbury v. Madison echoes these general considerations, though he also calls attention to the text, including the judiciary article, pointing only at the end to the language about supremacy, concerning which he says that it "confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." Much might be said on this as to the style of reasoning that was deemed most persuasive when these documents were written but this would be irrelevant to my concern about the meaning that Judge Hand insists he cannot determine within the words or structure of the Constitution, even with the aid of the historical material that surely points in the direction I suggest.

You will not wonder now why I should be concerned about the way Judge Hand has read the text, despite his view that the judicial power was a valid importation to preserve the governmental plan. Here as elsewhere a position cannot be divorced from its supporting reasons; the reasons are, indeed, a part and most important part of the position. To demonstrate I quote Judge Hand:

[S]ince this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importantly the occasion demands an answer. It may be better to leave the issue to be worked out without authoritative solution; or perhaps the only solution available is one that the court has no adequate means to enforce.
If this means that a court, in a case properly before it, is free—or should be free on any fresh view of its duty—either to adjudicate a constitutional objection to an otherwise determinative action of the legislature or executive, national or state, or to decline to do so, depending on "how importantly" it considers the occasion to demand an answer, could anything have more enormous import for the theory and the practice of review? What showing would be needed to elicit a decision? Would anything suffice short of a demonstration that judicial intervention is essential to prevent the government from foundering—the reason, you recall, for the interpolation of the power to decide? For me, as for anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judicial obligation; the duty cannot be attenuated in this way.

The duty, to be sure, is not that of policing or advising legislatures or executives, nor even, as the uninstructed think, of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support. It is the duty to decide the litigated case and to decide it in accordance with the law, with all that that implies as to a rigorous insistence on the satisfaction of procedural and jurisdictional requirements; the concept that Professor Freund reminds us was so fundamental in the thought and work of Mr. Justice Brandeis. Only when the standing law, decisional or statutory, provides a remedy to vindicate the interest that demands protection against an infringement of the kind that is alleged, a law of remedies that ordinarily at least is framed in reference to rights and wrongs in general, do courts have any business asking what the Constitution may require or forbid, and only then when it is necessary for decision of the case that is at hand. How was it Marshall put the questions to be faced in Marbury?

1st. Has the applicant a right to the commission he demands?
2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3dly. If they do afford him a remedy, is it a mandamus issuing from this court?

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19 5 U.S. (1 Cranch) at 154.

It was because he thought, as his opponents also thought, that the Constitution had a bearing on the answers to these questions, that he claimed the right and duty to examine its commands.

As a legal system grows, the remedies that it affords substantially proliferate, a development to which the courts contribute but in which the legislature has an even larger hand. There has been major growth of this kind in our system and I dare say there will be more, increasing correspondingly the number and variety of the occasions when a constitutional adjudication may be sought and must be made. Am I not right, however, in believing that the underlying theory of the courts’ participation has not changed and that, indeed, the very multiplicity of remedies and grievances makes it increasingly important that the theory and its implications be maintained?

It is true, and I do not mean to ignore it, that the courts themselves regard some questions as “political,” meaning thereby that they are not to be resolved judicially, although they involve constitutional interpretation and arise in the course of litigation. Judge Hand alluded to this doctrine which, insofar as its scope is undefined, he labeled a “stench in the nostrils of strict constructionists.” 20 And Mr. Justice Frankfurter, in his great paper at the Marshall conference, avowed “disquietude that the line is often very thin between the cases in which the Court felt compelled to abstain from adjudication because of their ‘political’ nature, and the cases that so frequently arise in applying the concepts of ‘liberty’ and ‘equality.’” 21

The line is thin, indeed, but I suggest that it is thinner than it needs to be or ought to be; that all the doctrine can defensively imply is that the courts are called upon to judge whether the

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20 See, e.g., Developments in the Law—Remedies Against the United States and Its Officials, 90 Harv. L. Rev. 827 (1957).

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17 It will be remembered that the Jeffersonian objections to the issuance of a mandamus to the Secretary rested on constitutional submissions with respect to the separation of judicial and executive authority. See 1 Warren, The Supreme Court in United States History 272 (1937): Kendall v. United States, 37 U.S. (12 Pet.) 544, 610 (1838); Lee, The Origins of Judicial Control of Federal Executive Action, 36 Geo. L.J. 187 (1948).
Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation. Who, for example, would contend that the civil courts may properly review a judgment of impeachment when article I, section 3 declares that the “sole Power to try” is in the Senate? That any proper trial of an impeachment may present issues of the most important constitutional dimension, as Senator Kennedy reminds us in his moving story of the Senator whose vote saved Andrew Johnson, is simply immaterial in this connection.

What is explicit in the trial of an impeachment or, to take another case, the seating or expulsion of a Senator or Representative may well be found to be implicit in others. So it was held, and rightly it appears to me, respecting the provision that the publican Form of Government is to “make or alter” state regulations of the “Manner of Elections, Returns and Qualifications of its own Members . . . .” This guarantee appears, you will recall, in the same clause as does the duty to protect the states against invasion; it envisages the possible employment of the military force and bears an obvious relationship to the autonomous authority of the Houses of Congress in seating their respective members.

It also may be reasonable to conclude, or so it seems to me, though there are arguments the other way, that the power of Congress to “make or alter” state regulations of the “Manner of holding Elections for Senators and Representatives,” implying as it does a power to draw district lines or to prescribe the standards to be followed in defining them, excludes the courts from passing on a constitutional objection to state gerrymanders, even if the Constitution can be thought to speak to this kind of inequality and the law of remedies gives disadvantaged voters legal standing to complain, which are both separate questions to be faced.

If I may put my point again, I submit that in cases of the kind that I have mentioned, as in others that I do not pause to state, the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely, whatever factors may be rightly weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally. That, I submit, is tuto caelo different from a broad discretion to abstain or intervene.

The Supreme Court does have a discretion, to be sure, to grant or to deny review of judgments of the lower courts in situations in which the jurisdictional statute permits certiorari but does not provide for an appeal. I need not say that this is an entirely different matter. The system rests upon the power that the Constitution vests in Congress to make exceptions to and regulate the Court’s appellate jurisdiction; it is addressed not to the measure of judicial duty in adjudication of a case but rather to the right to a determination by the highest as distinguished from the lower courts. Even here, however, it is well worth noting that the Court by rule has defined standards for the exercise of its discretion, standards framed in neutral terms, like the importance of the
question or a conflict of decisions. Only the maintenance and the improvement of such standards can, I say with deference, protect the Court against the danger of the imputation of a bias favoring claims of one kind or another in the granting or denial of review.

Indeed, I will go further and assert that, necessary as it is that the Court's docket be confined to manageable size, much would be gained if the governing statutes could be revised to play a larger part in the delineation of the causes that make rightful call upon the time and energy of the Supreme Court. Think of the protection it gave Marshall's court that there was no discretion of the other branches of the government are consistent with the Constitution, when a case is properly before them in the sense I have called upon the time and energy of the Supreme Court. Think of the protection it gave Marshall's court that there was no discretion with the consequence that he could say in *Cohens v. Virginia*:

It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

II. THE STANDARDS OF REVIEW

If courts cannot escape the duty of deciding whether actions of the other branches of the government are consistent with the Constitution, when a case is properly before them in the sense I have attempted to doubt, you will not doubt the relevancy and importance of demanding what, if any, are the standards to be followed in interpretation. Are there, indeed, any criteria that both the Supreme Court and those who undertake to praise or to condemn its judgments are morally and intellectually obligated to support?

Whatever you may think to be the answer, surely you agree with me that I am right to state the question as the same one for the Court and for its critics. An attack upon a judgment involves an assertion that a court should have decided otherwise than as it did. Is it not clear that the validity of an assertion of this kind depends upon assigning reasons that should have prevailed with the tribunal; and that any other reasons are irrelevant? That is, of course, not only true of a critique of a decision of the courts; it applies whenever a determination is in question, a determination that it is essential to make either way. Is it the irritation of advancing years that leads me to lament that our culture is not rich with critics who respect these limitations of the enterprise in which they are engaged?

You may remind me that, as someone in the ancient world observed—perhaps it was Josephus—history has little tolerance for any of those reasonable judgments that have turned out to be wrong. But history, in this sense, is ineradicable, concealing all its verdicts in the bosom of the future; it is never a contemporary critic.

I revert then to the problem of criteria as it arises for both courts and critics—by which I mean criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will. Even to put the problem is, of course, to raise an issue no less old than our culture. Those who perceive in law only the element of fiat, in whose conception of the legal cosmos reason has no meaning or no place, will not join gladly in the search for standards of the kind I have in mind. I must, in short, expect dissent in *timine* from anyone whose view of the judicial process leaves no room for the antinomy Professor Fuller has so gracefully explored. So too must I anticipate dissent from those more numerous among us who, vouching no philosophy to warranty, frankly or covertly make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values they support.

I shall not try to overcome the philosophic doubt that I have

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34 It is regrettable, in my view, that when the Court revised its rules in 1954 it determined not to attempt an improved articulation of the statement of "considerations governing review on certiorari." But see Winer, *The Supreme Court's New Rules*, 68 Harv. L. Rev. 20, 60-63 (1954).


36 The present distribution of obligatory and discretionary jurisdiction derives largely, though not entirely, from the Judiciary Act of 1825, ch. 240, 43 Stat. 736, the architects of which were a committee of the Court. See Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1915*, 35 Yale L.J. 1 (1925); *Frankfurter & Landis*, op. cit. supra note 35, at 255-94. For major changes since 1925, see *Hart & Wechsler*, op. cit. supra note 7, at 1317.

37 19 U.S. (6 Wheat.) 264, 404 (1821).

mentioned, although to use a phrase that Holmes so often used—
"it hits me where I live." That battle must be fought on wider
fronts than that of constitutional interpretation; and I do not
delude myself that I can qualify for a command, great as is my
wish to render service. The man who simply lets his judgment
turn on the immediate result may not, however, realize that his
position implies that the courts are free to function as a naked
power organ, that it is an empty affirmation to regard them, as
ambivalently he so often does, as courts of law. If he may know
he disapproves of a decision when all he knows is that it has sus-
tained a claim put forward by a labor union or a taxpayer, a Negro
or a segregationist, a corporation or a Communist—he acquiesces
in the proposition that a man of different sympathy but equal in-
tural constitutionalism may no less properly conclude that he approves.

You will not charge me with exaggeration if I say that this type
of ad hoc evaluation is, as it has always been, the deepest problem
of our constitutionalism, not only with respect to judgments of
the courts but also in the wider realm in which conflicting con-
stitutional positions have played a part in our politics.

Did not New England challenge the embargo that the South
supported on the very ground on which the South was to resist
New England's demand for a protective tariff? Was not Je-
ferson in the Louisiana Purchase forced to rest on an expansive
reading of the clauses granting national authority of the very kind
that he had steadfastly opposed in his attacks upon the Bank? Can
you square his disappointment about Burr's acquittal on the
treason charge and his subsequent request for legislation with

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60 See 4 Adams, History of the United States of America During the Sec-
ond Administration of Thomas Jefferson 267 (1807): "If Congress had the right
to regulate commerce for such a purpose in 1805, South Carolina seemed to have
no excuse for questioning, twenty years later, the constitutionality of a protective
system."

60 3 Adams, History of the United States of America During the First
Administration of Thomas Jefferson 90 (1807): "The Louisiana treaty gave
a fatal wound to 'strict construction,' and the Jeffersonian theories never again
received general support. In thus giving them up, Jefferson did not lead the way,
but he allowed his friends to drag him in the path they chose." See also 3 Wilson,

61 In his annual message of October 27, 1827, Jefferson said:
I shall think it my duty to lay before you the proceedings and the evidence
publicly exhibited on the arraignment of the principal offenders before the cir-
cuit court of Virginia. You will be enabled to judge whether the defect was in
the testimony, in the law, or in the administration of the law; and wherever
it shall be found, the Legislature alone can apply or originate the remedy.
The framers of our Constitution certainly supposed that they had guarded as

the attitude towards freedom and repression most enduringly as-
associated with his name? Were the abolitionists who rescued
fugitives and were acquitted in defiance of the evidence able to
distinguish their view of the compulsion of a law of the United
States from that advanced by South Carolina in the ordinance that
they despised? 62

To bring the matter even more directly home, what shall we
think of the Harvard records of the Class of 1829, the class of
Mr. Justice Curtis, which, we are told, 63 praised at length the
Justice's dissent in the Dread Scott case but then added, "Again,
and seemingly adverse to the above, in October, 1862, he prepared
a legal opinion and argument, which was published in Boston in
pamphlet form, to the effect that President Lincoln's Proclamation
of prospective emancipation of the slaves in the rebellious States
is unconstitutional."

62 See 4 Adams, History of the United States of America During the Sec-
ond Administration of Thomas Jefferson 267 (1807). The trial pro-
ceedings were transmitted to the Senate on November 23, 1807. See 17 Annals of
Cong. 365-78 (1807).

63 Jefferson's conception of the "remedy" not only involved legislation overcoming
Marshall's strict construction of the treason clause but also a provision for the
removal of judges on the address of both Houses of Congress. See 1 Randall, The
Life of Thomas Jefferson 160-61 (1865); 1 Warren, The Supreme Court in
United States History 311-15 (1857).

On the former point, different bills were introduced in the Senate and the House.
The Senate bill by Gilles undertook to define "levying war" for purposes of treason.
The proposed definition included "assembling themselves together with in-
tent forcibly to overturn or change the Government of the United States, or any of
the Territories thereof... or forcibly to resist the general execution of any
public law thereof... or if any person or persons shall traitorously aid or assist in
the doing any of the acts aforesaid, although not personally present when any such
act is done..." 18 id. at 1217-18.

64 See South Carolina Ordinance of Nullification, 1 S.C. Stat. 319 (1832).

65 See 2 Curtis, A Memoir of Benjamin Robbins Curtis 354-55 n.1 (1879).

hition worked emancipation of a slave whose owner brought him to reside in such a territory—a man who thought all these things detracted obviously from the force of his positions if he also thought the President without authority to abrogate a form of property established and protected by state law within the states where it was located, states which the President and his critic alike maintained had not effectively seceded from the Union and were not a foreign enemy at war.

How simple the class historian could make it all by treating as the only thing that mattered whether Mr. Justice Curtis had, on the occasions noted, helped or hindered the attainment of the freedom of the slaves.

I have cited these examples from the early years of our history since time has bred aloofness that may give them added force. What a wealth of illustration is at hand today! How many of the constitutional attacks upon congressional investigations of suspected Communists have their authors felt obliged to launch against the inquiries respecting the activities of Goldfine or of Hoffa or of others I might name? How often have those who think the Smith Act, as construed, inconsistent with the first amendment seen no virtue in distinguishing between advocacy of merely racial agitators fanning flames of prejudice and discontent? Turning the case around, are those who in relation to the Smith Act see no virtue in distinguishing between advocacy of merely abstract doctrine and advocacy which is planned to instigate unlawful action, equally unable to see virtue in the same distinction in relation, let us say, to advocacy of resistance to the judgments of the courts, especially perhaps to judgments vindicating claims that equal protection of the laws has been denied? I may live a uniquely sheltered life but am I wrong in thinking I discerned in some extremely warm enthusiasts for jury trial a certain diminution of enthusiasm as the issue was presented in the course of the debate in 1957 on the bill to extend federal protection of our civil rights?

All I have said, you may reply, is something no one will deny, that principles are largely instrumental as they are employed in politics, instrumental in relation to results that a controlling sentiment demands at any given time. Politicians recognize this fact of life and are obliged to trim and shape their speech and votes ac-

have suggested is intrinsic to judicial action — however much we may admire such a reasoned exposition when we find it in those other realms.

Does not the special duty of the courts to judge by neutral principles addressed to all the issues make it inappropriate to contend, as Judge Hand does, that no court can review the legislative choice — by any standard other than a fixed “historical meaning” of constitutional provisions 44 — without becoming “a third legislative chamber”? 44 Is there not, in short, a vital difference between legislative freedom to appraise the gains and losses in projected measures and the kind of principled appraisal, in respect of values that can reasonably be asserted to have constitutional dimension, that alone is in the province of the courts? Does not the difference yield a middle ground between a judicial House of Lords and the abandonment of any limitation on the other branches — a middle ground consisting of judicial action that embodies what are surely the main qualities of law, its generality and its neutrality? This must, it seems to me, have been in Mr. Justice Jackson’s mind when in his chapter on the Supreme Court “as a political institution” he wrote 45 in words that I find stirring, “Liberty is not the mere absence of restraint, it is not a spontaneous product of majority rule, it is not achieved merely by lifting underprivileged classes to power, nor is it the inevitable by-product of technological expansion. It is achieved only by a rule of law.” 45 Is it not also what Mr. Justice Frankfurter must mean in calling upon judges for “allegiance to nothing except the effort, amid tangled words and limited insights, to find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice between man and man, between man and state, through reason called law”? 46

You will not understand my emphasis upon the role of reason and of principle in the judicial, as distinguished from the legislative or executive, appraisal of conflicting values to imply that I deprecate the duty of fidelity to the text of the Constitution, when its words may be decisive — though I would certainly remind you of the caution stated by Chief Justice Hughes: “Behind the words of the constitutional provisions are postulates which limit and control.” 51 Nor will you take me to deny that history has weight in the elucidation of the text, though it is surely subtle business to appraise it as a guide. Nor will you even think that I deem precedent without importance, for we surely must agree with Holmes that “imitation of the past, until we have a clear reason for change, no more needs justification than appetite.” 54 But after all, it was Chief Justice Taney who declared his willingness “that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.” 54 Would any of us have it otherwise, given the nature of the problems that confront the courts?

At all events, is not the relative compulsion of the language of the Constitution, of history and precedent — where they do not combine to make an answer clear — itself a matter to be judged, so far as possible, by neutral principles — by standards that transcend the case at hand? I know, of course, that it is common to distinguish, as Judge Hand did, clauses like “due process,” cast “in such sweeping terms that their history does not elucidate their contents,” 50 from other provisions of the Bill of Rights addressed to more specific problems. But the contrast, as it seems to me, often implies an overstatement of the specificity or the immutability these other clauses really have — at least when problems under them arise.

No one would argue, for example, that there need not be indictment and a jury trial in prosecutions for a felony in district courts. What made a question of some difficulty was the issue whether service wives charged with the murders of their husbands overseas could be tried there before a military court. 56 Does the language of the double-jeopardy clause or its preconstitutional history actually help to decide whether a defendant tried for

44 Hand, op. cit. supra note 3, at 65.
45 Id. at 42.
46 Jackson, The Supreme Court In the American System of Government 76 (1937).
47 Frankfurter, Chief Justices I Have Known, in Of Law and Men 138 (Elman ed. 1946).
matters. If at the great American Revolution, the words "due process of law," far from meaning only or mainly a right to a fair trial by a jury when an accused is charged with crime, had also the meaning of an absolute and unqualified prohibition against any law that might impair such freedom of speech or press, and might also include a prohibition against any other executive action that might be taken to impair such freedom, its limits would have been fixed by the consensus of a century long past, with problems very different from those that must be given weight in legislation and administration at the risk of courting trouble in the courts.

So far as possible, to finish with my point, I argue that we should properly review the actions of the other branches in the light of constitutional provisions, including those that must be given weight in legislation and administration at the risk of courting trouble in the courts.

Let me repeat what I have thus far tried to say. The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does. In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are—or are obliged to be—entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to the basic values of a free society, values embodied only relatively fundamental rules of right, as generally understood by all English-speaking communities, would be.

The virtue or demerit of a judgment turns, therefore, entirely
on the reasons that support it and their adequacy to maintain any choice of values it decrees, or, it is vital that we add, to maintain the rejection of a claim that any given choice should be decreed. The critic's role, as T. R. Powell showed throughout so many fruitful years, is the sustained, disinterested, merciful examination of the reasons that the courts advance, measured by standards of the kind I have attempted to describe. I wish that more of us today could imitate his dedication to that task.

III. SOME APPRAISALS OF REVIEW

One who has ventured to advance such generalities about the courts and constitutional interpretation is surely challenged to apply them to some concrete problems—if only to make clear that he believes in what he says. A lecture, to be sure, is a poor medium for such an undertaking, for the statement and analysis of cases inescapably takes time. Nonetheless, I feel obliged to make the effort and I trust that I can do so without trespassing on the indulgence you already have displayed.

Needless to say, I must rely on you to understand that in alluding to some areas of constitutional interpretation, selected for their relevancy to my thesis, I do not mean to add another capsulated estimate of the performance of our highest court to those that now are in such full supply. The Court in constitutional adjudications faces what must surely be the largest and the hardest task of principled decision-making faced by any group of men in the entire world. There is a difference worthy of articulation between purported evaluations of the Court and comments on decisions or opinions.

1. — I start by noting two important fields of present interest in which the Court has been decreeing value choices in a way that makes it quite impossible to speak of principled determinations or the statement and evaluation of judicial reasons, since the Court has not disclosed the grounds on which its judgments rest.

The first of these involves the sequel to the Burstyn case, in which, as you recall, the Court decided that the motion picture is a medium of expression included in the "speech" and "press" to which the safeguards of the first amendment, made applicable to the states by the fourteenth, apply. But Burstyn left open, as it was of course obliged to do, the extent of the protection that the movies are accorded, and even the question whether any censorship is valid, involving as it does prior restraint. The judgment rested, quite properly, upon the vice inherent in suppression based upon a finding that the film involved was "sacrilegious"—with the breadth and vagueness that that term had been accorded in New York. "[W]hether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films" was said to be "a very different question" not decided by the Court. In five succeeding cases, decisions sustaining censorship of different films under standards variously framed have been reversed, but only by per curiam decisions. In one of these, in which I should aver I was of counsel, the standard was undoubtedly too vague for any argument upon the merits. I find it hard to think that this was clearly so in all the others. Given the subtlety and difficulty of the problem, the need and opportunity for clarifying explanation, are such unexplained decisions in a new domain of constitutional interpretation consonant with standards of judicial action that the Court or we can possibly defend? I realize that nine men often find it easier to reach agreement on result than upon reasons and that such a difficulty may be posed within this field. Is it not preferable, however, indeed essential, that if this is so the variations of position be disclosed?


45 Id. at 506.


48 Attention should be called to Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 370 U.S. 874 (1962), decided with full opinions since the present paper was delivered. The Court was unanimous in holding invalid New York's refusal to license the exhibition of a film based on D. H. Lawrence's Lady Chatterley's Lover. The opinion of the Court by Mr. Justice Stewart, deeming the censorship order to rest solely on the ground that the picture portrays an adulterous relationship as an acceptable pattern of behavior, held the statute so construed an unconstitutional impairment of freedom to disseminate ideas. Justices Black and Douglas joined in the opinion but in brief concurrences expressed their view that any prior restraint on motion pictures is as vulnerable as the censorship of
The second group of cases to which I shall call attention involves what may be called the progeny of the school-segregation ruling of 1954. Here again the Court has written on the merits of the constitutional issue posed by state segregation only once, 69 its subsequent opinions on the form of the decree 70 and the defiance in Arkansas 71 deal, of course, with other matters. The original opinion, you recall, was firmly focused on state segregation in the public schools, its reasoning accorded import to the nature of the educational process, and its conclusion was that separate educational facilities are "inherently unequal.

What shall we think then of the Court's extension of the ruling to other public facilities, such as public transportation, parks, golf courses, bath houses, and beaches, which no one is obliged to use — all by per curiam decisions? 72 That these situations present a weaker case against state segregation is not, of course, what I am saying. I am saying that the question whether it is stronger, weaker, or of equal weight appears to me to call for principled decisions. I do not know, and I submit you cannot know, whether the per curiam affirmance in the Dawson case, involving public bath houses and beaches, embraced the broad opinion of the circuit court that all state-enforced racial segregation is invalid or approved only its immediate result and, if the latter, on what ground. Is this "process of law," to borrow the words Professor Brown has used so pointedly in writing of such unexplained decisions upon matters far more technical 73 — the process that newspapers or books. Mr. Justice Frankfurter in one opinion and Mr. Justice Harlan in another, joined by Justices Frankfurter and Whittaker, conceived of the New York statute as demanding some showing of obscenity or of incitement to immorality and thought, therefore, that it escaped the condemnation of the majority opinion. In their view, however, the film could not be held to have embodied either obscenity or incitement. Hence, the statute was invalid as applied.

Were I a prudent man I would, no doubt, confine myself to problems of this order, involving not the substance but the method of decision — for other illustrations might be cited in the same domain. I shall, however, pass beyond this to some areas of substantive interpretation which appear to me to illustrate my theme. (2). — The phase of our modern constitutional development that I conceive we can most confidently deem successful inures in the broad reading of the commerce, taxing, and related powers of the Congress, achieved with so much difficulty little more than twenty years ago — against restrictions in the name of state autonomy to which the Court had for a time turned such a sympathetic ear.

Why is it that the Court failed so completely in the effort to contain the scope of national authority and that today one reads decisions like Hammer v. Dagenhart, 74 or Carter Coal, 75 or the invalidation of the Agricultural Adjustment Act 76 with eyes that disbelieve? No doubt the answer inheres partly in the simple facts of life and the consensus they have generated on the powers that a modern nation needs. But is it not a feature of the case as well — a feature that has real importance — that the Court could not articulate an adequate analysis of the restrictions it imposed on Congress in favor of the states, whose representatives — upon an equal footing in the Senate — controlled the legislative process and had broadly acquiesced in the enactments that were subject to review?

Is it not also true and of importance that some of the principles the Court affirmed were strikingly deficient in neutrality, sustaining, for example, national authority when it impinged adversely upon labor, as in the application of the Sherman Act, but not when it was sought to be employed in labor's aid? On this score, the contrast in today's position certainly is striking. The power that sustained the Wagner Act is the same power that sustains Taft-Hartley — with its even greater inroads upon state autonomy but with restraints on labor that the Wagner Act did not impose.

One of the speculative questions I must confess I find intriguing is upon the question whether there are any neutral principles that
might have been employed to mark the limits of the commerce power of the Congress in terms more circumscribed than the virtual abandonment of limits in the principle that has prevailed. Given the readiness of President Roosevelt to compromise on any basis that allowed achievement of the substance of his program, might not the formulae of coverage employed in the legislation of the Thirties have quite readily embraced any such principles the Court had then been able to devise before the crisis became so intense — principles sustaining action fairly equal to the need? I do not say we would or should be happier if that had happened and the Court still played a larger part within this area of our federalism, given the attention to state interests that is so inherent in the Congress and the constitutional provisions governing the selection and the composition of the Houses, which make that attention very likely to endure. I say only that I find such speculation interesting. You will recall that it was Holmes who deprecated argument of counsel the logic of which left "no part of the conduct of life with which on similar principles Congress might not interfere."  

(3). — The poverty of principled articulation of the limits put on Congress as against the states before the doctrinal reversal of the Thirties was surely also true of the decisions, dealing with the very different problem of the relationship between the individual and government, which invoked due process to maintain laissez faire. Did not the power of the great dissents inheres precisely in their demonstrations that the Court could not present an adequate analysis, in terms of neutral principles, to support the values choices it decreed? Holmes, to be sure, saw limits beyond which "the contract and due process clauses are gone"; and his insistence on the need for compensation to sustain a Pennsylvania prohibition of the exploitation of subsurface coal, threatening subsidence of a dwelling belonging to the owner of the surface land, indicates the kind of limit he perceived. Am I simply voicing my own sympathies in saying that his analysis of those limits has a thrust entirely lacking in the old and now forgotten 

78 Northern Sec. Co. v. United States, 193 U.S. 397, 403 (1904) (dissenting opinion).  

judgments striking down minimum-wage and maximum-hour laws?  

If I am right in this it helps to make a further point that has more bearing upon current issues, that I believe it misconceives the problem of the Court to state it as the question of the proper measure of judicial self-restraint, with the resulting issue whether such restraint is only proper in relation to protection of a purely economic interest or also in relation to an interest like freedom of speech or of religion, privacy, or discrimination (at least if it is based on race, origin, or creed). Of course, the courts ought to be cautious to impose a choice of values on the other branches or a state, based upon the Constitution, only when they are persuaded, on an adequate and principled analysis, that the choice is clear. That I suggest is all that self-restraint can mean and in that sense it always is essential, whatever issue may be posed. The real test inheres, as I have tried to argue, in the force of the analysis. Surely a stronger analysis may be advanced against a particular uncompensated taking as a violation of the fifth amendment than against a particular limitation of freedom of speech or press as a violation of the first.  

In this view, the "preferred position" controversy hardly has a point — indeed, it never has been really clear what is asserted or denied to have a preference and over what. Certainly the concept is pernicious if it implies that there is any simple, almost mechanistic basis for determining priorities of values having constitutional dimension, as when there is an inescapable conflict between claims to free press and a fair trial. It has a virtue, on the other hand, insofar as it recognizes that some ordering of social values is essential; that all cannot be given equal weight, if the Bill of Rights is to be maintained. Did Holmes mean any less than this when he lamented the tendency "toward underrating or forgetting the safeguards in bills of rights that had to be fought for in their day and that still are worth fighting for"? Only in that view could he have dissented in the Abrams and the Gitlow cases and have struggled so intensely to develop a principled delineation of the freedom that he  

81 See Holmes-Pollock Letters 25 (Howe ed. 1941); see also Holmes-Laski Letters 203, 329-30 (Howe ed. 1953); cf. 2 id. at 888.  
voted to sustain. Even if one thinks, as I confess I do, that his analysis does not succeed if it requires that an utterance designed to stimulate unlawful action must be accorded an immunity unless it is intended to achieve or creates substantial danger of immediate results, can anyone deny it his respect? Is not the force of a position framed in terms of principles of the neutrality and generality that Holmes achieved entirely different from that of the main opinion, for example, in the Swarey case, resting at bottom as it does, on principles of power separation among the branches of state government that never heretofore have been conceived to be a federal requirement and that, we safely may predict, the Court will not apply to any other field?

(4). — Finally, I turn to the decisions that for me provide the hardest test of my belief in principled adjudication, those in which the Court in recent years has vindicated claims that deprivations based on race deny the equality before the law that the fourteenth amendment guarantees. The crucial cases are, of course, those involving the white primary, the enforcement of racially restrictive covenants, and the segregated schools.

The more I think about the past the more skeptical I find myself about predictions of the future. Viewed a priori would you not have thought that the invention of the cotton gin in 1792 should have reduced the need for slave labor and hence diminished the attractiveness of slavery? Brooks Adams tells us that its con~stitutional~ity may have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years. It is in this perspective that I ask how far they rest on neutral principles and are entitled to approval in the only terms that I acknowledge to be relevant to a decision of the courts.

The primary and covenant cases present two different aspects of a single problem — that it is a state alone that is forbidden by the fourteenth amendment to deny equal protection of the laws, as only a state or the United States is precluded by the fifteenth amendment from denying or abridging on the ground of race or color the right of citizens of the United States to vote. It has, of course, been held for years that the prohibition of action by the state reaches not only an explicit deprivation by a statute but the rest of the state reaches not only an explicit deprivation by a statute but also action of the courts or of subordinate officials, purporting to exert authority derived from public office.

I deal first with the primary. So long as the Democratic Party in the South excluded Negroes from participation, in the exercise of an authority conferred by statute regulating political parties, it was entirely clear that the amendment was infringed; the exclusion involved an application of the statute. The problem became difficult only when the states, responding to these judgments, repealed the statutes, leaving parties free to define their membership as private associations, protected by the state but not directed


\[\text{See Korematsu v. United States, 323 U.S. 214 (1944).}\]

\[\text{See Newsweek, Dec. 29, 1948, p. 23.}\]

\[\text{See, e.g., Ex parte Virginia, 100 U.S. 339, 347 (1879); Hale, Freedom Through Law ch. xi (1951).}\]

or controlled or authorized by law. In this position the Court held in 1955 that an exclusion by the party was untouched by the amendment, being action of the individuals involved, not of the state or its officials.84

Then came the Classic case 85 in 1941, which I perhaps should say I argued for the Government. Classic involved a prosecution of election officials for depriving a voter of a right secured by the Constitution in willfully failing to count his vote as it was cast in a Louisiana Democratic primary. In holding that the right of a qualified voter to participate in choosing Representatives in Congress, a right conferred by article I, section 2,86 extended to participating in a primary which influenced the ultimate selection, the Court did not, of course, deal with the scope of party freedom to select its members. The victim of the fraud in Classic was a member of the Democratic Party, voting in a primary in which he was entitled to participate, and the only one in which he could.87

Yet three years later Classic was declared in Smith v. Allwright 88 to have determined in effect that primaries are a part of the election, with the consequence that parties can no more defend racial exclusion from their primaries than can the state, a result reaffirmed in 1953.89 This is no doubt a settled proposition in the

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86 "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."
87 The seventeenth amendment contains similar provisions for the choice of Senators.
88 The Government brief in Classic stated with respect to Grow: Moreover, what Article I, Section 2 secures is the right to choose. The implicit premise of the Grow decision is that the negroes excluded from the Democratic primary were legally free to record their choice by joining an opposition party or by organizing themselves. In the present case the voters exercised the right to choose in accordance with the contemplated method; and the wrong alleged deprived them of an opportunity to express their choice in any other way.
90 121 U.S. 649 (1944). Mr. Justice Frankfurter concurred only in the result. Mr. Justice Roberts alone dissented.
clusion, or does it embrace the owner's reasons for excluding if it buttresses his power by the law? Would a declaratory judgment that a fee is determinable if a racially restrictive limitation should be violated represent discrimination by the state upon the racial ground? Would a judgment of ejectment?

None of these questions has been answered by the Court nor are the problems faced in the opinions. Philadelphia, to be sure, has been told that it may not continue to administer the school for "poor male white orphans," established by the city as trustee under the will of Stephen Girard, in accordance with that racial limitation. All the Supreme Court said, however, was the following: "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment." When the Orphans' Court thereafter dismissed the city as trustee, appointing individuals in substitution, its action was sustained in Pennsylvania. Further review by certiorari was denied.

One other case in the Supreme Court has afforded opportunity for reconsidering the basis and scope of the Shelley principle, Black v. Cutter Labs. Here a collective-bargaining agreement was so construed that Communist Party membership was "just cause" for a discharge. In this view, California held that a worker was lawfully dismissed upon that ground. A Supreme Court majority concluded that this judgment involved nothing but interpretation of a contract, making irrelevant the standards that would govern the validity of a state that required the discharge. Only Mr. Chief Justice Warren and Justices Douglas and Black, dissenting, thought the principle of Shelley v. Kraemer was involved when the state court sustained the discharge.

Many understandably would like to perceive in the primary and covenant decisions a principle susceptible of broad extension, applying to the other power aggregates in our society limitations of the kind the Constitution has imposed on government. My colleague A. A. Berle, Jr., has, indeed, pointed to the large business corporation, which after all is chartered by the state and yields in many areas more power than the government, as uniquely suitable for choice as the next subject of such application. I doubt that the courts will yield to such temptations; and I do not hesitate to say that I prefer to see the issues faced through legislation, where there is room for drawing lines that courts are not equipped to draw. If this is right the two decisions I have mentioned will remain, as they now are, ad hoc determinations of their narrow problems, yielding no neutral principles for their extension or support.

Lastly, I come to the school decision, which for one of my persuasion stirs the deepest conflict I experience in testing the thesis I propose. Yet I would surely be engaged in playing Hamlet without Hamlet if I did not try to state the problems that appear to me to be involved.

The problem for me, I hardly need to say, is not that the Court departed from its earlier decisions holding or implying that the equality of public educational facilities demanded by the Constitution could be met by separate schools. I stand with the long tradition of the Court that previous decisions must be subject to reexamination when a case against their reasoning is made. Nor is the problem that the Court disturbed the settled patterns of a portion of the country; even that must be accepted as a lesser evil than nullification of the Constitution. Nor is it that history does not confirm that an agreed purpose of the fourteenth amendment was to forbid separate schools or that there is important evidence

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that many thought the contrary; 111 the words are general and leave room for expanding content as time passes and conditions change. Nor is it that the Court may have miscalculated the extent to which its judgment would be honored or accepted; it is not a prophet of the strength of our national commitment to respect the judgments of the courts. Nor is it even that the Court did not remit the issue to the Congress, acting under the enforcement clause of the amendment. That was a possible solution, to be sure, but certainly Professor Freund is right 112 that it would merely have evaded the claims made.

The problem inheres strictly in the reasoning of the opinion, an opinion which is often read with less fidelity by those who praise it than by those by whom it is condemned. The Court did not declare, as many wish it had, that the fourteenth amendment forbids all racial lines in legislation, though subsequent per curiam decisions may, as I have said, now go that far. Rather, as Judge Hand observed, 113 the separate-but-equal formula was not overruled “in form” but was held to have “no place” in public education on the ground that segregated schools are “inherently unequal,” with deleterious effects upon the colored children in implying their inferiority, effects which retard their educational and mental development. So, indeed, the district court had found as a fact in the Kansas case, a finding which the Supreme Court embraced, citing some further “modern authority” in its support. 114

Does the validity of the decision turn then on the sufficiency of evidence or of judicial notice to sustain a finding that the separation harms the Negro children who may be involved? There were, indeed, some witnesses who expressed that opinion in the Kansas case, 115 as there were also witnesses in the companion Virginia case, including Professor Garrett of Columbia, 116 whose view was to the contrary. Much depended on the question that the witness had in mind, which rarely was explicit. Was he comparing the position of the Negro child in a segregated school with his position in an integrated school where he was happily accepted and regarded by the whites; or was he comparing his position under separation with that under integration where the whites were hostile to his presence and found ways to make their feelings known? And if the harm that segregation worked was relevant, what of the benefits that it entailed: sense of security, the absence of hostility? Were they irrelevant? Moreover, was the finding in Topeka applicable without more to Clarendon County, South Carolina, with 2,799 colored students and only 295 whites? Suppose that more Negroes in a community preferred separation than opposed it? Would that be relevant to whether they were hurt or aided by segregation as opposed to integration? Their fates would be governed by the change of system quite as fully as those of the students who complained.

I find it hard to think the judgment really turned upon the facts. Rather, it seems to me, it must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved. For many who support the Court's decision this assuredly is the decisive ground. But this position also presents problems. Does it not involve an inquiry into the motive of the legislature, which is generally foreclosed to the courts? 117 Is it alternatively defensible to make the measure of validity of legislation the way it is interpreted by those who are affected by it? In the context of a charge that segregation with equal facilities is a denial of equality, is there not a point in Plessy in the statement that if "enforced separation stamps the colored race with a badge of inferiority" it is solely because its members choose "to put that construction upon it"? 118 Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is imposed by judgments predominantly male?

112 See Freund, Storm Over the American Supreme Court, 21 MODERN L. REV. 345, 352 (1958).
113 Id., supra note 2, at 54.
114 For a detailed account of the character and quality of research in this field, see Note, Grade School Segregation: The Latest Attack on Racial Discrimination, 61 Yale L.J. 730 (1952).
115 See Record, pp. 135-36, 153 (Hugh W. Speer), Brown v. Board of Educ., 347 U.S. 483 (1954); id. at 164-65 (William B. Brooker); id. at 170-71 (Louisa Holt); id. at 176-79 (John J. Kane).
117 Motive is open to examination when executive action is challenged as discriminatory, but there the purpose is to show that an admitted inequality of treatment was not inadvertent. See, e.g., Snowden v. Hughes, 321 U.S. 1 (1944). Even in such a case, invidious motivation alone has not been held to establish the inequality.
118 Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
Is a prohibition of miscegenation a discrimination against the colored member of the couple who would like to marry?

For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved. I think, and I hope not without foundation, that the Southern white also pays heavily for segregation, not only in the sense of guilt that he must carry but also in the benefits he is denied. In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court, before the present building was constructed, he did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess. Does not the problem of miscegenation show most clearly that it is the freedom of association that at bottom is involved, the only case, I may add, where it is implicit in the situation that association is desired by the only individuals involved? I take no pride in knowing that in 1956 the Supreme Court dismissed an appeal in a case in which Virginia nullified a marriage on this ground, a case in which the statute had been squarely challenged by the defendant, and the Court, after remanding once, dismissed per curiam on procedural grounds that I make bold to say are wholly without basis in the law.119

But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms — conflicts that Professor Sutherland has recently described.120 Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases.


THE PROBLEM OF SOCIAL COST

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THE PROBLEM TO BE EXAMINED

This paper is concerned with those actions of business firms which have harmful effects on others. The standard example is that of a factory the smoke from which has harmful effects on those occupying neighbouring properties. The economic analysis of such a situation has usually proceeded in terms of a divergence between the private and social product of the factory, in which economists have largely followed the treatment of Pigou in The Economics of Welfare. The conclusions to which this kind of analysis seems to have led most economists is that it would be desirable to make the owner of the factory liable for the damage caused to those injured by the smoke, or alternatively, to place a tax on the factory owner varying with the amount of smoke produced and equivalent in money terms to the damage it would cause, or finally, to exclude the factory from residential districts (and presumably from other

1 This article, although concerned with a technical problem of economic analysis, arose out of the study of the Political Economy of Broadcasting which I am now conducting. The argument of the present article was implicit in a previous article dealing with the problem of allocating radio and television frequencies (The Federal Communications Commission, 2 J. Law & Econ. (1959)) but comments which I have received seemed to suggest that it would be desirable to deal with the question in a more explicit way and without reference to the original problem for the solution of which the analysis was developed.
areas in which the emission of smoke would have harmful effects on others). It is my contention that the suggested courses of action are inappropriate, in that they lead to results which are not necessarily, or even usually, desirable.

II. The Reciprocal Nature of the Problem

The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm. I instanced in my previous completely satisfactory manner: when the damaging business has to pay for all damaging business has to pay for all damage caused and other means of attaining the same end...1

Let us suppose that a farmer and a cattle-raiser are operating on neighbouring proper-


Bystraying cattle which destroy crops growing on neighbouring land. Let us suppose that a farmer and a cattle-raiser are operating on neighbouring proper-

To simplify the argument, I propose to use an arithmetical example. I shall assume that the annual cost of fencing the farmer's property is $9 and that the price of the crop is $1 per ton. Also, I assume that the relation between the number of cattle in the herd and the annual crop loss is as follows:

<table>
<thead>
<tr>
<th>Number in Herd (Steers)</th>
<th>Annual Crop Loss (Tons)</th>
<th>Crop Loss per Additional Steer (Tons)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
<td>1</td>
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<tr>
<td>2</td>
<td>3</td>
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<tr>
<td>3</td>
<td>6</td>
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<tr>
<td>4</td>
<td>10</td>
<td>4</td>
</tr>
</tbody>
</table>

Given that the cattle-raiser is liable for the damage caused, the additional annual cost imposed on the cattle-raiser if he increased his herd from, say, 2 to 3 steers is $3 and in deciding on the size of the herd, he will take this into account along with his other costs. That is, he will not increase the size of the herd unless the value of the additional meat produced (assuming that the cattle-raiser slaughters the cattle), is greater than the additional costs that this will entail, including the value of the additional crops destroyed. Of course, if, by the employment of dogs, herdsmen, aeroplanes, mobile radio and other means, the amount of damage can be reduced, these means will be adopted when their cost is less than the value of the crop which they prevent being lost. Given that the annual cost of fencing is $9, the cattle-raiser who wished to have a herd with 4 steers or more would pay for fencing to be erected and maintained, assuming that other means of attaining the same end would not do so more cheaply. When the fence is erected, the marginal cost due to the liability for damage becomes zero, except to the extent that an increase in the size of the herd necessitates a stronger and therefore more expensive fence because more steers are liable to lean against it at the same time. But, of course, it may be cheaper for the cattle-raiser not to fence and to pay for the damaged crops, as in my arithmetical example, with 3 or fewer steers.

It might be thought that the fact that the cattle-raiser would pay for all crops damaged would lead the farmer to increase his planting if a cattle-raiser came to occupy the neighbouring property. But this is not so. If the crop was previously sold in conditions of perfect competition, marginal cost was equal...
to price for the amount of planting undertaken and any expansion would have reduced the profits of the farmer. In the new situation, the existence of crop damage would mean that the farmer would sell less on the open market but his receipts for a given production would remain the same, since the cattle-raiser would pay the market price for any crop damaged. Of course, if cattle-raising commonly involved the destruction of crops, the coming into existence of a cattle-raising industry might raise the price of the crops involved and farmers would then extend their planting. But I wish to confine my attention to the individual farmer.

I have said that the occupation of a neighbouring property by a cattle-raiser would not cause the amount of production, or perhaps more exactly the amount of planting, by the farmer to increase. In fact, if the cattle-raising has any effect, it will be to decrease the amount of planting. The reason for this is that, for any given tract of land, if the value of the crop damaged is so great that the receipts from the sale of the undamaged crop are less than the total costs of cultivating that tract of land, it will be profitable for the farmer and the cattle-raiser to make a bargain whereby that tract of land is left uncultivated. This can be made clear by means of an arithmetical example. Assume initially that the value of the crop obtained from cultivating a given tract of land is $12 and that the cost incurred in cultivating this tract of land is $10, the net gain from cultivating the land being $2. Assume for purposes of simplicity that the farmer owns the land. Now assume that the cattle-raiser starts operations on the neighbouring property and that the value of the crops damaged is $1. In this case $11 is obtained by the farmer from sale on the market and $1 is obtained from the cattle-raiser for damage suffered and the net gain remains $2. Now suppose that the cattle-raiser finds it profitable to increase the size of his herd, even though the amount of damage rises to $3; which means that the value of the additional meat production is greater than the additional costs, including the additional $2 payment for damage. But the total payment for damage is now $3. The net gain to the farmer from cultivating the land is still $2. The cattle-raiser would be better off if the farmer would agree not to cultivate his land for any payment less than $3. The farmer would be agreeable to not cultivating the land for any payment greater than $2. There is clearly room for a mutually satisfactory bargain which would lead to the abandonment of cultivation. But the same argument applies not only to the whole tract cultivated by the farmer but also to any subdivision of it. Suppose, for example, that the cattle have a well-defined route, say, to a brook or to a shady area. In these circumstances, the amount of damage to the crop along the route may well be great and if so, it could be that the farmer and the cattle-raiser would find it profitable to make a bargain whereby the farmer would agree not to cultivate this strip of land.

But this raises a further possibility. Suppose that there is such a well-defined route. Suppose further that the value of the crop that would be obtained by cultivating this strip of land is $10 but that the cost of cultivation is $11. In the absence of the cattle-raiser, the land would not be cultivated. However, given the presence of the cattle-raiser, it could well be that if the strip was cultivated, the whole crop would be destroyed by the cattle. In such case, the cattle-raiser would be forced to pay $10 to the farmer. It is true that the farmer would lose $1. But the cattle-raiser would lose $10. Clearly this is a situation which is not likely to last indefinitely since neither party would want this to happen. The aim of the farmer would be to induce the cattle-raiser to make a payment in return for an agreement to leave this land uncultivated. The farmer would not be able to obtain a payment greater than the cost of fencing off this piece of land nor so high as to lead the cattle-raiser to abandon the use of the neighbouring property. What payment would in fact be made would depend on the shrewdness of the farmer and the cattle-raiser as bargainers. But as the payment would not be so high as to cause the cattle-raiser to abandon this location and as it would not vary with the size of the herd, such an agreement would not affect the allocation of resources but would merely alter the distribution of income and wealth as between the cattle-raiser and the farmer.

I think it is clear that if the cattle-raiser is liable for damage caused and the pricing system works smoothly, the reduction in the value of production elsewhere will be taken into account in computing the additional cost involved in increasing the size of the herd. This cost will be weighed against the value of the additional meat production and, given perfect competition in the cattle industry, the allocation of resources in cattle-raising will be optimal. What needs to be emphasized is that the fall in the value of production elsewhere which would be taken into account in the costs of the cattle-raiser may well be less than the damage which the cattle would cause to the crops in the ordinary course of events. This is because it is possible, as a result of market transactions, to discontinue cultivation of the land. This is desirable in all
cases in which the damage that the cattle would cause, and for which the cattle-raiser would be willing to pay, exceeds the amount which the farmer would pay for use of the land. In conditions of perfect competition, the amount which the farmer would pay for the use of the land is equal to the difference between the value of the total production when the factors are employed on this land and the value of the additional product yielded in their next best use (which would be what the farmer would have to pay for the factors). If damage exceeds the amount the farmer would pay for the use of the land, the value of the additional product of the factors employed elsewhere would exceed the value of the total product in this use after damage is taken into account. It follows that it would be desirable to abandon cultivation of the land and to release the factors employed for production elsewhere. A procedure which merely provided for payment for damage to the crop caused by the cattle but which did not allow for the possibility of cultivation being discontinued would result in too small an employment of factors of production in cattle-raising and too large an employment of factors in cultivation of the crop. But given the possibility of market transactions, a situation in which damage to crops exceeded the rest of the land would not endure. Whether the cattle-raiser pays the farmer to leave the land uncultivated or himself rents the land by paying the land-owner an amount slightly greater than the farmer would pay (if the farmer was himself renting the land), the final result would be the same and would maximise the value of production. Even when the farmer is induced to plant crops which it would not be profitable to cultivate for sale on the market, this will be a purely short-term phenomenon and may be expected to lead to an agreement under which the planting will cease. The cattle-raiser will remain in that location and the marginal cost of meat production will be the same as before, thus having no long-run effect on the allocation of resources.

IV. The Pricing System with No Liability for Damage

I now turn to the case in which, although the pricing system is assumed to work smoothly (that is, costlessly), the damaging business is not liable for any of the damage which it causes. This business does not have to make a payment to those damaged by its actions. I propose to show that the allocation of resources will be the same in this case as it was when the damaging business was liable for damage caused. As I showed in the previous case that the allocation of resources was optimal, it will not be necessary to repeat this part of the argument.

I return to the case of the farmer and the cattle-raiser. The farmer would suffer increased damage to his crop as the size of the herd increased. Suppose that the size of the cattle-raiser's herd is 3 steers (and that this is the size of the herd that would be maintained if crop damage was not taken into account). Then the farmer would be willing to pay up to $3 if the cattle-raiser would reduce his herd to 2 steers, up to $5 if the herd were reduced to 1 steer and would pay up to $6 if cattle-raising was abandoned. The cattle-raiser would therefore receive $3 from the farmer if he kept 2 steers instead of 3. This $3 foregone is therefore part of the cost incurred in keeping the third steer. Whether the $3 is a payment which the cattle-raiser has to make if he adds the third steer to his herd (which it would be if the cattle-raiser was liable to the farmer for damage caused to the crop) or whether it is a sum of money which he would have received if he did not keep a third steer (which it would be if the cattle-raiser was not liable to the farmer for damage caused to the crop) does not affect the final result. In both cases $3 is part of the cost of adding a third steer, to be included along with the other costs. If the increase in the value of production in cattle-raising through increasing the size of the herd from 2 to 3 is greater than the additional costs that have to be incurred (including the $3 damage to crops), the size of the herd will be increased. Otherwise, it will not. The size of the herd will be the same whether the cattle-raiser is liable for damage caused to the crop or not.

It may be argued that the assumed starting point—a herd of 3 steers—was arbitrary. And this is true. But the farmer would not wish to pay to avoid crop damage which the cattle-raiser would not be able to cause. For example, the maximum annual payment which the farmer could be induced to pay could not exceed $9, the annual cost of fencing. And the farmer would only be willing to pay this sum if it did not reduce his earnings to a level that would cause him to abandon cultivation of this particular tract of land. Furthermore, the farmer would only be willing to pay this amount if he believed that, in the absence of any payment by him, the size of the herd maintained by the cattle-raiser would be 4 or more steers. Let us assume that this is the case. Then the farmer would be willing to pay up to $3 if the cattle-raiser would reduce his herd to 3 steers, up to $6 if the herd were reduced to 2 steers, up to $8 if one steer only were kept and up to $9 if cattle-raising were abandoned. It will be noticed that the change in the starting point has not altered the amount which would accrue to the cattle-raiser if he reduced the size of his herd by any given amount. It is still true that the cattle-raiser could receive an additional $3 from the farmer if he agreed to reduce his herd from 3 steers to 2 and that the $3 represents the value of the crop that would be destroyed by adding the third steer to the herd. Although a different belief on the part of the farmer (whether justified or not) about the size of the herd that the cattle-raiser would maintain in the absence of payments from him may affect the total payment he can be induced to pay, it is not true that this different belief would have any effect on the size of the herd that the cattle-raiser will actually keep. This will be the same as it would be if the cattle-raiser had to pay for damage caused by his cattle, since a receipt foregone of a given amount is the equivalent of a payment of the same amount.

It might be thought that it would pay the cattle-raiser to increase his herd
above the size that he would wish to maintain once a bargain had been made, in order to induce the farmer to make a larger total payment. And this may be true. It is similar in nature to the action of the farmer (when the cattle-raiser was liable for damage) in cultivating land on which, as a result of an agreement with the cattle-raiser, planting would subsequently be abandoned (including land which would not be cultivated at all in the absence of cattle-raising). But such manoeuvres are preliminaries to an agreement and do not affect the long-run equilibrium position, which is the same whether or not the cattle-raiser is held responsible for the crop damage brought about by his cattle.

It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.

V. The Problem Illustrated Anew

The harmful effects of the activities of a business can assume a wide variety of forms. An early English case concerned a building which, by obstructing currents of air, hindered the operation of a windmill.8 A recent case in Florida concerned a building which cast a shadow on the cabana, swimming pool and sunbathing areas of a neighbouring hotel.9 The problem of straying cattle and the damaging of crops which was the subject of detailed examination in the two preceding sections, although it may have appeared to be rather a special case, is in fact but one example of a problem which arises in many different guises. To clarify the nature of my argument and to demonstrate its general applicability, I propose to illustrate it anew by reference to four actual cases.

Let us first reconsider the case of Sturges v. Bridgeman10 which I used as an illustration of the general problem in my article on "The Federal Communications Commission." In this case, a confectioner (in Wigmore Street) used two mortars and pestles in connection with his business (one had been in operation in the same position for more than 60 years and the other for more than 26 years). A doctor then came to occupy neighbouring premises (in Wimpole Street). The confectioner's machinery caused the doctor no harm until, eight years after he had first occupied the premises, he built a consulting room at the end of his garden right against the confectioner's kitchen. It was then found that the noise and vibration caused by the confectioner's machin-

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9 See Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (1959).
10 11 Ch. D. 852 (1879).

ery made it difficult for the doctor to use his new consulting room. "In particular... the noise prevented him from examining his patients by auscultation11 for diseases of the chest. He also found it impossible to engage with effect in any occupation which required thought and attention." The doctor therefore brought a legal action to force the confectioner to stop using his machinery. The courts had little difficulty in granting the doctor the injunction he sought. "Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes."

The court's decision established that the doctor had the right to prevent the confectioner from using his machinery. But, of course, it would have been possible to modify the arrangements envisaged in the legal ruling by means of a bargain between the parties. The doctor would have been willing to waive his right and allow the machinery to continue in operation if the confectioner would have paid him a sum of money which was greater than the loss of income which he would suffer from having to move to a more costly or less convenient location or from having to curtail his activities at this location or, as was suggested as a possibility, from having to build a separate wall which would deaden the noise and vibration. The confectioner would have been willing to do this if the amount he would have to pay the doctor was less than the fall in income he would suffer if he had to change his mode of operation at this location, abandon his operation or move his confectionery business to some other location. The solution of the problem depends essentially on whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's.12 But now consider the situation if the confectioner had won the case. The confectioner would then have had the right to continue operating his noise and vibration-generating machinery without having to pay anything to the doctor. The boot would have been on the other foot: the doctor would have had to pay the confectioner to induce him to stop using the machinery. If the doctor's income would have fallen more than the income of the confectioner than it added to the income of the confectioner, there would clearly be room for a bargain whereby the doctor paid the confectioner to stop using the machinery. That is to say, the circumstances in which it would not pay the confectioner to continue to use the machinery and to compensate the doctor for the losses that this would bring (if the doctor had the right to prevent the confectioner's using his

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11 Auscultation is the act of listening by ear or stethoscope in order to judge by sound the condition of the body.
12 Note that what is taken into account is the change in income after allowing for alterations in methods of production, location, character of product, etc.
machine) would be those in which it would be in the interest of the doctor to make a payment to the confectioner which would induce him to discontinue the use of the machinery (if the confectioner had the right to operate the machinery). The basic conditions are exactly the same in this case as they were in the example of the cattle which destroyed crops. With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources. It was of course the view of the judges that they were affecting the working of the economic system—and in a desirable direction. Any other decision would have had "a prejudicial effect upon the development of land for residential purposes," an argument which was elaborated by examining the example of a forge operating on a barren moor, which was later developed for residential purposes. The judges' view that they were settling how the land was to be used would be true only in the case in which the costs of carrying out the necessary market transactions exceeded the gain which might be achieved by any rearrangement of rights. And it would be desirable to preserve the areas (Wimpole Street or the moor) for residential or professional use (by giving non-industrial users the right to stop the noise, vibration, smoke, etc., by injunction) only if the value of the additional residential facilities obtained was greater than the value of cakes or iron lost. But of this the judges seem to have been unaware.

Another example of the same problem is furnished by the case of Cooke v. Forbes.10 One process in the weaving of cocoa-nut fibre matting was to immerse it in bleaching liquids after which it was hung out to dry. Fumes from a manufacturer of sulphate of ammonia had the effect of turning the matting from a bright to a dull and blackish colour. The reason for this was that the bleaching liquid contained chloride of tin, which, when affected sulphuretted hydrogen, is turned to a darker colour. An injunction was sought to stop the manufacturer from emitting the fumes. The lawyers for the defendant argued that if the plaintiff "were not to use... a particular bleaching liquid, their fibre would not be affected; that their process is unusual, not according to the custom of the trade, and even damaging to their own fabrics." The judge commented: "... it appears to me quite plain that a person has a right to carry on upon his own property a manufacturing process in which he uses chloride of tin, or any sort of metallic dye, and that his neighbour is not at liberty to pour in gas which will interfere with his manufacture. If it can be traced to the neighbour, then, I apprehend, clearly he will have a right to come here and ask for relief." But in view of the fact that the damage was accidental and occasional, that careful precautions were taken and that there was no exceptional risk, an injunction was refused, leaving the plaintiff to bring an action for damages if he wished. What the subsequent developments were I do not know. But it is clear that the situation is essentially the same as that found in Sturges v. Bridgman, except that the cocoa-nut fibre matting manufacturer could not secure an injunction but would have to seek damages from the sulphate of ammonia manufacturer. The economic analysis of the situation is exactly the same as with the cattle which destroyed crops. To avoid the damage, the sulphate of ammonia manufacturer could increase his precautions or move to another location. Either course would presumably increase his costs. Alternatively he could pay for the damage. This he would do if the payments for damage were less than the additional costs that would have to be incurred to avoid the damage. The payments for damage would then become part of the cost of production of sulphate of ammonia. Of course, if, as was suggested in the legal proceedings, the amount of damage could be eliminated by changing the bleaching agent (which would presumably increase the costs of the matting manufacturer) and if the additional cost was less than the damage that would otherwise occur, it should be possible for the two manufacturers to make a mutually satisfactory bargain whereby the new bleaching agent was used. Had the court decided against the matting manufacturer, as a consequence of which he would have had to suffer the damage without compensation, the allocation of resources would not have been affected. It would pay the matting manufacturer to change his bleaching agent if the additional cost involved was less than the reduction in damage. And since the matting manufacturer would be willing to pay the sulphate of ammonia manufacturer an amount up to his loss of income (the increase in costs or the damage suffered) if he would cease his activities, this loss of income would remain a cost of production for the manufacturer of sulphate of ammonia. This case is indeed analytically exactly the same as the cattle example.

Bryant v. Lefton11 raised the problem of the smoke nuisance in a novel form. The plaintiff and the defendants were occupiers of adjoining houses, which were of about the same height. Before 1876 the plaintiff was able to light a fire in any room of his house without the chimneys smoking: the two houses had remained in the same condition some thirty or forty years. In 1876 the defendants took down their house, and began to rebuild it. They carried up a wall by the side of the plaintiff's chimneys much beyond its original height, and stacked timber on the roof of their house, and thereby caused the plaintiff's chimneys to smoke whenever he lighted fires.

The reason, of course, why the chimneys smoked was that the erection of the wall and the stacking of the timber prevented the free circulation of air. In a trial before a jury, the plaintiff was awarded damages of £40. The case then went to the Court of Appeals where the judgment was reversed. Bramwell, L.J., argued:

10 L. R. 5 Eq. 166 (1867-1868).

11 4 C.P.D. 172 (1878-1879).
it is said, and the jury have found, that the defendants have done that which caused a nuisance to the plaintiff's house. We think there is no evidence of this. No doubt there is a nuisance, but it is not of the defendant's causing. They have done nothing in causing the nuisance. Their house and their timber are harmless enough. It is the plaintiff who causes the nuisance by lighting a coal fire in the chimney of which is placed so near the defendants' wall, that the smoke does not escape, but comes into the house. Let the plaintiff cease to light his fire, let him move his chimney, let him carry it higher, and there would be no nuisance. Who then, causes it? It would be very clear that the plaintiff did, if he had built his house or chimney after the defendants had put up the timber on theirs, and it is really the same though he did so before the timber was there. But (what is in truth the same answer), if the defendants cause the nuisance, they have a right to do so. If the plaintiff has not the right to the passage of air, except subject to the defendants' right to build or put timber on their house, then his right is subject to their right, and though a nuisance follows from the exercise of their right, they are not liable.

And Cotton, L.J., said:

Here it is found that the erection of the defendants' wall has sensibly and materially interfered with the comfort of human existence in the plaintiff's house, and it is said this is a nuisance for which the defendants are liable. Ordinarily this is so, but the defendants have done so, not by sending on to the plaintiff's property any smoke or noxious vapour, but by interrupting the egress of smoke from the plaintiff's house in a way to which ... the plaintiff has no legal right. The plaintiff creates the smoke, which interferes with his comfort. Unless he has ... a right to get rid of this in a particular way which has been interfered with by the defendants, he cannot sue the defendants, because the smoke made by himself, for which he has not provided any efficacious means of escape, causes him annoyance. It is as if a man tried to get rid of liquid filth arising on his own land by a drain into his neighbour's land. Until a right had been acquired by user, the neighbour might stop the drain without incurring liability by so doing. No doubt great inconvenience would be caused to the owner of the property on which the liquid filth arises. But the act of his neighbour would be a lawful act, and he would not be liable for the consequences attributable to the fact that the man had accumulated filth without providing any efficacious means of getting rid of it.

I do not propose to show that any subsequent modification of the situation, as a result of bargains between the parties (conditioned by the cost of stacking the timber elsewhere, the cost of extending the chimney higher, etc.), would have exactly the same result whatever decision the courts had come to since this point has already been adequately dealt with in the discussion of the cattle example and the two previous cases. What I shall discuss is the argument of the judges in the Court of Appeals that the smoke nuisance was not caused by the man who erected the wall but by the man who lit the fires. The novelty of the situation is that the smoke nuisance was suffered by the man who lit the fires and not by some third person. The question is not a trivial one since it lies at the heart of the problem under discussion. Who caused the smoke nuisance? The answer seems fairly clear. The smoke nuisance was caused both by the man who built the wall and by the man who lit the fires. Given the fires, there would have been no smoke nuisance without the wall; given the wall, there would have been no smoke nuisance without the fires. Eliminate the wall or the fires and the smoke nuisance would disappear. On the marginal principle it is clear that both were responsible and both should be forced to include the loss of amenity due to the smoke as a cost in deciding whether to continue the activity which gives rise to the smoke. And given the possibility of market transactions, this is what would in fact happen. Although the wall-builder was not liable legally for the nuisance, as the man with the smoking chimneys would presumably be willing to pay a sum equal to the monetary worth to him of eliminating the smoke, this sum would therefore become for the wall-builder, a cost of continuing to have the high wall with the timber stacked on the roof.

The judges' contention that it was the man who lit the fires who alone caused the smoke nuisance is true only if we assume that the wall is the given factor. This is what the judges did by deciding that the man who erected the higher wall had a legal right to do so. The case would have been even more interesting if the smoke from the chimneys had injured the timber. Then it would have been the wall-builder who suffered the damage. The case would then have closely paralleled Sturges v. Bridgeman and there can be little doubt that the man who lit the fires would have been liable for the ensuing damage to the timber, in spite of the fact that no damage had occurred until the high wall was built by the man who owned the timber.

Judges have to decide on legal liability but this should not confuse economists about the nature of the economic problem involved. In the case of the cattle and the crops, it is true that there would be no crop damage without the cattle. It is equally true that there would be no crop damage without the fires. The doctor's work would not have been disturbed if the confectioner had not worked his machinery; but the machinery would have disturbed no one if the doctor had not set up his consulting room in that particular place. The matting was blackened by the fumes from the sulphate of ammonia manufacturer; but no damage would have occurred if the matting manufacturer had not chosen to hang out his matting in a particular place and to use a particular bleaching agent. If we are to discuss the problem in terms of causation, both parties cause the damage. If we are to attain an optimum allocation of resources, it is therefore desirable that both parties should take the harmful effect (the nuisance) into account in deciding on their course of action. It is one of the beauties of a smoothly operating pricing system that, as has already been explained, the fall in the value of production due to the harmful effect would be a cost for both parties.
**Bass v. Gregory** will serve as an excellent final illustration of the problem. The plaintiffs were the owners and tenant of a public house called the Jolly Anglers. The defendant was the owner of some cottages and a yard adjoining the Jolly Anglers. Under the public house was a cellar excavated in the rock. From the cellar, a hole or shaft had been cut into an old well situated in the defendant's yard. The well therefore became the ventilating shaft for the cellar. The cellar had been used for a particular purpose in the process of brewing, which, without ventilation, could not be carried on. The cause of the action was that the defendant removed a grate from the mouth of the well, "so as to stop or prevent the free passage of air from [the] cellar upwards through the well..." What caused the defendant to take this step is not clear from the report of the case. Perhaps the air... impregnated by the brewing operations which "passed up the well and out into the open air" was offensive to him. At any rate, he preferred to have the well in his yard stopped up. The court had first to determine whether the owners of the public house could have a legal right to a current of air. If they were to have such a right, this case would have to be distinguished from Bryant v. Lejeune (already considered). This, however, presented no difficulty. In this case, the current of air was confined to "a strictly defined channel." In the case of Bryant v. Lejeune, what was involved was the "general current of air common to all mankind." The judge therefore held that the owners of the public house could have the right to a current of air whereas the owner of the private house in Bryant v. Lejeune could not. An economist might be tempted to add "but the air moved all the same." However, all that had been decided at this stage of the argument was that there could be a legal right, not that the owners of the public house possessed it. But evidence showed that the shaft from the cellar to the well had existed for over forty years and that the use of the well as a ventilating shaft must have been known to the owners of the yard since the air, when it emerged, smelt of the brewing operations. The judge therefore held that the public house had such a right by the "doctrine of lost grant." This doctrine states that if a legal right is proved to have existed and been exercised for a number of years the law ought to presume that it had a legal origin. So the owner of the cottages and yard had to unstop the well and endure the smell.

**VI. THE COST OF MARKET TRANSACTIONS TAKEN INTO ACCOUNT**

The argument has proceeded up to this point on the assumption (explicit in Sections III and IV and tacit in Section V) that there were no costs involved in carrying out market transactions. This is, of course, a very unrealistic assumption. In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost. In earlier sections, when dealing with the problem of the rearrangement of legal rights through the market, it was argued that such a rearrangement would be made through the market whenever this would lead to an increase in the value of production. But this assumed costless market transactions. Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement
is greater than the costs which would be involved in bringing it about. When it is less, the granting of an injunction (or the knowledge that it would be granted) or the liability to pay damages may result in an activity being discontinued (or may prevent its being started) which would be undertaken if market transactions were costless. In these conditions the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates. One arrangement of rights may bring about a greater value of production than any other. But unless this is the arrangement of rights established by the legal system, the costs of reaching the same result by altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production which it would bring, may never be achieved. The part played by economic considerations in the process of delimiting legal rights will be discussed in the next section. In this section, I will take the initial delimitation of rights and the costs of carrying out market transactions as given.

It is clear that an alternative form of economic organisation which could achieve the same result at less cost than would be incurred by using the market would enable the value of production to be raised. As I explained many years ago, the firm represents such an alternative to organising production through market transactions. Within the firm individual bargains between the various cooperating factors of production are eliminated and for a market transaction is substituted an administrative decision. The rearrangement of production then takes place without the need for bargains between the owners of the factors of production. A landowner who has control of a large tract of land may devote his land to various uses taking into account the effect that the interrelations of the various activities will have on the net return of the land, thus rendering unnecessary bargains between those undertaking the various activities. Owners of a large building or of several adjoining properties in a given area may act in much the same way. In effect, using our earlier terminology, the firm would acquire the legal rights through the market may be substituted an administrative decision. The rearrangement of production then takes place without the need for bargains between the owners of the factors of production. A landowner who has control of a large tract of land may devote his land to various uses taking into account the effect that the interrelations of the various activities will have on the net return of the land, thus rendering unnecessary bargains between those undertaking the various activities. Owners of a large building or of several adjoining properties in a given area may act in much the same way.

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An alternative solution is direct Government regulation. Instead of instituting a legal system of rights which can be modified by transactions on the market, the government may impose regulations which state what people must or must not do and which have to be obeyed. Thus, the government (by statute or perhaps more likely through an administrative agency) may, to deal with the problem of smoke nuisance, decree that certain methods of production should or should not be used (e.g. that smoke preventing devices should be installed or that coal or oil should not be burned) or may confine certain types of business to certain districts (zoning regulations).

The government is, in a sense, a super-firm (but of a very special kind) since it is able to influence the use of factors of production by administrative decision. But the ordinary firm is subject to checks in its operations because of the competition of other firms, which might administer the same activities at lower cost and also because there is always the alternative of market transactions as against organisation within the firm if the administrative costs become too great. The government is able, if it wishes, to avoid the market altogether, which a firm can never do. The firm has to make market agreements with the owners of the factors of production that it uses. Just as the government can conscript or seize property, so it can decree that factors of production should only be used in such-and-such a way. Such authoritarian methods save a lot of trouble (for those doing the organising). Furthermore, the government has at its disposal the police and the other law enforcement agencies to make sure that its regulations are carried out.

It is clear that the government has powers which might enable it to get some things done at a lower cost than could a private organisation (or at any...
rate one without special governmental powers). But the governmental administrative machine is not itself costless. It can, in fact, on occasion be extremely costly. Furthermore, there is no reason to suppose that the restrictive and zoning regulations, made by a fallible administration subject to political pressures and operating without any competitive check, will necessarily always be those which increase the efficiency with which the economic system operates. Furthermore, such general regulations which must apply to a wide variety of cases will be enforced in some cases in which they are clearly inappropriate. From these considerations it follows that direct governmental regulation will not necessarily give better results than leaving the problem to be solved by the market or the firm. But equally there is no reason why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency. This would seem particularly likely when, as normally the case with the smoke nuisance, a large number of people are involved and in which therefore the costs of handling the problem through the market or the firm may be high.

There is, of course, a further alternative, which is to do nothing about the problem at all. And given that the costs involved in solving the problem by regulations issued by the governmental administrative machine will often be heavy (particularly if the costs are interpreted to include all the consequences which follow from the Government engaging in this kind of activity), it will no doubt be commonly the case that the gain which would come from regulating the actions which give rise to the harmful effects will be less than the costs involved in Government regulation.

The discussion of the problem of harmful effects in this section (when the costs of market transactions are taken into account) is extremely inadequate. But at least it has made clear that the problem is one of choosing the appropriate social arrangement for dealing with the harmful effects. All solutions have costs and there is no reason to suppose that government regulation is called for simply because the problem is not well handled by the market or the firm. Satisfactory views on policy can only come from a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects. Economists need to study the work of the broker in bringing parties together, the effectiveness of restrictive covenants, the problems of the large-scale real-estate development company, the operation of Government zoning and other regulating activities. It is my belief that economists, and policy-makers generally, have tended to over-estimate the advantages which come from governmental regulation. But this belief, even if justified, does not do more than suggest that government regulation should be curtailed. It does not tell us where the boundary line should be drawn. This, it seems to me, has to come from a detailed investigation of the actual results of handling the problem in different ways. But it would be unfortunate if this investigation were undertaken with the aid of a faulty economic analysis. The aim of this article is to indicate what the economic approach to the problem should be.

VII. THE LEGAL DELIMITATION OF RIGHTS AND THE ECONOMIC PROBLEM

The discussion in Section V not only served to illustrate the argument but also afforded a glimpse at the legal approach to the problem of harmful effects. The cases considered were all English but a similar selection of American cases could easily be made and the character of the reasoning would have been the same. Of course, if market transactions were costless, all that matters (questions of equity apart) is that the rights of the various parties should be well-defined and the results of legal actions easy to forecast. But as we have seen, the situation is quite different when market transactions are so costly as to make it difficult to change the arrangement of rights established by the law. In such cases, the courts directly influence economic activity. It would therefore seem desirable that the courts should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions. Even when it is possible to change the legal delimitation of rights through market transactions, it is obviously desirable to reduce the need for such transactions and thus reduce the employment of resources in carrying them out.

A thorough examination of the presuppositions of the courts in trying such cases would be of great interest but I have not been able to attempt it. Nevertheless it is clear from a cursory study that the courts have often recognized the economic implications of their decisions and are aware (as many economists are not) of the reciprocal nature of the problem. Furthermore, from time to time, they take these economic implications into account, along with other factors, in arriving at their decisions. The American writers on this subject refer to the question in a more explicit fashion than do the British. Thus, to quote Prosser on Torts, a person may make use of his own property or . . . conduct his own affairs at the expense of some harm to his neighbors. He may operate a factory whose noise and smoke cause some discomfort to others, so long as he keeps within reasonable bounds. It is only when his conduct is unreasonable, in the light of its utility and the harm which results [italics added], that it becomes a nuisance. . . . As it was said in an ancient case in regard to candle-making in a town, "Le utility del chose excusara le noisomeness del stink."

The world must have factories, smelters, oil refineries, noisy machinery and blasting, even at the expense of some inconvenience to those in the vicinity and the
plaintiff may be required to accept some not unreasonable discomfort for the general good.16

The standard British writers do not state as explicitly as this that a comparison between the utility and harm produced is an element in deciding whether a harmful effect should be considered a nuisance. But similar views, if less strongly expressed, are to be found.17 The doctrine that the harmful effect must be substantial before the court will act is, no doubt, in part a reflection of the fact that there will almost always be some gain to offset the harm. And in the reports of individual cases, it is clear that the judges have had in mind what would be lost as well as what would be gained in deciding whether to grant an injunction or award damages. Thus, in refusing to prevent the destruction of a prospect by a new building, the judge stated:

I know no general rule of common law, which . . . says, that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns; and I must grant injunctions to all the new buildings in this town. . . .18

In Webb v. Bird19 it was decided that it was not a nuisance to build a schoolhouse so near a windmill as to obstruct currents of air and hinder the working of the mill. An early case seems to have been decided in an opposite direction. Gale commented:

In old maps of London a row of windmills appears on the heights to the north of London. Probably in the time of King James it was thought an alarming circumstance, as affecting the supply of food to the city, that anyone should build so near them as to take the wind out from their sails.20

In one of the cases discussed in section V, Sturges v. Bridgman, it seems clear that the judges were thinking of the economic consequences of alternative decisions. To the argument that if the principle that they seemed to be following


of which would no doubt consider the availability of fish-and-chips to outweigh the pervading odour and "fog or mist" so graphically described by the plaintiff. Had there been no other "more suitable place in the neighbourhood," the case would have been more difficult and the decision might have been different. What would "the poor people" have had for food? No English judge would have said: "Let them eat cake."

The courts do not always refer very clearly to the economic problem posed by the cases brought before them but it seems probable that in the interpretation of words and phrases like "reasonable" or "common or ordinary use" there is some recognition, perhaps largely unconscious and certainly not very explicit, of the economic aspects of the questions at issue. A good example of this would seem to be the judgment in the Court of Appeals in Andrews v. Selfridge and Company Ltd.26 In this case, a hotel (in Wigmore Street) was situated on part of an island site. The remainder of the site was acquired by Selfridges which demolished the existing buildings in order to erect another in their place. The hotel suffered a loss of custom in consequence of the noise and dust caused by the demolition. The owner of the hotel brought an action against Selfridges for damages. In the lower court, the hotel was awarded £4,500 damages. The case was then taken on appeal.

The judge who had found for the hotel proprietor in the lower court said:

I cannot regard what the defendants did on the site of the first operation as having been commonly done in the ordinary use and occupation of land or houses. It is neither usual nor common, in this country, for people to excavate a site to a depth of 60 feet and then to erect upon that site a steel framework and fasten the steel frames together with rivets. . . . Nor is it, I think, a common or ordinary use of land, in this country, for people to excavate a site to a depth of 60 feet and then to erect upon that site a steel framework and fasten the steel frames together with rivets. . . . Nor is it, I think, a common or ordinary use of land, in this country, to act as the defendants did when they were dealing with the site of their second operation—namely, to demolish all the houses that they had to demolish, five or six of them I think, if not more, and to use for the purpose of demolishing them pneumatic hammers.

Sir Wilfred Greene, M.R., speaking for the Court of Appeals, first noted that when one is dealing with temporary operations, such as demolition and re-building, everybody has to put up with a certain amount of discomfort, because operations of that kind cannot be carried on at all without a certain amount of noise and a certain amount of dust. Therefore, the rule with regard to interference must be read subject to this qualification. . . .

He then referred to the previous judgment:

With great respect to the learned judge, I take the view that he has not approached this matter from the correct angle. It seems to me that it is not possible to say . . . that the type of demolition, excavation and construction in which the defendant company was engaged in the course of these operations was of such an abnormal and unusual nature as to prevent the qualification to which I have referred coming into operation. It seems to me that, when the rule speaks of the common or ordinary use of land, it does not mean that the methods of using land and building on it are in some way to be stabilised for ever. As time goes on new inventions or new methods enable land to be more profitably used, either by digging down into the earth or by mounting up into the skies. Whether, from other points of view, that is a matter which is desirable for humanity is neither here nor there; but it is part of the normal use of land, to make use upon your land, in the matter of construction, of what particular type and what particular depth of foundations and particular height of building may be reasonable, in the circumstances, and in view of the developments of the day. . . . Guests at hotels are very easily upset. People coming to this hotel, who were accustomed to a quiet outlook at the back, coming back and finding demolition and building going on, may very well have taken the view that the particular merit of this hotel no longer existed. That would be a misfortune for the plaintiff; but assuming that there was nothing wrong in the defendant company's works, assuming the defendant company was carrying on the demolition and its building, productive of noise though it might be, with all reasonable skill, and taking all reasonable precautions not to cause annoyance to its neighbors, then the plaintiff might lose all her clients in the hotel because they have lost the amenities of an open and quiet place behind, but she would have no cause of complaint. . . . [But those] who say that their interference with the comfort of their neighbors is justified because their operations are normal and usual and conducted with proper care and skill are under a specific duty . . . to use that reasonable and proper care and skill. It is not a correct attitude to take to say: 'We will go on and do what we like until somebody complains!' . . . Their duty is to take proper precautions and to see that the nuisance is reduced to a minimum. It is no answer for them to say: 'But this would mean that we should have to do the work more slowly than we would like to do it, or it would involve putting us to some extra expense.' All these questions are matters of common sense and degree, and quite clearly it would be unreasonable to expect people to conduct their work so slowly or so expensively, for the purpose of preventing a transient inconvenience, that the cost and trouble would be prohibitive. . . . In this case, the defendant company's attitude seems to have been to go on until somebody complained, and, further, that its desire to hurry its work and conduct it according to its own ideas and its own convenience was to prevail if there was a real conflict between it and the comfort of its neighbors. That . . . is not carrying out the obligation of using reasonable care and skill. . . . The effect comes to this . . . the plaintiff suffered an actionable nuisance; . . . she is entitled, not to a nominal sum, but to a substantial sum, based upon those principles . . . but in arriving at the sum . . . I have discounted any loss of custom . . . which might be due to the general loss of amenities owing to what was going on at the back. . . .

The upshot was that the damages awarded were reduced from £4,500 to £1,600.

The discussion in this section has, up to this point, been concerned with court decisions arising out of the common law relating to nuisance. Delimitation of rights in this area also comes about because of statutory enactments. Most economists would appear to assume that the aim of governmental
action in this field is to extend the scope of the law of nuisance by designating
as nuisances activities which would not be recognized as such by the common
law. And there can be no doubt that some statutes, for example, the Public
Health Acts, have had this effect. But not all Government enactments are
of this kind. The effect of much of the legislation in this area is to protect
businesses from the claims of those they have harmed by their actions. There
is a long list of legalized nuisances.

The position has been summarized in Halsbury's Laws of England as
follows:

Where the legislature directs that a thing shall in all events be done or authorizes
certain works at a particular place for a specific purposes or grants powers with
the intention that they shall be exercised, although leaving some discretion as to
the mode of exercise, no action will lie at common law for nuisance or damage
which is the inevitable result of carrying out the statutory powers so conferred.
This is so whether the act causing the damage is authorised for public purposes or
private profit. Acts done under powers granted by persons to whom Parliament
delegated authority to grant such powers, for example, under provisional orders
of the Board of Trade, are regarded as having been done under statutory authority.
In the absence of negligence it seems that a body exercising statutory powers will
not be liable to an action merely because it might, by acting in a different way, have
minimised an injury.

Instances are next given of freedom from liability for acts authorized:

An action has been held not to be against a body exercising its statutory powers
without negligence in respect of the flooding of land by water escaping from water-
courses, from water pipes, from drains, or from a canal; the escape of fumes from
sewers; the escape of sewage: the subsidence of a road over a sewer; vibration or
noise caused by a railway; fires caused by authorised acts; the pollution of a stream
discharging the
soil; annoyance
escape of tar acid; or interference with the access of a
work; or safety railings
the same as in England, except that the power of the legislatures to
giving compensation to the person harmed, is somewhat more limited, as it
what would otherwise be nuisances under the common law, at least without
is subject to constitutional restrictions. Nonetheless, the power is there
and cases more or less identical with the English cases can be found. The

and Public Officers.

* See Prosser, op. cit. supra n. 16 at 411; Harper and James, op. cit. supra n. 16 at 86-87.

question has arisen in an acute form in connection with airports and the
operation of aeroplanes. The case of Delta Air Corporation v. Kersey, Kersey
v. City of Atlanta is a good example. Mr. Kersey bought land and built
a house on it. Some years later the City of Atlanta constructed an airport
on land immediately adjoining that of Mr. Kersey. It was explained that his
property was "a quiet, peaceful and proper location for a home before the
airport was built, but dust, noises and low flying of airplanes caused by the
operation of the airport have rendered his property unsuitable as a home," a
state of affairs which was described in the report of the case with a wealth
of distressing detail. The judge first referred to an earlier case, Thrasher v.
City of Atlanta in which it was noted that the City of Atlanta had been
expressly authorized to operate an airport.

By this franchise aviation was recognized as a lawful business and also as an en-
prise affected with a public interest . . . all persons using [the airport] in the manner
contemplated by law are within the protection and immunity of the franchise granted
by the municipality. An airport is not a nuisance per se, although it might become
such from the manner of its construction or operation.

Since aviation was a lawful business affected with a public interest and the
construction of the airport was authorized by statute, the judge next referred
to Georgia Railroad and Banking Co. v. Maddox in which it was said:

Where a railroad terminal yard is located and its construction authorized, under
statutory powers, if it be constructed and operated in a proper manner, it cannot be
adjudged a nuisance. Accordingly, injuries and inconveniences to persons residing
near such a yard, from noises of locomotives, rumbling of cars, vibrations produced
thereby, and smoke, cinders, soot and the like, which result from the ordinary and
necessary, therefore proper, use and operation of such a yard, are not nuisances,
but are the necessary concomitants of the franchise granted.

In view of this, the judge decided that the noise and dust complained of by
Mr. Kersey "may be deemed to be incidental to the proper operation of an
airport, and as such they cannot be said to constitute a nuisance." But the
complaint against low flying was different:

. . . can it be said that flights . . . at such a low height [25 to 50 feet above Mr.
Kersey's house] as to be imminently dangerous to . . . life and health . . . are a
necessary concomitant of an airport? We do not think this question can be answered
in the affirmative. No reason appears why the city could not obtain lands of an area
[sufficiently large] . . . as not to require such low flights. . . . For the sake of public
convenience adjoining-property owners must suffer such inconvenience from noise
and dust as result from the usual and proper operation of an airport, but their private
rights are entitled to preference in the eyes of the law where the inconvenience is
not one demanded by a properly constructed and operated airport.

* Supreme Court of Georgia 193 Ga. 861, 20 S.E. 2d 245 (1942).

Of course this assumed that the City of Atlanta could prevent the low flying and continue to operate the airport. The judge therefore added:

From all that appears, the conditions causing the low flying may be remedied; but if on the trial it should appear that it is indispensable to the public interest that the airport should continue to be operated in its present condition, it may be said that the petitioner should be denied injunctive relief.

In the course of another aviation case, *Smith v. New England Aircraft Co.* the court surveyed the law in the United States regarding the legalizing of nuisances and it is apparent that, in the broad, it is very similar to that found in England:

It is the proper function of the legislative department of government in the exercise of the police power to consider the problems and risks that arise from the use of new inventions and endeavor to adjust private rights and harmonize conflicting interests by comprehensive statutes for the public welfare. There are analogies where the invasion of the airspace over underlying land by noise, smoke, vibration, dust and disagreeable odors, having been authorized by the legislative department of government and not being in effect a condemnation of the property although in some measure depreciating its market value, must be borne by the landowner without compensation or remedy. Legislative sanction makes that lawful which otherwise might be a nuisance. Examples of this are damages to adjacent land arising from smoke, vibration and noise in the operation of a railroad; the noise of ringing factory bells; the abatement of nuisances; the erection of steam engines and furnaces; unpleasant odors connected with sewers, oil refining and storage of naphtha.

Most economists seem to be unaware of all this. When they are prevented from sleeping at night by the roar of jet planes overhead (publicly authorized and perhaps publicly operated), are unable to think (or rest) in the day because of the noise and vibration from passing trains (publicly authorized and perhaps publicly operated), find it difficult to breathe because of the odour from a local sewage farm (publicly authorized and perhaps publicly operated) and are unable to escape because their driveways are blocked by a road obstruction (without any doubt, publicly devised), their nerves frayed and mental balance disturbed, they proceed to declaim about the disadvantages of private enterprise and the need for Government regulation.

While most economists seem to be under a misapprehension concerning the character of the situation with which they are dealing, it is also the case that the activities which they would like to see stopped or curtailed may well be socially justified. It is a question of weighing up the gains that would accrue from eliminating these harmful effects against the gains that accrue from allowing them to continue. Of course, it is likely that an extension of Government economic activity will often lead to this protection against action for nuisance being pushed further than is desirable. For one thing, the Government is likely to look with a benevolent eye on enterprises which it is itself promoting. For another, it is possible to describe the committing of a nuisance by public enterprise in a much more pleasant way than when the same thing is done by private enterprise. In the words of Lord Justice Sir Alfred Denning:

...the significance of the social revolution of today is that, whereas in the past the balance was much too heavily in favor of the rights of property and freedom of contract, Parliament has repeatedly intervened so as to give the public good its proper place.

There can be little doubt that the Welfare State is likely to bring an extension of that immunity from liability for damage, which economists have been in the habit of condemning (although they have tended to assume that this immunity was a sign of too little Government intervention in the economic system). For example, in Britain, the powers of local authorities are regarded as being either absolute or conditional. In the first category, the local authority has no discretion in exercising the power conferred on it. "The absolute power may be said to cover all the necessary consequences of its direct operation even if such consequences amount to nuisance." On the other hand, a conditional power may only be exercised in such a way that the consequences do not constitute a nuisance.

It is the intention of the legislature which determines whether a power is absolute or conditional. [As] there is the possibility that the social policy of the legislature may change from time to time, a power which in one era would be construed as being conditional, might in another era be interpreted as being absolute in order to further the policy of the Welfare State. This point is one which should be borne in mind when considering some of the older cases upon this aspect of the law of nuisance.

It would seem desirable to summarize the burden of this long section. The problem which we face in dealing with actions which have harmful effects is not simply one of restraining those responsible for them. What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm. In a world in which there are costs of rearranging the rights established by the legal system, the courts, in cases relating to nuisance, are, in effect, making a decision on the economic problem and determining how resources are to be employed. It was argued that the courts are conscious of this and that they often make, although not always in a very explicit fashion, a comparison between what would be gained and what lost by preventing

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*See Sir Alfred Denning, Freedom Under the Law 71 (1949).*

actions which have harmful effects. But the delimitation of rights is also the result of statutory enactments. Here we also find evidence of an appreciation of the reciprocal nature of the problem. While statutory enactments add to the list of nuisances, action is also taken to legalize what would otherwise be nuisances under the common law. The kind of situation which economists are prone to consider as requiring corrective Government action is, in fact, often the result of Government action. Such action is not necessarily unwise. But there is a real danger that extensive Government intervention in the economic system may lead to the protection of those responsible for harmful effects being carried too far.

VIII. Pigou’s Treatment in “The Economics of Welfare”

The fountainhead for the modern economic analysis of the problem discussed in this article is Pigou’s *Economics of Welfare* and, in particular, that section of Part II which deals with divergences between social and private net products which come about because one person A, in the course of rendering some service, for which payment is made, to a second person B, incidentally also renders services or disservices to other persons (not producers of like services), of such a sort that payment cannot be exacted from the benefited parties or compensation enforced on behalf of the injured parties.

Pigou tells us that his aim in Part II of *The Economics of Welfare* is to ascertain how far the free play of self-interest, acting under the existing legal system, tends to distribute the country’s resources in the way most favorable to the production of a large national dividend, and how far it is feasible for State action to improve upon “natural” tendencies.

To judge from the first part of this statement, Pigou’s purpose is to discover whether any improvements could be made in the existing arrangements which determine the use of resources. Since Pigou’s conclusion is that improvements could be made, one might have expected him to continue by saying that he proposed to set out the changes required to bring them about. Instead, Pigou adds a phrase which contrasts “natural” tendencies with State action, which seems in some sense to equate the present arrangements with “natural” tendencies and to imply that what is required to bring about these improvements is State action (if feasible). That this is more or less Pigou’s position is evident from Chapter I of Part II. Pigou starts by referring to “optimistic followers of the classical economists” who have argued that the value of production would be maximised if the Government refrained from any interference in the economic system and the economic arrangements were those which came about “naturally.” Pigou goes on to say that if self-interest does promote economic welfare, it is because human institutions have been devised to make it so. (This part of Pigou’s argument, which he develops with the aid of a quotation from Cannan, seems to me to be essentially correct.) Pigou concludes:

But even in the most advanced States there are failures and imperfections. . . . there are many obstacles that prevent a community’s resources from being distributed . . . in the most efficient way. The study of these constitutes our present problem. . . . its purposes is essentially practical. It seeks to bring into clearer light some of the ways in which it now is, or eventually may become, feasible for governments to control the play of economic forces in such wise as to promote the economic welfare, and through that, the total welfare, of their citizens as a whole.

Pigou’s underlying thought would appear to be: Some have argued that no State action is needed. But the system has performed as well as it has because of State action. Nonetheless, there are still imperfections. What additional State action is required?

If this is a correct summary of Pigou’s position, its inadequacy can be demonstrated by examining the first example he gives of a divergence between private and social products.

It might happen . . . that costs are thrown upon people not directly concerned, through, say, uncompensated damage done to surrounding woods by sparks from railway engines. All such effects must be included—some of them will be positive, others negative elements—in reckoning up the social net product of the marginal increment of any volume of resources turned into any use or place.

The example used by Pigou refers to a real situation. In Britain, a railway does not normally have to compensate those who suffer damage by fire caused by sparks from an engine. Taken in conjunction with what he says in Chapter 9 of Part II, I take Pigou’s policy recommendations to be, first, that there should be State action to correct this “natural” situation and, second, that the railways should be forced to compensate those whose woods are burnt. If this is a correct interpretation of Pigou’s position, I would argue that the first recommendation is based on a misapprehension of the facts and that the second is not necessarily desirable.

*In Wealth and Welfare, Pigou attributes the “optimism” to Adam Smith himself and not to his followers. He there refers to the “highly optimistic theory of Adam Smith that the national dividend, in given circumstances of demand and supply, tends ‘naturally’ to a maximum” (p. 104).

*Pigou, op. cit. supra n. 35 at 129-30.

*Id. at 134.
Let us consider the legal position. Under the heading "Sparks from engines," we find the following in Halsbury's Laws of England:

If railway undertakers use steam engines on their railway without express statutory authority to do so, they are liable, irrespective of any negligence on their part, for fires caused by sparks from engines. Railway undertakers are, however, generally given statutory authority to use steam engines on their railway; accordingly, if an engine is constructed with the precautions which science suggests against fire and is used without negligence, they are not responsible at common law for any damage which may be done by sparks. . . . In the construction of an engine the undertaker is bound to use all the discoveries which science has put within its reach in order to avoid doing harm, provided they are such as it is reasonable to require the company to adopt, having proper regard to the likelihood of the damage and to the cost and convenience of the remedy; but it is not negligence on the part of an undertaker if it refuses to use an apparatus the efficiency of which is open to bona fide doubt.

To this general rule, there is a statutory exception arising from the Railway (Fires) Act, 1905, as amended in 1923. This concerns agricultural land or agricultural crops.

In such a case the fact that the engine was used under statutory powers does not affect the liability of the company in an action for the damage . . . . These provisions, however, only apply where the claim for damage . . . does not exceed £200. [£100 in the 1905 Act] and where written notice of the occurrence of the fire and the intention to claim has been sent to the company within seven days of the occurrence of the damage and particulars of the damage in writing showing the amount of the claim in money not exceeding £200 have been sent to the company within twenty-one days.

Agricultural land does not include moorland or buildings and agricultural crops do not include those led away or stacked. I have not made a close study of the parliamentary history of this statutory exception, but to judge from debates in the House of Commons in 1922 and 1923, this exception was probably designed to help the smallholder.41

Let us return to Pigou's example of uncompensated damage to surrounding woods caused by sparks from railway engines. This is presumably intended to show how it is possible "for State action to improve on 'natural' tendencies." If we treat Pigou's example as referring to the position before 1905, or as being an arbitrary example (in that he might just as well have written "surrounding buildings" instead of "surrounding woods"), then it is clear that the reason why compensation was not paid must have been that the railway had statutory authority to run steam engines (which relieved it of liability for fires caused by sparks). That this was the legal position was

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41 see 31 Halsbury, Laws of England 475-75 (3d ed. 1960), Article on Railways and Canals, from which this summary of the legal position, and all quotations, are taken.

42 See 152 H.C. Deb. 2617-61 (1912); 161 H.C. Deb. 2935-55 (1923).
vergence between private and social net products. It results in the railway performing acts which will lower the value of total production—and which it would not do if it were liable for the damage. This can be shown by means of an arithmetical example.

Consider a railway, which is not liable for damage by fires caused by sparks from its engines, which runs two trains per day on a certain line. Suppose that running one train per day would enable the railway to perform services worth $150 per annum and running two trains a day would enable the railway to perform services worth $250 per annum. Suppose further that the cost of running one train is $50 per annum and two trains $100 per annum. Assuming perfect competition, the cost equals the fall in the value of production elsewhere due to the employment of additional factors of production by the railway. Clearly the railway would find it profitable to run two trains per day. But suppose that running one train per day would destroy by fire crops worth (on an average over the year) $60 and two trains a day would result in the destruction of crops worth $120. In these circumstances running one train per day would raise the value of total production but the running of a second train would reduce the value of total production. The second train would enable additional railway services worth $100 per annum to be performed. But the fall in the value of production elsewhere would be $110 per annum; $50 as a result of the employment of additional factors of production and $60 as a result of the destruction of crops. Since it would be better if the second train were not run and since it would not run if the railway were liable for damage caused to crops, the conclusion that the railway should be made liable for the damage seems irresistible. Undoubtedly it is this kind of reasoning which underlies the Pigovian position.

The conclusion that it would be better if the second train did not run is correct. The conclusion that it is desirable that the railway should be made liable for the damage it causes is wrong. Let us change our assumption concerning the rule of liability. Suppose that the railway is liable for damage from fires caused by sparks from the engine. A farmer on lands adjoining the railway is then in the position that, if his crop is destroyed by fires caused by the railway, he will receive the market price from the railway; but if his crop is not damaged, he will receive the market price by sale. It therefore becomes a matter of indifference to him whether his crop is damaged by fire or not. The position is very different when the railway is not liable. Any crop destruction through railway-caused fires would then reduce the receipts of the farmer. He would therefore take out of cultivation any land for which the damage is likely to be greater than the net return of the land (for reasons explained at length in Section III). A change from a regime in which the railway is not liable for damage to one in which it is liable is likely therefore to lead to an increase in the amount of cultivation on lands adjoining the railway. It will also, of course, lead to an increase in the amount of crop destruction due to railway-caused fires.

Let us return to our arithmetical example. Assume that, with the changed rule of liability, there is a doubling in the amount of crop destruction due to railway-caused fires. With one train per day, crops worth $120 would be destroyed each year and two trains per day would lead to the destruction of crops worth $240. We saw previously that it would not be profitable to run the second train if the railway had to pay $60 per annum as compensation for damage. With damage at $120 per annum the loss from running the second train would be $60 greater. But now let us consider the first train. The value of the transport services furnished by the first train is $250. The cost of running the train is $50. The amount that the railway would have to pay out as compensation for damage is $120. It follows that it would not be profitable to run any trains. With the figures in our example we reach the following result: if the railway is not liable for fire-damage, two trains per day would be run; if the railway is liable for fire-damage, it would cease operations altogether. Does this mean that it is better that there should be no railway? This question can be resolved by considering what would happen to the value of total production if it were decided to exempt the railway from liability for fire-damage, thus bringing it into operation (with two trains per day).

The operation of the railway would enable transport services worth $250 to be performed. It would also mean the employment of factors of production which would reduce the value of production elsewhere by $100. Furthermore it would mean the destruction of crops worth $120. The coming of the railway will also have led to the abandonment of cultivation of some land. Since we know that, had this land been cultivated, the value of the crops destroyed by fire would have been $120, and since it is unlikely that the total crop on this land would have been destroyed, it seems reasonable to suppose that the value of the crop yield on this land would have been higher than this. Assume it would have been $160. But the abandonment of cultivation would have released factors of production for employment elsewhere. All we know is that the amount by which the value of production elsewhere will increase will be less than $160. Suppose that it is $150. Then the gain from operating the railway would be $750 (the value of the transport services minus $100 (the cost of the factors of production) minus $120 (the value of crops destroyed by fire) minus $160 (the fall in the value of crop production due to the abandonment of cultivation) plus $150 (the value of production elsewhere of the released factors of production). Overall, operating the railway will increase the value of total production by $20. With these figures it is clear that it is better that the railway should not be liable for the damage it causes, thus enabling it to operate profitably. Of course, by altering the
figures, it could be shown that there are other cases in which it would be desirable that the railway should be liable for the damage it causes. It is enough for my purpose to show that, from an economic point of view, a situation in which there is "uncompensated damage done to surrounding woods by sparks from railway engines" is not necessarily undesirable. Whether it is desirable or not depends on the particular circumstances.

How is it that the Pigovian analysis seems to give the wrong answer? The reason is that Pigou does not seem to have noticed that his analysis is dealing with an entirely different question. The analysis as such is correct. But it is quite illegitimate for Pigou to draw the particular conclusion he does. The question at issue is not whether it is desirable to run an additional train or a faster train or to install smoke-preventing devices; the question at issue is whether it is desirable to have a system in which the railway has to compensate those who suffer damage from the fires which it causes or one in which the railway does not have to compensate them. When an economist is comparing alternative social arrangements, the proper procedure is to compare the total social product yielded by these different arrangements. The comparison of private and social products is neither here nor there. Whether it is desirable or not depends on the particular circumstances. The Pigovian analysis shows us that it is possible to conceive of better worlds than the one in which we live. But the problem is to ascertain that human beings are not made worse off in the process.

In discussing the second case (disservices without compensation to those damaged), Pigou says that they are rendered "when the owner of a site in a residential quarter of a city builds a factory there and so destroys a great part of the amenities of the house opposite; or when he invests resources in erecting buildings in a crowded centre, which by contracting the air-space and the playing room of the neighbours, tend to injure the health and efficiency of the families living there." Pigou is, of course, quite right to describe such actions as "uncharged disservices." But he is wrong when he describes these actions as "anti-social." They may or may not be. It is necessary to weigh the harm against the good that will result. Nothing could be more "anti-social" than to oppose any action which causes any harm to anyone.

The example with which Pigou opens his discussion of "uncharged disservices" is not as I have indicated, the case of the smokey chimney but the case of the overrunning rabbits: "... incidental uncharged disservices are rendered to third parties when the game-preserving activities of one occupier involve the overrunning of a neighbouring occupier's land by rabbits. ..."

This example is of extraordinary interest, not so much because the economic
The problem of legal liability for the actions of rabbits is part of the general subject of liability for animals. I will, although with reluctance, confine my discussion to rabbits. The early cases relating to rabbits concerned the relations between the lord of the manor and commoners, since, from the thirteenth century on, it became usual for the lord of the manor to stock the commons with conies (rabbits), both for the sake of the meat and the fur. But in 1597, in Boulston's case, an action was brought by one landowner against a neighbouring landowner, alleging that the defendant had made coney-burrows and that the conies had increased and had destroyed the plaintiff's corn. The action failed for the reason that

... so soon as the conies come on his neighbor's land he may kill them, for they are ferae naturae, and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the conies do in which he has no property, and which the other may lawfully kill.

As Boulston's case has been treated as binding—Bray, J., in 1919, said that he was not aware that Boulston's case has ever been overruled or questioned—Figou's rabbit example undoubtedly represented the legal position at the time The Economics of Welfare was written. And in this case, it is not far from the truth to say that the state of affairs which Figou describes came about because of an absence of Government action (at any rate in the form of statutory enactments) and was the result of "natural" tendencies.

Nonetheless, Boulston's case is something of a legal curiosity and Professor Williams makes no secret of his distaste for this decision:

"See G. L. Williams, Liability for Animals—An Account of the Development and Present Law of Trespass Liability for Animals, Distress Damage Feasant and the Duty to Fence, in Great Britain, Northern Ireland and the Common Law Dominions (1939). Part Four, "The Action of Nuisance, in Relation to Liability for Animals," 236-62, is especially relevant to our discussion. The problem of liability for rabbits is discussed in this part, 238-47. I do not know how far the common law in the United State regarding liability for animals has diverged from that in Britain. In some Western States of the United States, the English common law regarding the duty to fence has not been followed, in part because "the considerable amount of open, uncaged land made it a matter of public policy to allow cattle to run at large" (Williams, op. cit. supra 227). This affords a good example of how a different set of circumstances may make it economically desirable to change the legal rule regarding the delimitation of rights.


"I have not looked into recent cases. The legal position has also been modified by statutory enactments.

The conception of liability in nuisance as being based upon ownership is the result, apparently, of a confusion with the action of cattle-trespass, and runs counter both to principle and to the medieval authorities on the escape of water, smoke and filth... The prerequisite of any satisfactory treatment of the subject is the final abandonment of the pernicious doctrine in Boulston's case... Once Boulston's case disappears, the way will be clear for a rational restatement of the whole subject, on lines that will harmonize with the principles prevailing in the rest of the law of nuisance.

The judges in Boulston's case were, of course, aware that their view of the matter depended on distinguishing this case from one involving nuisance:

This cause is not like to the cases put, on the other side, of erecting a lime-kiln, dye-house, or the like; for there the annoyance is by the act of the parties which make them; but it is not so here, for the conies of themselves went into the plaintiff's land, and he might take them when they came upon his land, and make profit of them.

Professor Williams comments:

Once more the atavistic idea is emerging that the animals are guilty and not the landowner. It is not, of course, a satisfactory principle to introduce into a modern law of nuisance. If A. erects a house or plants a tree so that the rain runs or drips from it on to B.'s land, this is A.'s act for which he is liable; but if A. introduces rabbits into his land so that they escape from it into B.'s, this is the act of the rabbits for which A. is not liable—such is the specious distinction resulting from Boulston's case.

It has to be admitted that the decision in Boulston's case seems a little odd. A man may be liable for damage caused by smoke or unpleasant smells, without it being necessary to determine whether he owns the smoke or the smell. And the rule in Boulston's case has not always been followed in cases dealing with other animals. For example, in Bland v. Yates, it was decided that an injunction could be granted to prevent someone from keeping an unusual and excessive collection of manure in which flies bred and which infested a neighbour's house. The question of who owned the flies was not raised. An economist would not wish to object because legal reasoning sometimes appears a little odd. But there is a sound economic reason for supporting Professor Williams' view that the problem of liability for animals (and particularly rabbits) should be brought within the ordinary law of nuisance. The reason is not that the man who harbours rabbits is solely responsible for the damage; the man whose crops are eaten is equally responsible. And given that the costs of market transactions make a rearrange-
ment of rights impossible, unless we know the particular circumstances, we cannot say whether it is desirable or not to make the man who harbours rabbits responsible for the damage committed by the rabbits on neighbouring properties. The objection to the rule in Boulston's case is that, under it, the harbourer of rabbits can never be liable. It fixes the rule of liability at one pole; and this is as undesirable, from an economic point of view, as of an act with the other pole and making the harbourer of rabbits always liable. But, as we saw in Section VII, the law of nuisance, as it is in fact handled by the courts, is flexible and allows for a comparison of the utility of an act with the harm it produces. As Professor Williams says: "The whole law of nuisance is an attempt to reconcile and compromise between conflicting interests..." To bring the problem of rabbits within the ordinary law of nuisance would not mean inevitably making the harbourer of rabbits liable for damage committed by the rabbits. This is not to say that the sole task of the courts in such cases is to make a comparison between the harm and the utility of an act. Nor is it to be expected that the courts will always decide correctly after making such a comparison. But unless the courts act very foolishly, the ordinary law of nuisance would seem likely to give economically more satisfactory results than adopting a rigid rule. Pigou's case of the overrunning rabbits affords an excellent example of how problems of law and economics are interrelated, even though the correct policy to follow would seem to be different from that envisioned by Pigou.

Pigou allows one exception to his conclusion that there is a divergence between private and social products in the rabbit example. He adds: "... unless... the two occupiers stand in the relation of landlord and tenant, so that compensation is given in an adjustment of the rent." This qualification is rather surprising since Pigou's first class of divergence is largely concerned with the difficulties of drawing up satisfactory contracts between landlords and tenants. In fact, all the recent cases on the problem of rabbits cited by Professor Williams involved disputes between landlords and tenants concerning sporting rights. Pigou seems to make a distinction between the case in which no contract is possible (the second class) and that in which the contract is unsatisfactory (the first class). Thus he says that the second class of divergences between private and social net product cannot, like divergences due to tenancy laws, be mitigated by a modification of the contractual relation between any two contracting parties, because the divergence arises out of a service or disservice rendered to persons other than the contracting parties.

But the reason why some activities are not the subject of contracts is exactly the same as the reason why some contracts are commonly unsatisfactory—it would cost too much to put the matter right. Indeed, the two cases are really the same since the contracts are unsatisfactory because they do not cover certain activities. The exact bearing of the discussion of the first class of divergence on Pigou's main argument is difficult to discover. He shows that in some circumstances contractual relations between landlord and tenant may result in a divergence between private and social products. But he also goes on to show that Government-enforced compensation schemes and rent-controls will also produce divergences. Furthermore, he shows that, when the Government is in a similar position to a private landlord, e.g. when granting a franchise to a public utility, exactly the same difficulties arise as when private individuals are involved. The discussion is interesting but I have been unable to discover what general conclusions about economic policy, if any, Pigou expects us to draw from it.

Indeed, Pigou's treatment of the problems considered in this article is extremely elusive and the discussion of his views raises almost insuperable difficulties of interpretation. Consequently it is impossible to be sure that one has understood what Pigou really meant. Nevertheless, it is difficult to resist the conclusion, extraordinary though this may be in an economist of Pigou's stature, that the main source of this obscurity is that Pigou had not thought his position through.

IX. The Pigovian Tradition

It is strange that a doctrine as faulty as that developed by Pigou should have been so influential, although part of its success has probably been due to the lack of clarity in the exposition. Not being clear, it was never clearly wrong. Curiously enough, this obscurity in the source has not prevented the emergence of a fairly well-defined oral tradition. What economists think they learn from Pigou, and what they tell their students, which I term the Pigovian tradition, is reasonably clear. I propose to show the inadequacy of this Pigovian tradition by demonstrating that both the analysis and the policy conclusions which it supports are incorrect.

I do not propose to justify my view as to the prevailing opinion by copious references to the literature. I do this partly because the treatment in the literature is usually so fragmentary, often involving little more than a reference to Pigou plus some explanatory comment, that detailed examination would be inappropriate. But the main reason for this lack of reference is that the doctrine, although based on Pigou, must have been largely the product of an oral tradition. Certainly economists with whom I have discussed these problems have shown a unanimity of opinion which is quite

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* Williams, op. cit. supra n. 49 at 259.
* Pigou, op. cit. supra n. 49 at 185.
* Williams, op. cit. supra n. 49 at 244-47.
* Pigou, op. cit. supra n. 35 at 192.

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remarkable considering the meagre treatment accorded this subject in the literature. No doubt there are some economists who do not share the usual view but they must represent a small minority of the profession.

The approach to the problems under discussion is through an examination of the value of physical production. The private product is the value of the additional product resulting from a particular activity of a business. The social product equals the private product minus the fall in the value of production elsewhere for which no compensation is paid by the business. Thus, if 10 units of a factor (and no other factors) are used by a business to make a certain product with a value of $105; and the owner of this factor is not compensated for their use, which he is unable to prevent; and these 10 units of the factor would yield products in their best alternative use worth $100; then, the social product is $105 minus $100 or $5. If the business now pays for one unit of the factor and its price equals the value of its marginal product, then the social product rises to $15. If two units are paid for, the social product rises to $25 and so on until it reaches $105 when all units of the factor are paid for. It is not difficult to see why economists have so readily accepted this rather odd procedure. The analysis focusses on the individual business decision and since the use of certain resources is not allowed for in costs, receipts are reduced by the same amount. But, of course, this means that the value of the social product has no social significance whatsoever. It seems to me preferable to use the opportunity cost concept and to approach these problems by comparing the value of the product yielded by factors in alternative uses or by alternative arrangements. The main advantage of a pricing system is that it leads to the employment of factors in places where the value of the product yielded is greatest and does so at less cost than alternative systems (I leave aside that a pricing system also eases the problem of the redistribution of income). But if through some God-given natural harmony factors flowed to the places where the value of the product yielded was greatest without any use of the pricing system and consequently there was no compensation, I would find it a source of surprise rather than a cause for dismay.

The definition of the social product is queer but this does not mean that the conclusions for policy drawn from the analysis are necessarily wrong. However, there are bound to be dangers in an approach which diverts attention from the basic issues and there can be little doubt that it has been responsible for some of the errors in current doctrine. The belief that it is desirable that the business which causes harmful effects should be forced to compensate those who suffer damage (which was exhaustively discussed in section VIII in connection with Pigou's railway sparks example) is undoubtedly the result of not comparing the total product obtainable with alternative social arrangements.

The same fault is to be found in proposals for solving the problem of harmful effects by the use of taxes or bounties. Pigou lays considerable stress on this solution although he is, as usual, lacking in detail and qualified in his support. Modern economists tend to think exclusively in terms of taxes and in a very precise way. The tax should be equal to the damage done and should therefore vary with the amount of the harmful effect. As it is not proposed that the proceeds of the tax should be paid to those suffering the damage, this solution is not the same as that which would force a business to pay compensation to those damaged by its actions, although economists generally do not seem to have noticed this and tend to treat the two solutions as being identical.

Assume that a factory which emits smoke is set up in a district previously free from smoke pollution, causing damage valued at $100 per annum. Assume that the taxation solution is adopted and that the factory owner is taxed $100 per annum as long as the factory emits the smoke. Assume further that a smoke-preventing device costing $90 per annum to run is available. In these circumstances, the smoke-preventing device would be installed. Damage of $100 would have been avoided at an expenditure of $90 and the factory-owner would be better off by $10 per annum. Yet the position achieved may not be optimal. Suppose that those who suffer the damage could avoid it by moving to other locations or by taking various precautions which would cost them, or be equivalent to a loss in income of, $40 per annum. Then there would be a gain in the value of production of $50 if the factory continued to emit its smoke and those now in the district moved elsewhere or made other adjustments to avoid the damage. If the factory owner is to be made to pay a tax equal to the damage caused, it would clearly be desirable to institute a double tax system and to make residents of the district pay an amount equal to the additional cost incurred by the factory owner (or the consumers of his products) in order to avoid the damage. In these conditions, people would not stay in the district or would take other measures to prevent the damage from occurring, when the costs of doing so were less than the costs that would be incurred by the producer to reduce the damage (the producer's object, of course, being not so much to reduce the damage as to reduce the tax payment). A tax system which was confined to a tax on the producer for damage caused would tend to lead to unduly high costs being incurred for the prevention of damage. Of course this could be avoided if it were possible to base the tax, not on the damage caused, but on the fall in the value of production (in its widest sense) resulting from the emission of smoke. But to do so would require a detailed knowledge of individual preferences and I am unable to imagine how the data needed for such a taxation system could be assembled. Indeed,
the proposal to solve the smoke-pollution and similar problems by the use of taxes bristles with difficulties: the problem of calculation, the difference between average and marginal damage, the interrelations between the damage suffered on different properties, etc. But it is unnecessary to examine these problems here. It is enough for my purpose to show that, even if the tax is exactly adjusted to equal the damage that would be done to neighboring properties as a result of the emission of each additional puff of smoke, the tax would not necessarily bring about optimal conditions. An increase in the number of people living or of business operating in the vicinity of the smoke-emitting factory will increase the amount of harm produced by a given emission of smoke. The tax that would be imposed would therefore increase with an increase in the number of those in the vicinity. This will tend to lead to a decrease in the value of production of the factors employed by the factory, either because a reduction in production due to the tax will result in factors being used elsewhere in ways which are less valuable, or because factors will be diverted to produce means for reducing the amount of smoke emitted. But people deciding to establish themselves in the vicinity of the factory will not take into account this fall in the value of production which results from their presence. This failure to take into account costs imposed on others is comparable to the action of a factory-owner in not taking into account the harm resulting from his emission of smoke. Without the tax, there may be too much smoke and too few people in the vicinity of the factory; but with the tax there may be too little smoke and too many people in the vicinity of the factory. There is no reason to suppose that one of these results is necessarily preferable.

I need not devote much space to discussing the similar error involved in the suggestion that smoke producing factories should, by means of zoning regulations, be removed from the districts in which the smoke causes harmful effects. When the change in the location of the factory results in a reduction in production, this obviously needs to be taken into account and weighed against the harm which would result from the factory remaining in that location. The aim of such regulation should not be to eliminate smoke pollution but rather to secure the optimum amount of smoke pollution, this being the amount which will maximise the value of production.

X. A CHANGE OF APPROACH

It is my belief that the failure of economists to reach correct conclusions about the treatment of harmful effects cannot be ascribed simply to a few slips in analysis. It stems from basic defects in the current approach to problems of welfare economics. What is needed is a change of approach.

Analysis in terms of divergencies between private and social products concentrates attention on particular deficiencies in the system and tends to nourish the belief that any measure which will remove the deficiency is necessarily desirable. It diverts attention from those other changes in the system which are inevitably associated with the corrective measure, changes which may well produce more harm than the original deficiency. In the preceding sections of this article, we have seen many examples of this. But it is not necessary to approach the problem in this way. Economists who study problems of the firm habitually use an opportunity cost approach and compare the receipts obtained from a given combination of factors with alternative business arrangements. It would seem desirable to use a similar approach when dealing with questions of economic policy and to compare the total product yielded by alternative social arrangements. In this article, the analysis has been confined, as is usual in this part of economics, to comparisons of the value of production, as measured by the market. But it is, of course, desirable that the choice between different social arrangements for the solution of economic problems should be carried out in broader terms than this and that the total effect of these arrangements in all spheres of life should be taken into account. As Frank H. Knight has so often emphasized, problems of welfare economics must ultimately dissolve into a study of aesthetics and morals.

A second feature of the usual treatment of the problems discussed in this article is that the analysis proceeds in terms of a comparison between a state of laissez faire and some kind of ideal world. This approach inevitably leads to a looseness of thought since the nature of the alternatives being compared is never clear. In a state of laissez faire, is there a monetary, a legal or a political system and if so, what are they? In an ideal world, would there be a monetary, a legal or a political system and if so, what would they be? The answers to all these questions are shrouded in mystery and every man is free to draw whatever conclusions he likes. Actually very little analysis is required to show that an ideal world is better than a state of laissez faire, unless the definitions of a state of laissez faire and an ideal world happen to be the same. But the whole discussion is largely irrelevant for questions of economic policy since whatever we may have in mind as our ideal world, it is clear that we have not yet discovered how to get to it from where we are. A better approach would seem to be to start our analysis with a situation approximating that which actually exists, to examine the effects of a proposed policy change and to attempt to decide whether the new situation would be, in total, better or worse than the original one. In this way, conclusions for policy would have some relevance to the actual situation.

A final reason for the failure to develop a theory adequate to handle the problem of harmful effects stems from a faulty concept of a factor of production. This is usually thought of as a physical entity which the businessman acquires and uses (an acre of land, a ton of fertiliser) instead of as a
right to perform certain (physical) actions. We may speak of a person owning land and using it as a factor of production but what the land-owner in fact possesses is the right to carry out a circumscribed list of actions. The rights of a land-owner are not unlimited. It is not even always possible for him to remove the land to another place, for instance, by quarrying it. And although it may be possible for him to exclude some people from using "his" land, this may not be true of others. For example, some people may have the right to cross the land. Furthermore, it may or may not be possible to erect certain types of buildings or to grow certain crops or to use particular drainage systems on the land. This does not come about simply because of Government regulation. It would be equally true under the common law. In fact it would be true under any system of law. A system in which the rights of individuals were unlimited would be one in which there were no rights to acquire.

If factors of production are thought of as rights, it becomes easier to understand that the right to do something which has a harmful effect (such as the creation of smoke, noise, smells, etc.) is also a factor of production. Just as we may use a piece of land in such a way as to prevent someone else from crossing it, or parking his car, or building his house upon it, so we may use it in such a way as to deny him a view or quiet or unpolluted air. The cost of exercising a right (of using a factor of production) is always the loss which is suffered elsewhere in consequence of the exercise of that right—the inability to cross land, to park a car, to build a house, to enjoy a view, to have peace and quiet or to breathe clean air.

It would clearly be desirable if the only actions performed were those in which what was gained was worth more than what was lost. But in choosing which of the actions carried on by a person, we have to bear in mind that a change in the existing system involved in operating the various social arrangements (whether it be the working of a market or of a government department), as well as the costs involved in moving to a new system. In devising and choosing between social arrangements we should have regard for the total effect. This, above all, is the change in approach which I am advocating.
The volume of the Supreme Court's business is steadily on the rise. It seems to be, quite simply, a direct function of the birth rate. But the number of important and far-reaching issues offered up for decision in any single Term is, in some part at least, a matter of the accidents of litigation. Accident, so far as we can tell, contrived to make the October Term, 1960, one of the most remarkable of record. There was no single litigation quite so spectacular as the Steel Seizure Case1 of 1952, or the Segregation Cases2 of 1954 and 1955. But the Court was presented with an arresting variety of constitutional questions, truly to be described, in the phrase Marshall used in Marbury v. Madison, as "deeply interesting to the United States..." And in contrast to what Marshall would have had us believe of the issue in Marbury, these questions were also "of an intricacy proportioned to [their] interest."3

One is tempted to deal with the resultant prodigious output by passing a Solomonic judgment on it, something like Dean Griswold's on the subject of Professor Hart's Foreword of two years ago. Mr. Hart, Dean Griswold observed, should have cut what he had written in two, and printed the latter half alone at another time and perhaps in a different place.4 The next best way out from under may be to talk not about what the Court did, but about whether it needed to do it; not so much, that is, about the Bill of Rights and the fourteenth amendment as about the Court's place in the scheme of American government. It happens that a frequent divisions within the Court.

Writing in 1949, Professor Freund noted "a remarkable core of agreement on the Court" with respect to human rights and the rights of property. He found that "the degree of concord in this area is much more important than the degree of discord..." Despite unmuffled sounds of dispute, the area of concord has in some significant respects enlarged. One need only mention the Segregation Cases, Cooper v. Aaron,4 and a whole pride of summary dispositions5 as bespeaking the Court's unity in disposing of what is surely the single most important issue to come before it, at least in this century. More may be ventured. The conceptual distance between Mr. Justice Black's absolutist positions, on the first amendment, for example, and the majority's generally more "balanced" results — to use the word the Justice particularly despises — may not be the true measure of the area of discord between them. The extremity of Justice Black's absolutist professions is a dissenting position. It is an opposition program. As Professor Charles L. Black, Jr., recently undertook to explain, there may be a great deal about it that is merely tactical; Justice Black knows as well as anyone else that free speech cannot be an absolute — pure, unconditional, never to be restricted — and that the first amendment does not literally say any such certain thing.6 The gap is perhaps not as wide as has seemed. It exists and is not to be minimized. The Justices do not all assess the values of speech and association alike. "There is something voluptuous in meaning well" — so Henry Adams reports a not altogether ill-meant remark by the French Minister about President Jefferson.7 The Justices are not equally first amendment voluptuaries. Moreover, the absolutist-literalist position raises a grave question of process; a question, some might say, of candor. For in propagating his absolutes, Justice Black chooses to obscure the actual process of decision. Yet on the immediate merits, more discord may strike the ear than is necessarily involved.

But to say that the Justices may be nearer than is apparent to certain common value judgments concerning civil rights and liberties8 is not to ameliorate the plainly observable differences in the results they often reach. It is to say that there would be fewer occasions for such differences if certain techniques of the mediating middle way were more imaginatively utilized. The Court, as Mr. Hart has written, "is predestined in the long run... to be a voice of reason, charged with the creative function of discerning aresh and of articulating and developing impersonal and durable principles..."9 The question is not only which principles and how, but also, when and in what circumstances.

1 FREUND, ON UNDERSTANDING THE SUPREME COURT 11, 9 (1949).
2 338 U.S. 293 (1949).
4 See Mr. Justice Black, the Supreme Court and the Bill of Rights, Harper's, Feb. 1961, p. 53.
5 See also, e.g., Sweatt v. New Hampshire, 354 U.S. 232 (1957) (Frankfurter, J. concurring); Frankfurter, Mr. Justice Holmes and the Supreme Court 76 (1961).
6 Hart, supra note 4, at 99.
The jurisprudence of the Court has developed certain doctrines whose chief content is a generalization on the timing and limits of the judicial function. They are loosely referred to as jurisdictional. A good number of them came home to roost at the last Term, as did also some cognate devices, whose similar import is not often remarked. These doctrines and devices are heavily encrusted with what Felix S. Cohen called "the vivid fictions and metaphors of traditional jurisprudence." They are in disrepair and consequently in not a little disrepute. I should like to draw attention to the need for scraping them off and refurbishing them, to the end that they may stand revealed in their full utility. It will be well to start somewhat anew, and from the beginning.


In the beginning was the reasoning of Marbury v. Madison, against the background of The Correspondence of the Justices and Hayburn's Case. The background was faint, but it assumed sharper outline once Marbury v. Madison had been decided. If, as Marshall argued, the judiciary's power to construe and enforce the Constitution against the other departments is to be deduced from the obligation of the courts to decide cases conformably to law, which may sometimes be the Constitution, then it must follow that the power may be exercised only in a case. Marshall offered no other coherent justification for lodging it in the courts, and the text of the Constitution, whatever other supports it may or may not offer for Marshall's argument, extends the judicial power only "to all Cases" and "to Controversies." It follows that courts may make no pronouncements in the large and in the abstract, by way of opinions advising the other departments upon request; that they may give no opinions, even in a concrete case, which are advisory because they are not finally decisive, the power of ultimate disposition of the case having been reserved elsewhere; and that they may not decide non-cases, which are not adversative situations and in which nothing of immediate consequence to the parties turns on the results. These are ideas at the heart of the reasoning in Marbury v. Madison. They constitute not so much limitations of the power of judicial review as necessary supports for the argument which established it. The words of art that are shorthand for these ideas are "case and controversy" and "standing."

It would seem also to follow from Marbury v. Madison that, except as stated, "all Cases" are justiciable and must be heard. Indeed Marshall, assuming the tone of absolute assertion that he deemed suitable when the Court's basic powers were in issue, said in Cohens v. Virginia:

It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should.

(With Secretary of State Jefferson and President Washington in 1793); see Hart and Wechsler, The Federal Courts and the Federal System 75-77 (1953).
14 2 U.S. (2 Dall.) 409 (1793).
there is and should be no constitutional principle protecting the right of a preferred shareholder to have his say in the management of a corporation. Since the general law was also negative on the subject, the suit of such a shareholder to enjoin the corporation from carrying out a contract with the allegedly unconstitutional Tennessee Valley Authority gave rise to no "case." As there was no showing of financial loss, the shareholder stood neither to lose nor to gain from the suit. Although he may have had an abstract interest in being advised as to the law, such an interest will not make a case under Marbury v. Madison. But it was quite a different matter to hold that the companies in Tennessee Elec. Power Co. v. TVA had no standing to test the constitutionality of the TVA act because their only claim was that the TVA injured them by competing with them and there is no right to prevent competition "otherwise lawful." The companies were subject to material injury. And the question whether the Constitution protects against some forms of competition cannot be assumed away; it protected a parochial school against a certain kind of public-school competition in Pierce v. Society of Sisters. So when the companies were held to have no standing, the Court was either deciding, on the merits but without opinion, that the Constitution does not protect against competition by such a governmental unit as the TVA, or that the case was for some discretionary reason an unsuitable one in which to pass on the constitutionality of the Tennessee Valley Authority. The general law of remedies obviously could not affect the former holding as such, for it could not create a constitutional right. The general law, state or federal, statutory or common, could however create a remedy against competition by instrumentalities of the federal government that are unconstitutional for independent reasons. Would that render adjudication mandatory in a case that the Court had otherwise deemed unsuitable? Perhaps not, if the remedy is the creature of state law, since special problems are thus raised. But at least if federal law creates the remedy, an affirmative answer follows from Mr. Wechsler's position.

We have in view cases such as Tennessee Elec. Power Co. v. TVA, "cases" in the Marbury v. Madison sense because, as a matter of fact, a palpable injury is present. If in fact there is no injury, either material or to a right independently created by law, and if the Constitution itself does not create the right, as it was held to do in Pierce and in Joint Anti-Fascist Refugee Comm. v. McGrath, no one contends that the law of remedies can, by allowing a suit to test constitutionality, make a "case." But if a "case" exists, is the question whether the Court must hear it answered by the federal law of remedies, that is, by jurisdictional statutes plus standard rules of equity, themselves subject to statutory

change? Mr. Wechsler must say yes, but many judges have thought and acted otherwise, and many cases are to the contrary, including the oft-cited Muskrat v. United States, which was a thoroughly concrete and adversarial "case." If the decisions are explained as exercises of equity discretion, the argument is at a standstill; Marshall's remarks in Cohens v. Virginia are meaningless, and Mr. Wechsler might as well agree with Judge Hand. But if the strict constructionist, Marbury v. Madison position is to be maintained it is impossible to allow anything like the escape from the duty to adjudicate of which the Court has continually, if erratically, availed itself. Moreover, the notion that the Court cannot decline to adjudicate any real "case" of which the law gives it jurisdiction pursuant to the constitutional enumeration may serve the purpose of avoiding an old theoretical difficulty for the strict-constitutionalist position; but the unseverable converse—that the Court may not hear constitutional claims made in real "cases" of which Congress has deprived it of jurisdiction—creates a serious new one. Indeed, in a phrase of Judge Hand's that Mr. Wechsler quotes, it should be an intolerable "stench in the nostrils of strict constructionists." How is it to be squared with Marshall's syllogism? How can there be a duty to decide "all Cases" conformably to the Constitution, acts of Congress to the contrary notwithstanding, if Congress can defeat this duty by a jurisdictional act? Would not this be "to overthrow in fact what was established in theory?" Would it not seem "an absurdity too gross to be insisted on?" Congress, to be sure, is authorized to regulate the Court's appellate jurisdiction and to make exceptions in it, but that cannot be the whole answer.

Mr. Wechsler's explanation of the political-question doctrine, potentially the widest and most radical avenue of escape from adjudication, runs along different lines. The explanation is that when the Court declines jurisdiction of a case as "political," or when, having taken the case, it declines to adjudicate the merits of a particular issue on the same ground, what it does, in conformity with Marbury v. Madison, is to render a constitutional adjudication that the matter in question is confided to the uncontrolled discretion of another department. This is sometimes an adequate statement of the result. It also represents, however, for Mr. Wechsler, "all the doctrine can defensively imply." He puts it quite plainly that the only proper judgment that may lead to an abstention from decision is

[50 U.S. 118 (1932).
51 268 U. S. 510 (1925).
56 See note 17 supra.
57 Hand, op. cit., supra note 17, at 15: quoted in Wechsler 11.
58 Marbury v. Madison, 9 U.S. (1 Cranch) 137, 177 (1803).
59 Ex parte McCardle, 74 U.S. (7 Wall.) 303 (1869).
that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely, whatever factors may be rightly weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made by judges and standards that should govern the interpretive process generally. That, I submit, is toto scelus different from a broad discretion to abstain or intervene.31

It is different, just so; but only by means of a play on words can the broad discretion that the courts have in fact exercised be turned into an act of constitutional interpretation. The political-question doctrine simply resists being domesticated in this fashion.32 There is something different about it, in kind, not in degree, from the general "interpretive process": something greatly more flexible, something of prudence, not construction and not principle. And it is something that cannot exist within the four corners of Marbury v. Madison.

The strict-constructionist position also has difficulty reconciling itself to the Court's two commonest devices of decline "the exercise of jurisdiction which is given": denials of certiorari and dismissals of appeals "for the want of a substantial federal question."33 Chief Justice Warren, speaking generally, has allowed that it "is only accurate to a degree and has been for many years, a great deal that is fiction in this explanation. Many are the dismissals for the want of a convenient, or timely, or suitably presented question."34 The certiorari jurisdiction is of course, professedly discretionary and based on few articulated standards. It may be said of it that it does not deny judicial review, but rather denies it in a particular court only. But constitutional adjudication in the lower courts is not the equivalent of what can be had in the Supreme Court. It lacks the general authoritativeness. And judgment, even as it affects the immediate litigant, is constrained.35 Moreover, what of cases coming up through the state courts, in which no access could have been had, or can any longer be had, to the lower federal courts? Here, surely,

\[Vol. 75:40

1961] THE SUPREME COURT — FOREWORD 47

we have outright denial of adjudication by an article III court.36 The system, says Mr. Wechsler, "rests upon the power that the Constitution vests in Congress to make exceptions to and regulate the Court's appellate jurisdiction . . . ."37 But it is the Supreme Court that makes the exceptions, and it does so by the case, not by the category; that is what happens even though the exceptions are the cases that are heard rather than those that are dismissed.

II. THE POWER TO DECLINE THE EXERCISE OF JURISDICTION WHICH IS GIVEN

I have tried to show that the Supreme Court's well-established if imperfectly understood practice of declining on occasion to exercise the power of judicial review is difficult to reconcile with the strict-constructionist conception of the foundation of that power. If this were all what is called merely academic, it would be none the worse for it. Actually, however, important consequences are in play. Of course, no concept, strict-, loose-, or medium-constructionist, can get around the sheer necessity of limiting each year's business to what nine men can fruitfully deal with. But strict-constructionist compunctions cause the techniques for meeting this necessity to be viewed with misgiving and to be encumbered with fictive explanations. So are other techniques of avoiding adjudication, and I would suggest that herein lies at least part of the reason for the confusion and lack of direction that has characterized their development.38 Some of the confusion may be in the eye of the beholder, but not all. Beyond this, and more fundamentally, the consequences of the strict-constructionist position are in the alternative. Either literal reliance on Marbury v. Madison leads to a rampant activism that takes pride in not "ducking" anything and takes comfort, and as Mr. Wechsler says, finds "protection," 39 in the dictum of Cohens v. Virginia. Or, for those like Mr. Wechsler who are not unaware that judicial review is at least potentially a deviant institution in a democratic society, the consequence is an effort to limit the power of review and render it tolerable through a radical restriction on the category of substantive principles that the Court is allowed to evolve and declare; the consequence is, indeed, a radical constriction of the quality of the Court's function.

The volume of responsible criticism that Mr. Wechsler's paper on "Neutral Principles" has produced is nothing short of the most genuine
kind of tribute to him. But it has not been sufficiently noticed how inextricably Mr. Wechsler's thesis is tied to the conviction - never lacking in comfort, yet fraught with risk — that there is no escape from the exercise of jurisdiction which is given. I take it that a neutral principle, whatever its other, less controversial but by no means unimportant aspects, is one that the Court must be prepared to apply across the board, without compromise. A neutral principle — of which, given the nature of a free society and the consensual basis of all its effective law, there can be but very few — is a rule of action that will be authoritatively enforced under present circumstances and in the foreseeable future, without adjustment or concession. If it sometimes hurts, nothing is better proof of its validity. If it must sometimes fail of application, it won't do. Thus the principle of the Segregation Cases is dubious for Mr. Wechsler. And the essential reason, if I am not mistaken, is that the principle must be tested not alone by its effect "on state-required segregation but also by its impact upon measures that take race into account to equalize job opportunity or to reduce de facto segregation, as in New York City's schools."41 When such cases come up, the Court is duty bound to decide them, and if it cannot apply evenhandedly the principle of the Segregation Cases, then that principle was not a proper one for the Court to enunciate. Hence the legislative choice represented by segregation statutes should have been declared valid. No other course was open to the Court.

The first thing to be remarked of the principle of the neutral principles is that it grievously mistakes the effect of decisions allowing a legislative policy to stand. It is true enough that the Court does not approve or otherwise anoint a legislative policy when it finds it unconstitutional. But, though not a compliment, it is a significant intervention in the political process. There is no such neat dividing line. There are exceptions, some of which are delineated by the political-question doctrine. Most often, however, and as often as not in matters of the widest and deepest concern such as the racial problem, both requirements exist most imperatively side by side: guiding principle and expedient compromise. The role of principle, when it cannot be the inflexible governing rule, is to affect the tendency of policies of expediency. And it is a potent role.

This idea was central to the political philosophy of Lincoln. As Professor Harry V. Jaffa is able to show in a highly original analysis of

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41 WECHSLER XIV.
42 Curtis, A Modern Supreme Court in a Modern World, 4 VAND. L. REV. 477, 481 (1941).
44 17 U.S. (4 Wheat.) 316 (1819).
Lincoln's thought, "government of, by and for the people," was for Lincoln required also to be principled government, with the counter-majoritarian restraints that this implies. And so Douglas' program of popular sovereignty, freeing the people to vote slavery up or down without reference to principle, was inadmissible, indeed revolting. But principled government by the consent of the governed often meant the definition of principled goals and the practice of the art of the possible in striving to attain them. It is the Court's function of declaring principled goals that the rule of the neutral principles would excise. More, it would require the Court to validate with overtones of principle most of what the political institutions do merely on grounds of expediency. Like Judge Hand, Mr. Wechsler appears to depreciate the function of the judge as "teachers to the citizenry." 46

The Court exists in the Lincolnian tension between principle and expediency. Mr. Wechsler would lift it out, but he cannot. He only distorts the tension, by placing the weight of the Court most often on expediency. Mr. Wechsler would lift it out, but he cannot. He only majoritarian restraints that this implies. And so Douglas' program of 50

When it does neither, it need not forsake its educational function, nor maintain itself in the tension on which our society thrives, because at least in modern times it nearly always has three courses of action open to it: it may strike down legislation as 'society thrives, because at least in modern times it nearly always has three courses of action open to it: it may strike down legislation as inconsistent with principle; it may legitimate it; or it may do neither. When it does neither, it need not forsake its educational function, nor abandon principle. Indeed, very often it engages in a Socratic dialogue with the other institutions and with society as a whole concerning the necessity for this or that measure, for this or that compromise. Is not this the meaning of the deliberate-speed formula itself, which resembles poetry and resembles equity techniques of discretionary accommodation between principle and expediency, but which fits precisely one thing only, namely the unique function of constitutional adjudication in the American system? 48 Did not the Court, having announced its principle, resume its accustomed posture of passive receptiveness to the complaints of litigants; some of which may be heard, but some of which may not, because they attack compromises whose present necessity and whose consistency or inconsistency with the ultimate goal must await the proof of further experience? It is not for the Court to work out or even to approve such compromises. That would be incompatible with the function of principled judgment. Nor is it automatically true, however, that such compromises nullify the validity or the effectiveness of principle. In its day, when the education of Negro children was just beginning, segregation by law in the public schools may have been a necessary compromise, and the Court's grave error lay not in failing to strike it down in the nineteenth century, but in legitimating it on principle. The Court's proper role is more truly exemplified by the recent affirmance in the Shuttlesworth case 49 of a refusal — a discretionary refusal, not based on lack of standing in the pure sense — to adjudicate the constitutionality of pupil-placement statutes on their face.

It follows that the techniques and allied devices for staying the Court's hand, as is avowedly true at least of certiorari, cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled. They mark the point at which the Court gives the electoral institutions their head and itself stays out of politics, and there is nothing paradoxical in finding that here the Court is most a political animal. But this is not to concede unchained, undirected, unchartered discretion. It is not to concede judgment proceeding from impulse, hunch, sentiment, predilection, inarticulate and unreasoned. The antithesis of principle in an institution that represents decency and reason is not whim, nor even expediency, but prudence. And so all the significant questions are still before us. We have touched so far only on the sort of generalization that cannot resolve a single concrete case, but without the aid of which no case can be sensibly decided. What then are the decisive considerations in various categories of cases? Toward this inquiry, which needless to say I mean merely to commence, a number of this Term's cases point a way.

III. RESTRAINT: PRIOR AND JUDICIAL

A purposive administration of the certiorari jurisdiction would have found no room for Times Film Corp. v. City of Chicago. 50 Certiorari was granted, and the Court divided five to four on the merits. 51 The case was this. Chicago has an ordinance requiring all motion pictures to be submitted "for examination or censorship" prior to being licensed for exhibition. An administrative appeal lies to the Mayor, and exhibition of a picture without the required license is subject to a fine of not less than fifty dollars nor more than a hundred for each day the picture is thus exhibited. 52 Times Film applied for a license but, when requested to present the motion picture in question, "Don Juan," for inspection, flatly refused to do so. For this reason the license was denied, and the Mayor affirmed. Times Film thereupon filed suit in federal district court for an injunction requiring issuance of a license and restraining the city from interfering with exhibition of the picture "Don Juan." No allegation was made describing the picture. The district judge held that there was no justiciable controversy, no substantial federal question, and no direct or threatened injury to plaintiff, and dismissed. 53 On appeal, the dismissal was affirmed. The film not being part of the record, the court said, no one had any idea what kind of a picture "Don Juan" was. Thus

46 JAFFA, CRIME IN THE HOUSE DIVIDED (1959).
47 Hyzinski, Constitutionalism: Limitation and Afirmation, in GOVERNMENT UNDER LAW 472, 485-86 (Sutherland ed. 1956).
50 165 U.S. 15 (1916).
51 The Chief Justice dissented in an opinion joined by Justices Black, Douglas, and Brennan, 165 U.S. at 56; Mr. Justice Douglas also dissented separately, and was joined by the Chief Justice and Mr. Justice Black, 165 U.S. at 78.
the case was reduced "to an abstract question of law." There was no
telling what kind of exhibition the court would be sanctioning if it granted
the relief prayed for. "It might be a portrayal of a school of crime, which,
for instance, teaches the steps to be taken in successfully carrying
out an assassination of a president of the United States as he leaves
the White House; or shows how to arrange an uprising of subversive
groups in one of our cities." 54

"The precise question at issue here [the constitutionality of prior re-
straints on the showing of motion pictures] never having been specifi-
cally decided by this Court, we granted certiorari." 55 So runs the ritual
recital of the grant in the opinion of the Court by Mr. Justice Clark. It
hardly needs counterrecital to establish that the Court does not grant
certiorari to decide all questions that have not previously been "specifi-
cally decided by this Court." Grants and denials turn rather, in addition
to other factors, on the importance of the issue and the suitability of the
case. The problem of movie censorship in general happens to have a
rather full recent history in the Supreme Court. For nearly a decade,
starting with Joseph Burstyn, Inc. v. Wilson, 56 everything that came up
was struck down. 57 The guiding consistency of this course of adjudica-
tion is marred, however, by the fact that only two opinions of the Court
were written, the rest being summary dispositions, and that no single
readily applicable principle was evolved. There can be no doubt that
lower courts as well as local administrators and legislators have had
great difficulty making head or tail of the so-called law that the Court
readily applicable principle was evolved. There can be no doubt that
Times Film case offered for adjudication was important. Certiorari
should have been denied, however, for overriding reasons of unsuita-
ability for adjudication. These do not concern "standing" or "case and
controversy" in the pure sense. They do necessarily involve the merits.

The question of constitutional standing is scarcely debatable. Times
Film was in danger of being fined for exhibiting "Don Juan," which is
quite an immediate prospect of palpable injury. The company could
have avoided the prospect, to be sure, by submitting the film fur licens-
ing. But that was precisely the requirement of law that it deemed un-
constitutional per se under any circumstances, then Times Film
was as concrete a case as the next. For a judge who so much as en-
tertains the faintest doubt about the absoluteness of such absolutes, no
case could be less suitable, for no case could have truncated the issue
more or narrowed the line of vision more severely. Absolutes to the
side, what after all is the issue of prior restraints?

There was a time when the issue was quite straightforward, because
the difference between a prior restraint on speech and regulations by
way of subsequent punishments was plain. 58 A prior restraint was cen-
sorship by the Crown or under the authority of Parliament. It repre-

sented, therefore, control by irresponsible or oligarchical officials. Sub-
sequent prosecution was subject to the safeguard — by the eighteenth
century, the reasonably well-developed safeguard — of trial by jury. 59 Lord
Mansfield wrote in 1754 that a conviction then obtained was the first
from a London jury in twenty-seven years. 60 In the colonies the differ-
ence was even starker. Prior restraint meant control by officers responsi-
ble to officials in England. Subsequent punishment meant trial before
local juries. The problem was to protect a majority and to foster an
infant democratic process. Prior restraints were a certain means of
strangling it. Jury trials came near to placing total control in the hands
of the very majority whose freedom was in question. This straight-
forward difference lay behind the abhorrence of prior restraints, ex-
pressed by Blackstone, which was so strong in the English tradition and
which most of the colonists certainly shared. 61 The problem today is
quite different. It is the protection of minorities against a majority in
a mature democracy, a majority whose attitudes will be reflected by the
executive as well as by the jury system. In a representative democracy,
neither officials — especially appointive ones — nor juries should be al-
lowed too wide a discretion to make policy in these matters. May, as
we shall see, have to be held fairly strictly to its own responsibility.
But this is a consideration that applies about equally to prior restraints and to a system of subsequent prosecution. If there remain significant general differences between the two, they must be other ones.

One difference is in the timing and posture of litigation, the difference between requiring the exhibitor to apply for a license and then perhaps to sue, and inviting him to act at his peril and wait for the censor to sue him. In either event, the ultimate decision will be by judges on review. In neither event can litigation be avoided. But a criminal prosecution is not so easily stated as a license is denied. One may well wonder why there should not be demanded of the censor a showing, or at least an allegation of reason to believe, that a film which must be submitted for examination might fall within a forbidden category. The wonder why there should not be demanded of the censor a showing, or state cannot ordinarily arrest an individual, or search his papers or effects, without first making out probable cause.

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The state cannot ordinarily arrest an individual, or search his papers or effects, without first making out probable cause that he has committed an illegal act, and it ought to have no greater power over the product of an individual's mind, which a motion picture may sometimes turn out to be. It is strange and unaccustomed that the exhibitor of a motion picture should have the burden of coming forward with evidence of "innocence," while the censor need prove nothing at this stage. But this is not an argument that could lead to wholesale prohibition of prior restraints. The most crucial present-day difference between prior restraints and subsequent punishment concerns what happens to the film after litigation takes its course. If it were necessarily true that a film may be exhibited — at the defendant's risk, to be sure — throughout the period of criminal litigation and appellate judgment, while it may not be exhibited during the period of civil litigation following denial of a license, then the difference would indeed be major. But this is far from a necessary consequence. The solution is to hold that showing the film without a license is not a punishable offense if the exhibitor wins the ultimate litigation.

The brief for the defendant in Times Film spent no more than a page dealing with justiciability. Its discussion of the merits ends with what is surely one of the most touching, upturned-face pleas ever made to any authoritative oracle, let alone the Supreme Court:

What, then, is the answer? It is for this Court to lead the way, for it is with this Court that the ultimate responsibility rests. The Court must adhere to a middle-of-the-road policy — a road that is flanked by two precipices. The one drops off to moral debasement, the other to witch-hunting, thought-strangulation, puritan regimentation. Neither course is for America. This Court must take the helm and lead us — both sides to this controversy — down the middle path where motion pictures will be subject to only such prior restraint as may be necessary to prohibit the obscene, the immoral and those motion pictures which tend to produce a breach of the peace and riots.

69. 356 U.S. at 75-77.
barest type of pornography, or incitement to riot, or forcible overthrow of orderly government . . . .

That is not very far-reaching doctrine. But there can be little doubt that the decision — especially since it was rendered in an unconcerned opinion, which treated the power to censor as if it hardly differed from a municipality’s street-maintenance functions — will have radiating consequences, and that these will be to encourage Comstockian tendencies. The Court’s previous adjudications, confusing as they were, at the very least rendered censorship much more difficult and much more uncertain of orderly government.

The Court’s previous adjudications, confusing as they were, at the very onset of its opinion.

56

municipality’s street-maintenance functions — as invalidating all motion picture censorship.

Certainly, it can be said that the Court had been having, and might expect to continue to have, a dampening effect on censorship. Times Film bids fair to inaugurate an opposite trend. Is this a consideration not properly addressed to the Court? It is unreal to think that by putting such matters out of view the Court keeps itself out of politics. It merely abandons control of the direction in which, inevitably, its decisions on such matters out of view the Court keeps itself out of politics. It merely abandons control of the theory or practice of democratic government.

An absolute prohibition on prior restraints is not, as I have maintained, a proper principle for the Court to impose. It is neither a proper neutral principle, in Mr. Wechsler’s sense, nor a proper principled goal, because it does not proceed from moral or other considerations sufficiently clear-cut to override countervailing ones. If it were an adequate principle, the Court would be quite a different matter, however, for the Court to proclaim an action toward an end of whose validity it has no present doubt. It would be quite a different matter, however, for the Court to proclaim an absolute which is not merely unattainable in practice, but untenable as such on principle. Herein appears to lie one of the differences between Justice Black’s absolutist position and the so-called balancing approach.

98 155 U.S. at 47.


103 For example, Swaff v. Painter, 339 U.S. 629 (1950).
is a sensitive and a powerful weapon. Utilized with sophistication, it complements the Supreme Court's broad discretion as to which cases the Court will entertain, and in what sequence. Case framed as *Times Film* was framed should not be heard because they are attempts to deprive the Court of a freedom of choice which it must reserve to itself.

To the extent that the decisive considerations at the certiorari stage have been accurately isolated here, the Court's practice whereby four votes are sufficient for a grant is brought into doubt. Of course, nothing has been said to shake the assumption that denial of certiorari is not an adjudication of the issues tendered; a denial is an avoidance of adjudication of the merits. But it is clear also that there are times when avoidance should rest on merits of its own, and it is not clear why a single case is involved, if the mere presence of a large number of petitions for certiorari is a sufficient reason. In the majority of the *Times Film* cases, none has been accurately isolated here, the Court's practice whereby four votes are sufficient for a grant is brought into doubt. Of course, nothing has been said to shake the assumption that denial of certiorari is not an adjudication of the issues tendered; a denial is an avoidance of adjudication of the merits. But it is clear also that there are times when avoidance should rest on merits of its own, and it is not clear why a majority of the Court should lack the power to make this judgment.

While the rule of four is in effect, however, it would seem to dictate that once certiorari had been granted in *Times Film* the action could not be reversed. The argument revealed nothing new about the case in respect of the relevant considerations, and a single case is involved, not a category. And so the appropriate disposition called for after argument was a jurisdictional dismissal for lack of ripeness.

IV. RIPENESS: BIRTH CONTROL

Connecticut has a statute which forbids the use by any person of "any drug, medicinal article or instrument for the purpose of preventing conception." Violations are punished by fines of not less than fifty dollars, imprisonment of not less than sixty days nor more than one year, or both. No Connecticut statute specifically forbids the sale or distribution of these devices, but the state is able to punish, if as they were, the principal offenders, accessory to the offense, who assist or counsel others to commit any offense. In *Tileston v. Ulman*, decided in 1945, the Court was asked to pass on the constitutionality of the Connecticut statute; but this attempt to obtain a decision failed for an elementary reason. *Tileston* alleged that he was prevented from giving professional birth-control advice to three patients whose lives would be endangered unless contraception could be pre-

In *Poe v. Ulman*, 1961 decided this Term, the pleading omission of *Tileston v. Ulman* was well and truly supplied. Dr. Buxton, one of the parties, sued in his own right, alleging that the Connecticut law prevented the full, conscientious exercise of his profession, and thus injured him in *The Supreme Court — Foreword*
"So the matter is entirely academic," Mr. Justice Frankfurter said to counsel for the defendant on the argument. "I suppose so," replied Mr. Cannon. But it hardly was. The highest court of the state, in the Tileston case, as well as in this case, had construed the statute to forbid and make punishable dissemination of birth-control information privately, by a doctor to his patients. Dr. Buxton alleged that he is a law-abiding as well as a prudent citizen and that the statute deterred him from prescribing contraceptives. This is something only Dr. Buxton can know. Whether prosecution is very likely, likely, possible, or even improbable, the incidence of some deterrent effect cannot be gainsaid. The matter was not academic at the time of the argument; it became so by decision of the Supreme Court.

The point of Mr. Justice Frankfurter’s opinion announcing the judgment of the Court, as Justice Harlan was able to show, is not that the plaintiffs had no standing, not that the controversy was feigned or unreal, and not, as in Times Film, that it was "so artificially truncated as to make the cases not susceptible to intelligent decision," 44 The point is that the job of the Court, even in a perfectly real, concrete, and fully developed controversy, is not to resolve issues on which the political processes are in deadlock, but to do what it can to break that deadlock, so that the political institutions may make their decision before the Court is required to pass judgment on its validity. If the Court was not "to close our eyes to reality," 45 it had to find that the situation in Connecticut in respect of the use of contraceptive devices by a doctor’s prescription is most curious. The influences that favor the objective of the statute cannot summon sufficient political strength — or perhaps they have not the desire 46 — to cause it to be enforced; assuming that the consistent enforcement of a law is as much a function of the political process as is enactment of it. The influences which oppose the law cannot summon sufficient political strength to cause it to be repealed; attempts have been made from 1923 onward, and they have failed. All this is not known to be the fact with regard to sales from vending machines or the establishment of birth-control clinics. But the cases before the Court concerned neither vending machines nor clinics. Had the attempt been to obtain a decision on the statute as applied to vending machines or to clinics, these cases should have been dismissed for lack of ripeness and concreteness. 47 When enacted in 1879, as part of a wholesale attack on what was then deemed obscene, under the title "An Act to Amend an Act Concerning Offenses against Decency, Morality and Humanity," 48 the statute was the product of very different political forces and a very different climate of opinion. There is nothing too uncommon about its survival under other patronage and to other ends today. But having regard to the total lack of enforcement in circumstances such as those of the cases before the Court, it is evident that, as so applied, the statute does not speak the present will of dominant forces in the state. It represents at present a deadlock of wills, from which the Court was asked to extricate the state. This may be the reality more often than we know or care to acknowledge. But this time it was demonstrable. Such a deadlock, in such circumstances, nevertheless constitutes a species of effective law, in the degree complained of by Dr. Buxton and his patients. But it is law by default. And it does not follow — except from the dictum in Cohen v. Virginia — that the Court owed an adjudication to Dr. Buxton and his patients.

For anyone prepared not to heed Thayer’s admonition that the "tendency of a common and easy resort to this great function [of judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility," 49 the Court’s judgment in Poe v. Ullman is nonsense. But if the case is regarded as having presented the Court with a choice between, on the one hand, a constitutional adjudication that would cooperate with the state’s political institutions in their efforts to evade their own responsibility for decision, and on the other, an opportunity to set in motion forces that could conduce to a political decision, then the result appears in a very different light. The truth is that neither the Connecticut legislature nor the prosecuting authorities have ever faced the issue in its present significance and in the context of the present political configuration. The legislature has voted against repeal. But that is not the same as voting to enact a statute 50 and the difference is peculiarly crucial, as I shall argue further, in circumstances of non-enforcement. Prosecutors have dealt only with a clinic and two vending machines. For the rest, all they have ever done has been, literally, to demur as occasion offered. A device to turn the thrust of forces favoring and opposing the present objectives of the statute toward the legislature, where the power of at least initial decision properly belongs in our system, was available to the Court, and it is implicit in the prevailing opinion. It is the concept of desuetude.

This, it must be said, is not an everyday, familiar doctrine of Anglo-American law. 51 The question which the doctrine seeks to answer is
not — as it was with bootlegging — whether "because a certain number of people do not like an Act and because a good many people disobey it, the Act is therefore 'obsolete' and no one need pay any attention to it . . . ." It is whether a statute that has never been enforced and that has not been obeyed for three-quarters of a century may suddenly be resurrected and applied. The civilians, though more bound to codes than we are, recognize the doctrine. "Wherefore very rightly this also is held," John Chipman Gray quotes from the early writer Julianus, "that statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all." And Gray points out, with his usual freshness, that formal rejection of the doctrine by our courts does not necessarily mean failure to apply its substance. "It is not as speedy or as simple a process to interpret a statute out of existence as to repeal it, but with time and patient skill it can often be done." The strongest claim that desuetude has to naturalization in American law is consanguinity with the well-established doctrine that statutes may be declared void for vagueness. As Mr. Anthony G. Amsterdam's brilliant recent analysis has shown, vagueness is vague; the doctrine has several meanings and serves more than one end. There are times when it imports a substantive adjudication, as when a statute is so worded that it is likely to deter more than it actually forbids, and this has several meanings and serves more than one end. There are times when it may not constitutionally regulate. "But this factor can hardly be

Columbia v. John R. Thompson Co., 346 U.S. 109, 112-18 (1953), although the Justice fails to cite it. But, happy as it was in the result, that was an exceedingly hard case, which may perhaps be excused for the kind of law it made. The Court did not there consider, and it has not elsewhere canvassed, the reason for rejecting the hypothesised or, as they say, the 'standing' label, if defendant's behavior, to which the statute was applied, falls within the area which may be constitutionally regulated. Such a defendant has standing because he is obviously subject to an injury from which he would be saved if the statute were held void. But just as obviously, his is not the most suitable case for adjudication of the issue tendered. Yet it may be true — as it was not in Times Films — that by hypothesis no more suitable case can ever be constructed, because those who are unjustly deterred will never be prosecuted, and who deter them is precisely the prospect of litigation. Whether they should be protected against it is the issue on the merits, and if the answer is at least, that by a guilty and no more concrete case raising the issue can be expected. See Amsterdam, supra note 105, at 96-99.


Yale L.J. 549, 547-48 n.9 (1960). Compare the Court's sensitivity to the problem of notice in Lambert v. California, 355 U.S. 121 (1957), and in James v. United States, 356 U.S. 433 (1958), in which an apparent majority of the Court seemed to accept the practice of prospective overruling of precedents, so as to give fair notice of the law.

See J. Goldstein, supra note 108, at 583 n.9.

See Gray, op. cit., supra note 103, at 191-93.

See J. Goldstein, supra note 108.
more. Regardless of two declaratory judgments in over seventy-five years, such as those in Tileston and in the present case, the total absence of prosecutions is surely the operative fact for the vast majority of people. It is bound to have greater significance than the imprecision of statutory language, which most people are unlikely to consult anyway, and which the courts will often hold to be the more precise and invulnerable, the more technical and incomprehensible it is to the layman. The books are full of dead-letter statutes. They make good comic filler at the foot of newspaper columns. The books are full also of more sinister enactments, which are administratively used short of prosecutions, to blackmail and harass and cajole people. It is no coincidence that such statutes are not infrequently found void for vagueness when a prosecution brings them to light. If this is not foreign to Anglo-American practice, then in the appropriate case, when there is a history of consistent nonenforcement over a long period, neither is the idea of desuetude, which serves exactly the same end and which is conceptually cleaner—not being enmeshed in what Mr. Amsterdam calls the "infinitely parallel contrariety" of "mutually oblivious doctrines."

The prevailing opinion by Mr. Justice Frankfurter does not in so many words hold that the Connecticut birth-control statute has been nullified by desuetude in its application to the use of contraceptives by a doctor's prescription. But it does rest on this flat statement: "The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis." And the prevailing opinion declines on this ground to reach what would otherwise be a ripe, justiciable issue. There might have been nothing amiss in language a shade more explicit. But the guarded expression is characteristic of our law in the initial stages of a doctrinal development. The consequence of the opinion, nevertheless, must be that a prosecution of persons situated as are Dr. Buxton and his patients would fail on the ground of desuetude. It has to be added, however, that Mr. Justice Brennan's brief concurrence, making a majority, amounts only to a discretionary vote against adjudication, for reasons that are none too scrutable.

V. Political Responsibility and Congressional Investigations

The Court in the Birth Control Cases engaged in a sort of colloquy with the political institutions, begun by way of questions and answers at the argument, stylized and brought to a Socratic conclusion in the prevailing opinion. The upshot was the framing of conditions to invite a responsible legislative decision. By contrast, in this Term's Wilkinson [118] and Braden [117] cases, the Court, as it had done in Barenblatt v. United States, [118] refused to continue a colloquy upon which it had entered earlier. As in Times Film, and as unnecessarily as in Times Film, the Court reached the merits and legitimized government action which, to be sure, as I shall argue, it could not very well forbid, but which need not have been turned into "the doctrine of the Constitution," there to gain "a generative power of its own." [119]

The first of the congressional-investigation cases that the Court brought up for full consideration was United States v. Rumely, [120] decided in 1953. It was as well-selected a case, and if one may say so, it stands as a textbook illustration of the Court's awareness and control of the implications and possibilities of its role in our scheme of government. Rumely had collided with a committee empowered by a special resolution of the House to investigate "all lobbying activities intended to influence, encourage, promote, or retard legislation."

Rumely's organization sold far-right political tracts, and he declined to reveal to the committee the names of those who made bulk purchases. The Court gracefully conceded the indispensable and far-reaching nature of what Wilson called the "informing function of Congress." [122] But it emphasized as well the obvious ways in which this function can impinge on what might be thought to be first amendment freedoms, and it construed the resolution as not authorizing the questions that were put to Rumely, despite considerable legislative history to the contrary. Of course, the action of the House in citing Rumely for contempt, "So to interpret," said the Court, "is in the candid service of avoiding a serious constitutional doubt." "Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." [123]

The next important event was Watkins v. United States. [124] Watkins' inquisitor was the House un-American Activities Committee, whose charter authorizes it to investigate

(1) The extent, character, and objects of un-American propaganda activi-

[118] Wilkinson v. United States, 365 U.S. 309 (1961). Mr. Justice Stewart delivered the opinion of the Court; Mr. Black, joined by the Chief Justice and Justice Douglas, dissented, 365 U.S. at 415; Mr. Justice Douglas also wrote a dissenting opinion, in which the Chief Justice and Justice Black joined, 365 U.S. at 419; Mr. Justice Douglas also concurred in the dissenting opinion of Justice Brennan, 365 U.S. at 449.


[120] See, e.g., Amsterdam, supra note 105, at 47-8; 120; Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1, 7 (1960); J. Goldstein, supra note 105, at 550-551.

[121] But see note 101 supra.

Watkins, a labor union official, when asked whether he had been or was then a member of the Communist Party, answered no to both questions, asserting his belief that these questions were "outside the proper scope of your committee's activities." The chairman told Watkins that the Committee was authorized "to investigate subversion and un-American propaganda . . . for the purpose of remedial legislation." The questions, the chairman said, were pertinent to such an inquiry, and he directed Watkins to answer. But Watkins maintained his refusal, and the citation for contempt followed. Reversing a conviction, the Supreme Court held the statute suffered from the element of vagueness that has more substance and a special byproduct, that statute is concerned with the sources of policy, with the crucial

106] THE SUPREME COURT — FOREWORD

tion to decide what is "pertinent." That is an issue of vagueness, but not of fair notice. Two years later, in Barenblatt v. United States, the Court, dividing five to four, held the Watkins case to the narrow and none too favorable ground mentioned above, voided the constitutional merits, and placed the crown of principled legitimacy upon the modestly inclined head of the House un-American Activities Committee. Wilkinson and Braden now reaffirm Barenblatt.

But the majority opinion in the Watkins case was more broadly and soundly based than has thus been made to appear; it carried forward what might be called the process of avoidance and admonition begun in Branzel. The power to investigate, the Court said in Watkins, though exercised by committees, is the power of the Houses of Congress. The broader the authorizing resolution, the greater "the discretion of the investigators." Under this resolution, "the preliminary control of the committee exercised by the House of Representatives is slight or non-existent." For the Committee "is allowed, in essence, to define its own authority, to choose the direction and focus of its activity." Wide-ranging investigations may place in issue constitutional protection of individual rights, and thus call for a "critical judgment," which the Court is in a poor position to make because "the House of Representatives itself has never made it." This, in the statement and in the application, is an element of the doctrine of vagueness that has more substance and is more frequently decisive than the fair-notice factor. In the realm of federal legislation other than the criminal code, it goes by the name of the doctrine of delegation. As such, it does not, unfortunately, have an illustrious past, which perhaps accounts in part for the rejection of Watkins in Barenblatt and in Wilkinson and Braden. But this is no reflection on its validity or utility. The Court has since early times paid lip service to the doctrine in terms of the polarities of the separation of powers. For decades the Court would recite something to this effect but go on to decide the case regardless. Then came Panama Refining Co. v. Ryan, and Schechter Poultry Corp. v. United States, in which the recitals were as of old, except that the Court did not go on to uphold what Congress had done. The ill repute of those cases has stuck to the doctrine, and not until Watkins was it ever made effective again, and not until Watkins was there ever a statement by the Court of its substance.

To say that the doctrine of delegation is concerned with the separation of powers is merely to invoke a symbol. To say that it is concerned with checks and balances is to speak of a side-effect it surely has. But it is not to get at the essence of its utility, for the important checks and counterchecks are built into the governmental scheme in more binding ways. To say that it facilitates control of official action by the courts is again to notice a byproduct, and it is to beg the question somewhat, by assuming that judicial control is necessary or desirable. The doctrine of delegation is concerned with the sources of policy, with the crucial

107. 20 U.S. 188 (1915).
108. 255 U.S. 452 (1921).
 joinder between power and broadly based, democratic responsibility, bestowed and discharged after the fashion of representative government. It follows that the doctrine should be as applicable to the relationship between Congress and one of its committees as between Congress and the executive. The members and staff of a congressional committee have of course no more of a national electoral mandate than does the Federal Communications Commission or a special assistant to the Third Assistant Postmaster General. The committee and its staff are a part of the bureaucracy, although the bureaucracy of Congress rather than the executive.

"Delegation of power to administration is," however, "the dynamo of the modern social service state." When should the Court recall the legislature to its own policymaking function? Obviously, the answer must lie in the importance of the decision left to the administrator or other official. And this is a judgment that will naturally be affected by the proximity of the delegated area to a constitutional issue. The more fundamental the issue, the nearer it is to principle, the more important it is that it be decided in the first instance by the legislature. In the peculiar desuetude situation, when the legislature cannot be said to have made and sustained any decision at all, not even the decision to delegate, no additional criteria come into play. Where delegation properly speaking has occurred, however, as in the usual vague statute, the capacity to argue for constitutional judgment remains to be exercised concomitantly with the capacity properly speaking to do this or that. It precedes such a judgment and avoids it, and is in the nature of an estimate, and quite properly prudential in character. Its end is to pose a question, not to impose an answer. This is perhaps all the Court can ever do with respect to most congressional investigations — but one was entitled to expect that it would follow the Rumely case, which dealt with a one-shot investigation only, by doing no less.

Nothing can better exemplify the tension between expediency and principle in American government than the problem of congressional investigations. It is easily said that there are constitutional limits to the power to investigate — that is, limits grounded in principle and to be enforced by the Court. Congress, as was held in Kilbourn v. Thompson, may not conduct an investigation unrelated to legislative purposes. It may not, as the Court said in Barenblatt, set itself up in place of the judiciary to adjudicate guilt. And the power to investigate, as the Court also affirmed in Barenblatt, is subject to "the relevant limitations of the Bill of Rights," including the first amendment, and including, one would suppose, what is perhaps most comprehensive,


135 503 U.S. 168 (1881).

136 300 U.S. at 122.

137 "the right to be let alone." But there is only one limitation that has been imposed with effective continuity, and that is the privilege against self-incrimination. The restriction to legislative matters may have meant something in 1881, though not in Kilbourn v. Thompson itself; it means almost nothing today, having regard to what are now the acknowledged concerns of Congress. Moreover, the informing function serves not only Congress but the public, for law with us is effective by consent, and Congress should have the power to generate consent by making known the facts that lead it to legislate. There are no doubt some barriers capable of principled formulation that might be imposed under the first and perhaps the fourth and fifth amendments. But they cannot normally be the same ones as may be imposed upon the governmental power to regulate, for Congress must in all reason be allowed to investigate in order to learn enough to know that it should not legislate; anything else is "to require of senators that they shall be seers." or is an aspect of the illusion of immutable, self-applying absolutes enclosing an area of permissible governmental power like some international line drawn on a map. Fittingly enough, Mr. Justice Black's dissent in Wilkinson contains one of the most striking expressions of the literalist-absolutist conception:

Our Constitution, in unequivocal terms, gives the right to each of us to say what we think without fear of the power of the Government. . . . Those principles are embodied for all who care to see in our Bill of Rights. They were put there for the specific purpose of preventing just the sort of governmental suppression of criticism that the majority upholds here. . . . For the principles of the First Amendment are stated in precise and mandatory terms. . . .

But for those for whom the governing rules of our day were less firmly and less completely prepackaged: 80 years ago, facts and conditions, yet to be uncovered when the power of investigation is put into question, are essential not only to the enactment of legislation but most often also to principled constitutional judgment by the Court. James M. Landis said it, concisely and definitively, a generation ago:

Relationships, and not their probabilities, determine the extent of Congressional power. Constitutionality depends upon such disclosures. Their presence, whether determinative of legislative or judicial power, cannot be relegated to guesswork. Neither Congress nor the Court can predicate, prior to the event, the result of investigation.

The sum of it is that the power to investigate operates under a suspension of many otherwise applicable rules. This includes
not only substantive principles but such procedural ones as the right to an impartial judge, to the showing of probable cause, to confrontation and cross-examination. And there seems to be no way to tailor a full suit of principled rules specially for congressional investigations, as has been done for jury trials. They must be done with quasi-judicial agencies, grand juries, and courts-martial. An investigation which invades what would otherwise be protected privacy may be a self-serving frolic, or it may answer to an urgently felt need. Most often, this is the real dividing line between investigations that should be permitted and those that should not. But as the Court said in *Watkins*: "Only the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures." 148 The Court can see that it does.

One method of judicial control which has been urged was rejected in *Watkins* and again now in *Wilkinson* and *Broden*. It is that the Court judge of the motives of the Committee, and hold unconstitutional an investigation whose "dominant purpose" is not "to gather information in aid of law making or law evaluation but rather to harass . . . [the witness] and expose him for the sake of exposure." 149 To the extent that, in *Barenblatt*, *Wilkinson*, and *Broden*, this position was bottomed on a determination of purpose proceeding from an objective inquiry, it represents an untenable simplistic view of the "informing function." 146 For the rest, it suffers from the uncertainty, indeed the impossibility that has always bedeviled the search for the decisive motive behind the action of a group of men. Motives are nearly always mixed and nearly never professed. They are never both unmixed and authoritatively professed in behalf of all those responsible for the action. This need not paralyze the function of political judgment; one may be satisfied, as a matter of prudence, that the un-American Activities Committee customarily embarks on punitive expeditions which misuse its power. But, as the Court has had occasion to find out, 147 this is shifting ground; it is an ad hoc foundation on which to rest a judgment purporting to be principled.

It remains to note that there was present in *Barenblatt*, *Wilkinson*, and *Broden* the procedural point that these three defendants, unlike Watkins, did not exhaust administrative remedies by specifically raising to the committee chairman the question of pertinency. This is a distinction relevant only on the fair-notice view of *Watkins*. At any rate, the Court did not avail itself of it. And it remains to account for *Hannah* v. *Larche*. 140 By a statute as precise as could be wished, the Civil Rights Commission was empowered to investigate denials of voting rights. The Commission is not an accusatory body; it wields no criminal sanctions. But it does wield the great power of exposure. It operates, both by its

146 352 U.S. at 306.
147 363 U.S. at 535.
148 See p. 65 supra; Landis, supra note 146, especially at 241-42.

*VI. Political Responsibility and Security Dismissals*

*Watkins*, though now repudiated, does not stand alone in the books, even aside from *Rumely*. And among its companions, *Kent v. Dulles*, 150 a much more difficult case for the result reached, retains unimpaired authority and, one may hope, influence. In *Watkins*, immense discretion was delegated, which the Committee never narrowed in the administration. Subsequent actions of the House may for the sake of argument be deemed to have ratified what the Committee did in the past; prospectively, they can only be said to have continued the grant of the widest discretion. In *Kent v. Dulles*, the original grant of authority to deny passports was as broad. But discretion had been narrowed administratively to reasonably well-defined categories of cases, of which this was one. Normal methods of statutory construction would therefore lead one to conclude that a congressional ratification in 1952 amounted respectively to an affirmation of administrative authority as limited to the categories of cases in which it had hitherto been exercised. It can thus be said that there was a legislative policy applicable in the circumstances of *Kent v. Dulles*. But as in *Rumely*, it was not wholly explicit. Were freedom to travel less jealously regarded, it might have sufficed. In "the candid service of avoiding a serious constitutional doubt," 151 it need not
have, and didn't. But this is a step beyond holding Congress to its responsibility for a policy decision which it has failed to make or to announce with sufficient particularity; this is remanding for a second look.190

Greene v. McElroy188 was Watkins all over again, only an even easier Watkins. Curiously enough, its authority has now been somewhat impaired, in this Term's Cafeteria Workers v. McElroy.214 The issue in both cases was procedural, as in Hannah v. Larche, not substantive, as in Kent v. Dulles. In Greene the Government had caused a security clearance to be withdrawn from Greene, an executive officer of a defense contractor, who consequently lost his job. There was no quarrel over the question of ultimate power; it was just that the Government had acted on the basis of confidential information from witnesses whom it did not make available for confrontation and cross-examination. This procedure had not been specifically authorized either by Congress or the President. Citing Watkins, the Court held that official discretion could not be allowed to impose "substantial restraints on employment opportunities of numerous persons . . . in a manner which is in conflict with our long-accepted notions of fair procedures."166

Rachel Brawner, in whose behalf the Cafeteria and Restaurant Workers Union sued, was a short-order cook employed by a private contractor who operated a cafeteria at the Naval Gun Factory in Washington, where classified weapons are developed. She needed, and had, clearance and a badge to come to work. One fine day both were withdrawn on the ground that she did not "meet the basic security requirements as regards entrance."134 No charges were made known; no hearing was held. The admiral in command said it would serve "no useful purpose."157 Affirming an en banc judgment of the court of appeals,158 the Supreme Court, Mr. Justice Stewart writing, held that the admiral of the gun factory was authorized to dismiss short-order cooks in this fashion, and that it was all quite constitutional.159

The admiral's authority was derived from Navy regulations approved by the President, which provide: "In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer . . . ."190 The question was whether employees of contractors may be summarily deprived of their jobs "within a command." Wherein, so far as failure to address itself to this question is concerned, does the above prose differ from the regulation under which Greene v. McElroy was disposed of? It read: "Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department . . . ."191 There is, said Mr. Justice Stewart, "the illuminating gloss of history."166 It shows that the gun factory is government property, and that the Government may exclude anyone from it. But it shows nothing concerning procedures in security dismissals. The commanding officer's power can hardly be absolute, as Justice Stewart said it was, though he seemed himself to doubt it at another point.168 Assuredly the commanding officer of an aircraft carrier docked in New York harbor has absolute authority to order all visitors off at 5 p.m.; but may he order Jews off at 3, or may he order that anyone be put off by being dumped in the sea? Despite disclaimers, the Court's opinion marks a regression to the question-begging "privilege v. right" reasoning of such inglorious episodes as Knapp v. Shaughnessy.164

But let us assume that the "gloss of history" does illumine the commanding officer's absolute authority. There was authority—that is, total discretion—in Watkins and Greene, and there was more detailed authority in Kent v. Dulles. Why, in contrast to those cases and to Rorem, was there this time no judicial performance "in the candid service of avoiding a serious constitutional doubt?" Plainly because the Court suffered no constitutional doubt. But why? It is not arguable that Mrs. Brawner was not injured. The Court maintained that she was not injured much; but that was not her view, as the only other job offered her by her employer, which she could not accept, was in an inconvenient out-of-town location.166 The Court may for good reason develop adjudication of an issue, taking into consideration that the injury to the moving party is in the Court's view de minimis. But it is surely startling to find a constitutional principle that the Government must grant hearings to private persons before inflicting palpable injury, except that it need not do so when the injury, though undoubtedly and bitterly complained of, seems slight. Such an estimate, prudently considered alongside other factors, may determine ripeness; it can scarcely form the content of an "impersonal and durable"184 principle of the Constitution.

The decisive factor for the majority, it may be ventured, is to be found in the unsubstantiated and on this record unprovable statement that the reason advanced for Mrs. Brawner's dismissal was "entirely rational," supplemented at the end by the casual suggestion that perhaps the admiral "simply thought that Rachel Brawner was garrulous, or careless with her identification badge."167 Perhaps the gun factory, like

193 360 U.S. at 506-07.
195 367 U.S. at 888.
197 Mr. Justice Brennan, joined by the Chief Justice and Black and Douglas, JJ., dissented, 367 U.S. at 892.
198 Quoted in 367 U.S. at 892.
the west coast in 1943, is a place from which jittery commanders must be allowed to ship people out on hunch, and ask and be asked no questions. One doubts it. But if this is necessary and expedient, no amount of rationing can divine the fact, and the Court cannot know and has not demonstrated it. The Court should have required a responsible policy decision to be made, as it did in Greene. Certainly it should not have sanctioned such procedures in this case, if ever.

Of course, there are in government, as in private employment, conditions which require that the superior have arbitrary power to be rid of his subordinate, because of the intimacy of their relationships, or in order to complement high political responsibility with commensurate authority. A hearing then would be nonsense, because it could come to nothing. It can be asserted with calm confidence that the relationship between Admiral Tyree of the gun factory and Mrs. Brawner of the cafeteria was nothing of the sort. Despite Andrew Jackson and his spoils system, which really raised quite different issues, hearings are now the norm, and for the most fundamental of reasons, Mrs. Brawner was the subject of an exception for which no principled justification has been put forward. It is not the function of the Court to construct such exceptions.

VII. The Political Question

Any progression of instances when the final, constitutional judgment of the Supreme Court has been or should be withheld culminates naturally in the nebulous neighborhood of the doctrine of political questions. In Trench Film — as most often, but not always; not in the Segregation Cases, for example — the substantive issue would not answer to any absolute principle; something equally principled but more malleable was called for, which was well within the Court's competence to evolve, but not in the case before it. Insufficient materials were offered for one sort of judgment, and the alternative, though adequate, was unwise in its tendency. We enjoy in many respects more freedoms (which is to say, more convenient social disorderliness) than the rule of principle should, or the judges could, guarantee us. But where freedom makes special claims, though they fall short of principle, the judges have no duty officially to encourage majoritarian forces of order, who will speak for themselves readily enough when they feel the need. In the Birth Control Cases, the substantive issue was again fit for judicial decision. Indeed, the cases presented relatively the easiest aspect of the issue. But there had, effectively, been no prior political decision. Hence the issue was not ripe — not merely in that case, but at all — because the Court should not reap the quality of the political process by exercising initial as opposed to reviewing judgment. The people of Connecticut might enjoy freedom from birth-control regulations without being guaranteed it by the judges.

182 But cf. id. at 181-82.

and it is better that way, if possible. The last collection of cases, starting with Rumely and Watkins, turned ultimately on issues bringing into question the very capacity of judicial judgment. Here "the candid service of avoiding a serious constitutional doubt" needed to be performed for the added reason that decision should, perhaps, be avoided permanently.

In Greene v. McElroy, the Government had won below. The Court of Appeals for the District of Columbia Circuit affirmed a dismissal of the suit, the operative reason being that the case did not present a justiciable controversy — a controversy, "which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence." The ultimate question was Greene's fitness to be entrusted with state secrets, and "any meaningful judgment in such matters must rest on considerations of policy, and decisions as to comparative risk, appropriate only to the executive branch of the Government .... In a mature democracy, choices such as this must be made by the executive ... " Such is the basis of the political-question doctrine: the court's sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be incorrect, as that perhaps it should be, but won't, finally and in sum ("in a mature democracy"), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.

The case does not exist, of course, in which the power of judicial review has been exercised and to which some such misgivings were not applicable in some degree. But the differences of degree can sometimes be satisfyingly conclusive. There are cases, such as Luther v. Borden, of which no more need be said than what Mr. Maurice Finkelstein said of Dred Scott v. Sandford: "A question which involved a Civil War can hardly be proper material for the wrangling of lawyers." Then there are questions that, as Professor Jaffe has written, "are of the sort for which we do not choose, or have not been able as yet to establish, strongly guiding rules. We may believe that the job is better done without rules ...." We may also believe, Mr. Jaffe adds, "that even though there are applicable rules, these rules should be only among the numerous relevant considerations." But this, as I shall argue, is a very different category of cases.

Civil wars to the side, it is quite plain that some questions are held to be political pursuant to a decision on principle that there ought to be discretion free of principled rules. The existence of such discretion may
be considered not generally, but with particular relation to the interest of a particular complainant, which it is held to override. The basis of the decision will be the same, only the result is put in terms of standing, and this is too bad, as it befuddles a concept that has a useful original significance. Recognition of foreign governments and unilateral abrogation of treaties fall in this discretionary category. So also, in effect at any rate, does the question whether and when Congress may permit the states to regulate interstate commerce; and so does the nature of the general welfare for whose promotion the federal government may tax and spend. Uniform geographic restrictions on travel by American citizens would appear to present this kind of political issues only the nature and coverage of the substantive regulation are deemed discretionary; procedural matters are not the same thing. Moreover, this political-question area is to be distinguished from such a power as that of Congress to regulate interstate commerce, which is plenary and almost without practical limit, but is yet not given up as wholly discretionary.

These are discretionary functions of the political institutions, which are unprincipled on principle, because we think "that the job is better done without rules," and there is no reason why their legitimacy as such should not be affirmed by the Court, as it sometimes has been. Such questions call for no avoidance; they call for principled adjudication. The same result would follow should a cabinet officer sue for back pay on the ground that the President had dismissed him arbitrarily, because of his race, and without a hearing. As the present consensus about the impeachment of President Johnson would indicate, it is not difficult to articulate the reasons why the President should have such arbitrary power. His whim should rule, because it is desirable to enlarge as broadly as possible his personal political responsibility, and this demands a special kind of loyalty and responsiveness in his immediate subordinates. But it is not arguable on principle that the security of the nation will be best served if all employees of the Government and of its contractors can be dismissed on whim or hunch. Nobody con-

177 See, e.g., Atlantic Freight Lines, Inc. v. Summerfield, 262 F.2d 64 (D.C. Cir. 1959); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 187 (1951) (Reed, J., dissenting); Colegrove v. Green, 328 U.S. 549, 557 (1946) (symbol); Massachusetts v. Mellon, 266 U.S. 447, 468-469 (1924) (symbol); cf. id. at 486-89, where standing in the pure sense was in question.
180 See Ex parte Young, 209 U.S. 69 (1908); Ex parte L.COM, 207 U.S. 100 (1907); Ex parte Young, 209 U.S. 100 (1907).
181 See Fong Yue Ting v. United States, 149 U.S. 698 (1893).
There is nothing shocking about this. The defendant would, to be sure, lose the benefit of jury trial, but the jury's function at present is small; for example, it does not pass on authority of the committee or pertinency of the question. The role that the Court should and can play would still be open to it on habeas corpus.

The most celebrated modern political-question case is, of course, Colegrove v. Green.187 This Term, Mr. Justice Frankfurter, the author of that opinion, had occasion to emphasize the essential foundation of Colegrove in the course of delivering the Court's adjudication on the merits in Gomillion v. Lightfoot.188 Colegrove does not rest on "a play upon words"189 about the politics of the people, else Smith v. Allwright190 and its progeny are unexplained, though there are differences in degree here which may have some influence. Colegrove is not a standing case, and it does not hold on principle that, like recognition of foreign governments, legislative apportionment must be unprincipled. Nor was the decisive factor the difficulty or uncertainty that might attend enforcement of a decree; it comes easily enough to mind that the foreseeable difficulty in the Segregation Cases was graver. The point of Colegrove is that even aside from such exceptions as are fixed by the constitutional scheme itself, the political institutions have consistently found it necessary to modify the principle of equality of representation, which is the goal established under the fifteenth and fourteenth amendments. It has been found necessary to represent not only people, but interests. The Court felt unable to deny this necessity, or without probing motives — to construct a principle that might accommodate it. Nor did the Court see it as its function to bless purely expedient arrangements, or to abandon the principal goal of equality of representation, and the benefits that might be had from its influence as such. Perhaps in an extreme case the Court should see its way to make it clear to the state's powers, one and all, the principle of equality.191 It will have a chance, in Baker v. Carr,192 a case argued this Term and set down for reargument at the next.

In the Segregation Cases necessity was set up to defend practices that were not mere deviations from an established principle, but were the fundamental negation of an emergent one, which the Court was to be


190 344 U.S. 339 (1952). The Court was unanimous in reaching the result. Mr. Justice Douglas, "while joining the opinion of the Court," adhered to his dissent in Colegrove and in South v. Peters, 339 U.S. 176 (1950). 344 U.S. at 348. Mr. Justice Whittaker concurred in the judgment, writing a brief opinion which placed the result strictly on the equal protection clause of the fourteenth amendment. 344 U.S. at 348.


192 121 U.S. 609 (1944).


# TABLE OF CONTENTS

Though each reprinted article bears the pagination of the journal in which it originally appeared, the numbers given in our Table of Contents refer to our own consecutive pagination, which can be found in the outside margin of each page.

Preface ......................................................................................................................... 1

## THE ARTICLES

**Unconsconability and the Code—The Emperor's New Clause,**

Arthur A. Leff ................................................................. 21

**Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"** Frank I. Michelman ....................... 97

**The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment,** Frank I. Michelman ............. 191

**Studying the Exclusionary Rule in Search and Seizure,**

Dallin H. Oakes ............................................................. 247
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**The Fall of the Citadel (Strict Liability to the Consumer),**

William L. Prosser .......................................................... 343
Reprinted with permission from the *Minnesota Law Review*, 50:791, 1966


**The Reformation of American Administrative Law,**

Richard B. Stewart ........................................................ 501

**Unraveling National League of Cities: The New Federalism and Affirmative Rights Essential to Government Services,**

Laurence H. Tribe ............................................................ 647
The Demise of the Right-Privilege Distinction in Constitutional Law, ................................. 687
William W. Van Alstyne


Strict Tort Liability of Manufacturers, John W. Wade ................................. 715
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Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, Harry H. Wellington ................................. 739
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Arranged alphabetically by author, Volume III contains the second group of law review articles selected as the twenty-two most influential law review writings published between 1965 and 1985. We open with Professor Leff's "Unconscionability and the Code—The Emperor's Clause," and close with Professor Wellington's "Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication."

It may strike the reader as odd that only one volume was necessary to reproduce articles for the pre-1965 period and that two volumes were needed to present the same number of selections from the 1965-1985 period. This can be explained by the growth in both the number of pages and the number of footnotes in the "typical" law review article. In the collection of pre-1965 articles, for example, the longest was Fuller and Percue's two-part article, "The Reliance Interest in Contract Damages," which covers 93 pages. The longest single piece was Reich's "The New Property" which is 55 pages in length and was written in 1964, the edge of the modern period. In contrast, our post-1965 selections are giants, with Kennedy's "The Structure of Blackstone's Commentaries" covering 174 pages and Stewart's "The Reformation of American Administrative Law" comprising 145 pages.

In regard to footnotes, the story is very similar. Excluding the work of the indomitable William Prosser, who appears in both pre-1965 and post-1965 collections, the difference in footnote usage is remarkable. The most heavily footnoted pre-1965 piece was Reich's 1964 effort, "The New Property," containing 233 footnotes. If one looks at other pre-1965 selections, Fuller and Percue used 228 footnotes in their two-part effort. The post-1965 story is quite different. For example, Stewart used 630 footnotes in his piece, "The Reformation of American Administrative Law" and Amsterdam utilized 629 footnotes in his "Perspectives on the Fourth Amendment." The post-1965 articles by Stewart and Amsterdam demonstrate changing times. These articles are longer and more heavily footnoted than the pre-1965 articles, and as such, make Grey's post-1965 article, "Do We Have An Unwritten Constitution?," with 16 pages and 49 footnotes, a breath of fresh air.


Length aside, we are confident that these articles represent an important cross-section of modern legal thought. We hope that you find them stimulating and thought-provoking.
1

Leff

Unconscionability and the Code — The Emperor’s New Clause


ARTHUR LEFF (1935-1981) graduated from Amherst College in 1956. He received his LL.B. degree from Harvard Law School in 1959 where he was involved with the Harvard Law Review. In 1971, he obtained an M.A. degree from Yale University. Before joining the faculty at Yale University he taught at Washington University. He died of cancer at the age of 46.

According to the New York Times, Professor Leff, who taught contracts, evidence and ethics “to scores of students at Yale Law School” was “among the Law School’s most popular professors.” Harry H. Wellington, interviewed by the New York Times, commented, “Mr. Leff’s insights in contracts and commercial law and jurisprudence . . . helped a whole generation of scholars working in those disciplines better to understand the appropriate questions to ask. In addition to that, he was one of the best law teachers in America. Students adored him.”

In a tribute to Professor Leff, Professor Grant Gilmore stated, “In all his writings, Arthur seemed incapable of saying an ordinary thing about anything. His research was always scrupulous; his vision was personal, idiosyncratic, even eccentric. He defied classification as conservative or liberal, formalist or realist, traditionalist or futurist. He was at all times his own man . . . . He has left us with a shining example that the path of the law leads not to the revelation of truth but to the progressive discovery of infinite complexity.”

Commenting that Professor Leff, throughout his scholarly life, “struggled” with “the problem of legal meaning,” Professor Bruce Ackerman expressed his thoughts of Professor Leff: “We who loved him can never say what we have lost. We may console ourselves, perhaps, in reflecting that Leff’s predicament is our own, and that his struggle for meaning should not, cannot, be forgotten by any lawyer who seeks to understand.”

In Yale Law Journal’s tribute to Professor Leff, Professor Owen Fiss stated, “He was an extraordinary citizen . . . . There was no subject, no field of learning, scientific or humanistic, that was not of great interest to him . . . . He was, in the very best sense of the word, a character.”

Professor Leff culminated a series of his brilliant studies in a book entitled *Swindling and Selling* (1976), in which he "developed the agonistic dimension of contract as no scholar had done before him." Among Professor Leff's last major works were the celebrated "Unspeakable Ethics, Unnatural Law" (1979 *Duke L. J.* 1229) and "Law and" (87 *Yale L. J.* 989). Commenting on "Law and" Bruce Ackerman stated, "Leff's multifaceted, almost jewel-like work will take its place among the very few classics that American academics have managed to produce." For a listing of Professor Leff's writings, consult the *Yale Law Journal*, Vol. 91, 1981, page 234.

A legal dictionary was Professor Leff's final project and as Professor Gilmore noted, "had he lived to complete it, the Dictionary would have been the strangest, and . . . no doubt, the most wonderful law book ever written." Charles L. Black, Jr. stated, "The work, had Arthur been allowed to finish it, would have been the visible sign of a mind to which nothing in law or about law was alien." He further commented that the book "would have been seen as having been the firm foundation for a range of knowledge, about the concreteness of law, scarcely to be matched in any mind; present or past, that was at the same time so philosophical and creative." Professor Robert Cover noted, "... it was clear that the Leff dictionary would have set a very different standard of erudition, scope, and style from that prevailing among law dictionaries now in use."

The completed portions of the dictionary were published in the *Yale Law Journal*, "The Leff Dictionary of Law: A Fragment," Vol. 94, 1985, pages 1855-2251. The editors noted that Professor Leff's typescript and manuscript of the dictionary are available in the archives of the Sterling Memorial Library at Yale University.

In regard to Professor Leff, Charles Black noted, "He carried around with him the classic Chinese maxim, that the inferior person makes demands on other people, while persons of honor make demands on themselves."\(^1\)

Commenting on Professor Leff's study of section 2-302 of the Uniform Commercial Code, "Unconscionability and the Code — The Emperor's New Clause," Grant Gilmore stated, "The author's erudition was awesome; his legal analysis was forbiddingly sophisticated; his style was graceful, witty, and irreverent. As the title itself suggested, he was out to upset applecarts, gore some respectable oxen, tilt gaily at one of the legal establishment's most admired windmills. It seemed incredible but was true that the article represented the scholarly debut of a young man who was identified by the editors of the *Law Review* as 'Assistant Professor of Law, Washington University of Law School.' "\(^2\)

Calling Professor Leff's article, "one of the most celebrated in the bibliography of the Uniform Commercial Code," Ellen A. Peters stated, "All of us were immediately impressed by every aspect of the article: by the originality of its research, the subtlety

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1Ackerman, op. cit., at 222
2Ibid., at 223
3Gilmore, op. cit.
6Black, op. cit., at 1846
7Gilmore, op. cit., at 217
of its analysis, and the felicity of its presentation. Since the publication of Arthur's article, no one has ever again been able to address the problem of unconscionability without incorporating the watershed distinctions that Arthur created. In commercial law, his article has taken a place in history similar to that accorded to Warren and Brandeis in the law of privacy, and Fuller and Perdue in the law of remedies."

2 & 3
Michelman

Property, Utility, and Fairness:
Comments on the Ethical Foundations of "Just Compensation" Law
80 Harv. L. Rev. 1165 (1967)

The Supreme Court, 1968 Term — Foreword:
On Protecting the Poor Through the Fourteenth Amendment
83 Harv. L. Rev. 7 (1969)

FRANK I. MICHELMAN was born in 1936 and received his B.A. degree in 1957 from Yale University. He obtained his LL.B. degree from Harvard University in 1960 where he was Note Editor for the Harvard Law Review. He was law clerk to Justice William J. Brennan, Jr. from 1961-62 and from 1962-63 he worked for the United States Department of Justice. Currently a law professor at Harvard, Mr. Michelman joined the faculty in 1963. An expert on property and constitutional law, he frequently writes about the relationship between the Constitution and property and land use law.

In collaboration with Terrance Sandalow, Professor Michelman wrote Materials on Government in Urban Areas: Cases, Comments and Questions (1970). In reviewing the book, the Harvard Law Review noted, "Simply stated, Michelman and Sandalow's Government in Urban Areas achieves a genuine breakthrough within urban legal studies. . . . It entails no exaggeration, in sum, to say that . . . the book brings a new maturity to the study of urban government law." 1

Professor Michelman's article entitled "Takings, 1987," triggered the Columbia Law Review to devote an entire issue to "The Jurisprudence of Takings," in which experts were asked to comment on Professor Michelman's article and to provide their own analyses. 11

Unlike some of the other authors described in this book, Professor Michelman has remained devoted to his teaching. His legacy can best be found in the generations of students who have benefitted from his time and energy.

Laurence E. Wiseman credits Professor Michelman with providing theories that "integrate notions of critical morality into theories of constitutional law" and stated, "Frank Michelman is concerned primarily with understanding our laws and legal system in light of the means available for evaluating fundamental features of our society. Michelman explores the vantages that economics and moral philosophy pro-

vide for a critical view of judicial decision-making. He examines not only what economic and philosophic perspectives reveal about law, but also what limits may be inherent in those perspectives."

Arguing that "the courts are institutionally incapable of making the complex 'fairness' determinations required for a satisfactory answer to the question of when compensation should be awarded," Professor Michelman's classic article, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," has been frequently cited by the United States Supreme Court. In the case of Penn Central Transp. Co. v. New York City (438 U.S. 104), the Supreme Court relied on Professor Michelman's article. In the case of Loretto v. Teleprompter Manhattan CATV Corp. (458 U.S. 419), Justice Marshall stated in a footnote that "Professor Michelman has accurately summarized the case law concerning the role of the concept of physical invasions in the development of takings jurisprudence. . . ."

Commenting on Professor Michelman's article, Edward Rabin stated, "If Professor Michelman did not invent, he at least popularized the tests of 'utility,' 'fairness,' and 'efficiency' for evaluating both whether a legislative directive to a landowner requires compensation by the government and whether it is rationally defensible. Most commentators, including myself, now accept these criteria." According to George P. Fletcher, "So far as I know, the Kaldor-Hicks standard of efficiency first came to the attention of lawyers in Michelman's remarkable article on the takings clause."""

Professor Michelman was given the privilege of providing the annual Foreword to the Supreme Court issue of the Harvard Law Review. His article, "The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment," is often cited by the United States Supreme Court. Defending his position on "explicitly Rawlsian grounds," Professor Michelman argues that "courts should secure affirmative claims for the poor under the Fourteenth Amendment." J. Skelly Wright commented, "In his Supreme Court Note Foreword, Professor Michelman demonstrated what should have been clear to all, that in indigent cases the Court intervened only when very fundamental interests were at stake." In regard to Professor Michelman's article, Clayton P. Gillette stated, "... Professor Michelman's efforts constitute the standard citation."""

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20G. Fletcher, "Why Kant," 87 Colum. L. Rev. 426 (1987)
22J. Wright, "Professor Bickel, the Scholarly Tradition and the Supreme Court," 84 Harv. L. Rev. 792 (1971)
Oaks

Studying the Exclusionary Rule in Search and Seizure


Born in 1932 in Provo, Utah, DALLIN OAKS received his B.A. degree from Brigham Young University in 1954. In 1957, he obtained his J.D. degree from the University of Chicago and in 1980, he received an LL.D. degree from Brigham Young University. He clerked for Chief Justice Earl Warren from 1957-58. He joined the faculty of the University of Chicago Law School in 1961 where he was a professor and associate dean. In 1971 he became President of Brigham Young University. He served as a justice on the Utah Supreme Court from 1981-84. When he was appointed, the Governor of Utah, Scott Matheson stated, “He is one of the most respected legal minds in the country.”

Mr. Oaks has been editor and author of several books on the law and over 100 articles. Commenting on his book entitled, Trust Doctrines in Church Controversies (1984), the Journal of Law and Religion stated, “Oaks is one of those rare individuals equally at home in the groves of academe . . . and in the corridors of public power. Reflecting the blend of scholarship and practicality manifested in the career of the author, this monograph is extraordinarily insightful. . . .” The journal further stated that the study would “undoubtedly shape the future of the law of church-state relations in this country.”

In 1984 Mr. Oaks was appointed as a member of the Council of Twelve of the Church of Jesus Christ of Latter-day Saints. Currently, he is active as a clergyman.

Professor Oaks has earned the reputation as “one of the most respected critics of the exclusionary rule” and his article, “Studying the Exclusionary Rule in Search and Seizure,” is “the most extensive study of available data on the exclusionary rule.” The article has been frequently cited by the United States Supreme Court. In the case of Schneckloth, Conservation Center Superintendent v. Bustamonte, (412 U.S. 218), Justice Powell, in a footnote, stated, “Mr. Justice Stewart having noted in Elkins v. United States, 364 U.S. 206, (1960), that ‘[empirical] statistics are not available’ as to the efficacy of the rule — a situation which continued until Professor Oaks’s study. . . . The most searching empirical study of the efficacy of the exclusionary rule was made by Professor Oaks. . . . Indeed, in referring to the basis for the exclusionary rule, Professor Oaks noted that it has been supported, not by facts, but by ‘recourse to polemic, rhetoric, and intuition.’” Similarly, in the case of California v. Minjares (443 U.S. 916) Justice Rehnquist noted, “The most comprehensive study on the exclusionary rule is probably that done by Dallin Oaks for the American Bar Foundation in 1970. According to this article, it is an open question whether the exclusionary rule deters the police from violating Fourth Amendment protection of individuals.”

25UPI, November 21, 1980
27Who’s Who in America, 2314 (1988-89)
Commenting on the article in 1983, Potter Stewart stated, "Though there have been many studies attempting to examine the deterrent effects of the rule, none have yielded conclusive results. The leading study remains the 1970 work of Professor Dallin Oaks. Professor Oaks ultimately determined that no conclusive results could be formulated from existing data about the rule's deterrent value. Yet Oaks's preliminary observations have been a fuel for critics of the rule. Oaks concluded that the rule's deterrent value was limited because illegal searches and seizures were still prevalent after the adoption of the rule. . . . If the study is correct, then an exclusionary rule will not deter significant incidents of illegal police conduct." 17

In a critique of Professor Oaks's article, the *Northwestern Law Review* (1974) commented that "his survey of a variety of attempts to measure the rule's deterrent effects left him with the conviction that no convincing evidence supporting the deterrence theory was available. To varying degrees, Oaks recognized that the inconclusive nature of much of this research was the result of severe methodological limitations. In response, he offered a variety of research suggestions and urged that further research be done to clarify the effects of the rule." 18


5

Prosser

The Fall of the Citadel (Strict Liability to the Consumer)

50 Minn. L. Rev. 791 (1966)

WILLIAM L. PROSSER (1898-1972) received his A.B. from Harvard in 1918 and his LL.B. from the University of Minnesota in 1928. After a few years of practice in Minneapolis, he joined the Minnesota law faculty and in 1941 published the first edition of his *Handbook of the Law of Torts*, which was to become a classic treatise. During World War II he returned to private practice. In 1947 he moved to Harvard Law School, and in 1948 he became Dean of the University of California School of Law at Berkeley. He stayed in Berkeley until 1963, when he moved across San Francisco Bay to Hastings College of the Law. William Prosser produced a number of articles that rank among the most widely cited pieces ever written. Considered one of the leading American scholars in tort law, William Prosser somehow found time to combine this prolific academic career with that of a humorist and playwright.

William Prosser is "commonly acknowledged with bringing modern tort law, and particularly products liability, into its enterprise liability era. . . ." 19 In a tribute


to William Prosser, Laurence H. Eldredge stated, “In 1941, as I read every word of the new Handbook of the Law of Torts by William L. Prosser, I realized that a new ‘Master of Torts’ was coming up on the horizon. . . . ‘Prosser on Torts’ is a familiar citation not only in the appellate opinions in California but in appellate opinions all over the United States. It, and his articles, have greatly influenced changes in wrong rules of tort law.”18

In 1952, William Prosser and Dean Smith produced Cases and Materials on Torts. In reviewing the book, Laurence H. Eldredge comments, “. . . this book is all a teacher of tort law can ask for . . . It will be difficult to cover anything that the student will not have before his eyes.”

In 1955, William Prosser was chosen by the American Law Institute as the Reporter for the second Restatements of Torts. According to Laurence H. Eldredge, the group was composed of the “top tortsmen in the country,” and their “common interest was to produce the best possible Restatement of Torts.” After fifteen years as the Reporter, William Prosser resigned in 1970.

In a tribute, Wex S. Malone stated that William Prosser was, “a character endowed with a fantastic capacity to absorb the richness of the world around him, a prodigious memory to retain in photographic detail all that he took in, an organizational genius to put it together in meaningful ways and a power of expression that enabled him to pass his world along to others with new fullness and fascination.”

In 1986, Craig Joyce stated, “Rarely in the history of American legal education has one author’s name been so clearly identified with his subject as the name of William L. Prosser is with the law of torts. Even today, fourteen years after his death in 1972, ‘Prosser on Torts’ remains in the minds of students, teachers, the bench, and the bar alike a single thought, its parts indistinguishable one from the other. Indeed, the passage of time has done nothing to diminish the influence of the man on the subject. His articles remain landmarks in the development both of the literature of torts and of the law itself.”

Featured in the first volume of Great American Law Reviews was Prosser’s 1960 article “The Assault Upon the Citadel,” which at the time, was “cited more than any other article listed in Shepard’s Law Review Citations.” The article led to Justice Traynor’s 1965 decision in Greenman v. Yuba Power Products, Inc., and to the imposition of strict products liability in Section 402A of the Restatement, Second, of Torts, for which Prosser was the Reporter. Six years after “The Assault Upon the Citadel,” Prosser surveyed the rapid development of the law in “The Fall of the Citadel (Strict Liability to the Consumer).” According to Stanton G. Darling II, “Dean Prosser . . . identified the date on which the ‘citadel of privity’ fell under the pressure of strict liability for products as May 9, 1960, when the Supreme Court of New Jersey announced its decision in Henningsen v. Bloomfield Motors, Inc.”

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19Ibid., at 1247-48.
20Ibid., at 1249.
Wade considers these two articles to be "the classic treatment of the history of the development of strict tort liability for products."17

6
Sax
The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention

JOSEPH L. SAX was born in Chicago, Illinois in 1936. He received his B.A. degree in 1957 from Harvard University. In 1959, he obtained his J.D. degree from the University of Chicago where he was editor-in-chief of the University of Chicago Law Review. He joined the University of Colorado faculty in 1962, and in 1966 he joined the faculty of the University of Michigan. He has been a professor of law at the University of California, Berkeley, since 1987. Considered a leading environmental law scholar, his other subjects of interest include: land use planning and natural resources.

A "leading pioneer" in environmental law, Mr. Sax is considered "the father of environmental law because he is the one who developed the theory that most cases in the field depend on."18 He is responsible for reviving the public trust doctrine which has become "the cornerstone of modern environmental litigation."19 In 1986, the Denver University Law Review commented, "...the doctrine is flourishing, often with reliance on the Sax argument."20

Professor Sax's articles concerning environmental problems have not only appeared in countless legal journals but also in several magazines including Natural History, American Heritage, Saturday Review and Esquire. In addition, his opinions have been quoted in U.S. Supreme Court decisions and federal legislation.

Professor Sax has written several books and contributed to others. In 1971, he wrote a popular book called Defending the Environment: A Handbook for Citizen Action which is a practical guide for citizen action. He also authored an important book entitled, Mountains Without Handrails (1980), which examines the meaning of national parks in our civilization. The book received the University Press Book Award in 1981. After drafting a compact version of his ideas on park philosophy set forth in this work, the National Park Service adopted it as official policy. Commenting that the work "is an important contribution to the public lands literature and deserves to be widely read and debated," the Stanford Law Review stated, "Professor Sax has written an elegant, concise, well-researched, and tightly reasoned argument in favor of severely limiting park access and development... Professor Sax's book will undoubtedly be cited in the increasing flow of litigation challenging..."

18 D. Holder, "This Land Is Our Land," 10 Student Lawyer 40 (September, 1981)
19 "Ibid.
ing Park Service discretion . . . [His] vision is the right one. It should be honored by Congress, the Department of the Interior, and, when appropriate, the courts."

Commenting on Mr. Sax's authorship of Michigan's environmental protection act (drafted in 1969), The National Wildlife Federation called it, "one of the strongest and most forward-looking pieces of conservation legislation in the country:" It is interesting to note that the act was later adopted by several other states.

Professor Sax has received high praise among his students. One former student commented, "He has spawned a whole generation of public interest attorneys and people who care deeply about the human needs of our environment. His former students are at work on environmental matters in almost every state.""

In his 1980 article, "Liberating the Public Trust Doctrine from Its Historical Shackles," Professor Sax states, "At a superficial level, the shape of the public trust doctrine is easy enough to discern. It draws upon the Roman Law idea of common properties (res communis) and on certain provisions of Magna Carta. It deals with lands beneath navigable waters, with constraints on alienation by the sovereign and with an affirmative protective duty of government — a fiduciary obligation — in dealing with certain properties held publicly. Yet to restate these commonplace observations is not to begin to penetrate the core of this unusual legal doctrine.""

According to the University of Pennsylvania Law Review (1984), "During the 1970s the public trust doctrine received a great deal of attention from commentators, who argued that the doctrine imposed affirmative duties on government officials." The Law Review further states that beginning with Professor Sax's 1970 article, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," a number of commentators insisted that the public trust concept ought to be a means for concerned individuals to challenge in court the way in which federal agencies and officials manage the public lands.""

Calling Professor Sax "one of our preeminent authorities on natural resources and environmental law," Charles F. Wilkinson states that Professor Sax's article, "has been enormously influential." Furthermore, Wilkinson comments, "The article, coming as it did at the inception of the modern era of natural resources law, not only resuscitated the public trust doctrine but also conceptualized a model of judicial review for what was essentially a new field.""

In 1986, the Iowa Law Review noted, "Since 1970 the public trust doctrine indisputably has had a major impact on litigation brought by parties on behalf of natural resource protection. . . . Over the last fifteen years in half of the states, approximately one hundred cases have been reported involving the public trust doctrine, many of which refer explicitly to Professor Sax's article.""

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4 A. Tarlock, "For Whom the National Parks?", 34 Stan. L. Rev. 257, 274 (1981)
4 Holder, op. cit., at 14-15
41 Ibid., at 15
Stewart  
The Reformation of American Administrative Law  
88 Harv. L. Rev. 1669 (1975)  

RICHARD B. STEWART was born in Cleveland, Ohio in 1940. He received his B.A. degree from Yale in 1961. As a Rhodes scholar, he obtained an M.A. from Oxford University (England) in 1963. Professor Stewart received his LL.B. degree from Harvard University in 1966 where he was involved with the Harvard Law Review. After graduation, he served as law clerk to Justice Potter Stewart of the United States Supreme Court. A member of the Harvard faculty since 1974, Professor Stewart is currently a Byrne Professor of Law at Harvard. Considered a "progressive administrative law scholar," Professor Stewart is also an expert on environmental law. He has served as a consultant to the United States Environmental Protection Agency, worked with the President's Commission on Three Mile Island and served on various committees of the National Academy of Science.

In the first volume of Great American Law Reviews, we quoted an article in the Harvard Law Record (1984) which commented that Professor Stewart had prepared a memorandum for a new journal which stemmed from "dissatisfaction with the general format of law review articles." The memorandum explained, "Many contemporary law review articles are excessively long, turgid, and overly footnoted. Often authors rehearse at great length their version of the entire history or framework of a subject before advancing one or two ideas which may represent a real advance in the state of thinking on the subject... Student editors seem to insist on heavy footnoting because they are unsure of the validity of textual assertions and take comfort in finding some authority that assertedly supports it. The overstuffed discourse that prevails in law review articles tends to smother the pointed debate, exchange, and sense of advance in a field that often characterizes scholarly journals in other fields."  

Thus, it seems fitting that Professor Stewart's seminal article, "The Reformation of American Administrative Law," has been chosen for inclusion in this volume.

Professor Stewart's article not only has been frequently cited by law reviews, but also has been cited by the United States Supreme Court. The article "heralded the coming of an interest representation model of administrative law as a unifying perspective from which to consider a number of legal doctrines." Having conducted an "exhaustive review of the transformation in administrative law," Professor Stewart argued that "the emerging interest representation model of administrative law ultimately fails as a general structure for legitimating agency action." In his work, Bureaucratic Justice Managing Social Security Disability Claims...
(1983), Jerry L. Mashaw commented that Professor Stewart's scholarship established that "the history of American administrative law is a history of failed ideas." 84

Professor Stewart, who "chronicled an evolution in administrative law away from what he calls the 'traditional' model," 85 noted that "administrative law seemed to be moving away from its traditional concern with protecting private autonomy through enforcing fidelity to congressional purpose, and toward a model of interest representation." 86

8

Tribe

Unraveling National League of Cities:
The New Federalism and Affirmative Rights to Essential Government Services
90 Harv. L. Rev. 1065 (1977)

LAURENCE H. TRIBE was born in Shanghai, China in 1941 where his Jewish parents fled to escape persecution in Eastern Europe. He then moved with his family to San Francisco when he was five. Entering Harvard University at the age of 16 as a math major, he later changed to law for graduate work. He received both his A.B. degree (1962) and J.D. degree (1966) from Harvard University. From 1966-67, he clerked for Justice M.O. Tobriner of the California Supreme Court and from 1967-68, he was law clerk to Justice Potter Stewart of the United States Supreme Court. A noted constitutional scholar, Professor Tribe has been a member of the Harvard faculty since 1968 and has been a Ralph Tyler, Jr. Professor of Constitutional Law since 1982.

In 1985 and 1988, the National Law Journal named Professor Tribe one of the most powerful lawyers in the United States. 87 In 1987, after his victory on behalf of Pennzoil Co., Business Week stated, "... Tribe has sealed his reputation as one of the hottest corporate lawyers around. His astounding record includes victories in 9 of 12 Supreme Court cases." 88 In regard to the Pennzoil case, the National Law Journal commented on Professor Tribe's "increasingly distinctive style, the rapid delivery that crams more words into 30 minutes than most lawyers deliver in 45; the detailed knowledge of, and frequent reference to, little-known citations; the key phrases repeated again and again to emphasize the central theme. Most immediately recognizable is the habit of working across the bench, citing opinions by each of the justices to support his points." 89

Professor Tribe is considered "a star appellate advocate renowned for his U.S. Supreme Court arguments." 90 His high court victories include "decisions that upheld local rent control against an antitrust challenge, upheld regional bank

58Shapiro and Levy, op. cit.
61E. Cours, "Profiles in Power, Nat. L.J.," April 15, 1985; May 2, 1988
63D. Lauer, "The Best Argument That Money Can Buy?: Highs stakes at the High Court," Nat.
64Couric, op. cit., May 2, 1988
mergers, and protected Pennzoil Company's judgment against Texaco Incorporated from federal judicial interference. He was a leading opponent who helped Democratic senators devise legal arguments to defeat Robert H. Bork's Supreme Court nomination. Professor Tribe's treatise entitled American Constitutional Law (1978) is considered the definitive work in the field and won the Colf Award in 1980 for the most outstanding legal writing. The second edition of this highly acclaimed treatise was released in 1988. According to Harvard Law School dean Erwin Griswold, "It may well be that no book has ever had a greater influence on the development of American constitutional law." Similarly, L. A. Powe, Jr. stated, "In 1978 Laurence Tribe accomplished the seemingly impossible by publishing American Constitutional Law, a scholarly, if controversial, treatise on constitutional law. To say that such an undertaking is vastly more than a career for most constitutional law scholars does not even begin to capture the achievement." According to Stephen Adler, "As the treatise began to be taught in law schools and cited in briefs and court opinions, Tribe started to get calls from people interested in his help in constitutional cases." Commenting that the book "well deserves the encomiums accorded it by distinguished judges and academics," Telford Taylor stated, "Furthermore it is unique, as no one for half a century has attempted anything remotely comparable in both scope and intensity, and even the nineteenth-century works of Story and Cooley are of less ambitious aim." Professor Tribe has also written two other well-reviewed books, Constitutional Choices (1985) and God Save This Honorable Court (1985). In regard to these two books, Allan C. Hutchinson stated, "the dust-jacket comments by various constitutional celebrities suggest that his constitutional canonization is imminent." According to the Wall Street Journal, Professor Tribe "has turned up frequently on television interview shows and in news articles as an expert on the high court and constitutional law" and is "widely recognized by lawyers, law professors, judges, and justices as a brilliant advocate in Supreme Court cases." Professor Tribe is a superb and popular teacher whose "basic course in constitutional law fills up instantly each term and has a waiting list numbering in the hundreds." In 1986, H. Jefferson Powell stated, "Laurence Tribe is a unique feature in our constitutional landscape. In recent years, Professor Tribe has argued many controversial cases before the United States Supreme Court while his treatise, American Constitutional Law, the definitive work in the field, has been the bible for its advocates."
Constitutional Law, already has achieved the status of a classic. Never before in American history has an individual simultaneously achieved Tribe’s preeminence both as a practitioner and as a scholar of constitutional law. . . . Any work by Tribe on the Constitution, therefore, rightfully commands the attention of judges, advocates, and academics.  

In regard to Professor Tribe’s philosophy, Laurence Wiseman stated, “For Laurence Tribe, . . . the Supreme Court is a political organ, a governmental policymaker. The Justices cannot be seen simply as facilitating procedure. Any decision as to whether a certain piece of legislation is worthy of deference is itself a substantive governmental policy decision. The Court as a policymaker has legitimacy distinct from, and not dependent on, the legitimacy attaching to the majoritarian organs of government. Accordingly, citizens have two distinct types of legitimate governmental expectations, one satisfied by the courts and one by legislatures: citizens have a right to participate as litigants and the right to participate as voters.”

The problem of which public powers and responsibilities are appropriately state and which are appropriately federal has in recent years been intensely debated. Thus, the decision in the case of National League of Cities v. Ussery (426 U.S. 833) has caused immense scholarly attention.

In his highly debated article, “Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services,” Professor Tribe discusses the case of National League of Cities v. Ussery and argues “the doctrinal boundaries and distinctions drawn in the decision prevent it from being understood as anything but an effort by the Court to provide the states leeway to afford their citizens basic governmental services guaranteed by the Constitution.” Interpreting “the Court’s opinion within the framework of an individual rights paradigm,” according to Ronald D. Rotunda, Professor Tribe believes that National League of Cities is “best understood as resting not on the Tenth Amendment, but rather on the desire of the Court to protect individual rights to basic governmental [state provided] services.” Rotunda further commented that “Professor [now Judge] Ruth Bader Ginsburg correctly calls this interpretation one of Tribe’s ‘eyebrow raisers’ and ‘extravagant.’”

While “most scholarly discussion is highly critical of the National League of Cities decision,” Professor Tribe’s discussion is considered a “sympathetic reading” in which he focuses on “our national tradition of assigning local government responsibility for providing essential human services” and argues that “if state and localities


bear these responsibilities, the federal government may not simultaneously undermine their ability to perform vital functions.\textsuperscript{76}

George D. Brown stated, "The Supreme Court's best known and most controversial state sovereignty case is the five-to-four decision in National League of Cities v. Usery. In National League of Cities, the Court struck down a 1974 amendment of the Fair Labor Standards Act that extended the Act's wage and hour provisions to most employees of state and local governments."\textsuperscript{77} Gerald Frug contends that "In National League of Cities v. Usery, the Court relied on the principle of federalism to declare unconstitutional the congressional extension of the Fair Labor Standards Act to state and local government employees, holding the extension beyond the power of Congress under the commerce clause because it displaced the states' freedom to structure integral operations in areas of traditional governmental functions."\textsuperscript{78}

9

Van Alstyne

The Demise of the Right-Privilege Distinction in Constitutional Law

81 Harv. L. Rev. 1439 (1968)

Born in 1934, WILLIAM W. VAN ALSTYNE received his B.A. in 1955 from the University of Southern California. In 1958, he obtained his L.L. B. degree from Stanford University. After law school, Professor Van Alstyne was Deputy Attorney General for the California Department of Justice. He then joined the Ohio State faculty as Assistant Dean and Assistant Professor. In 1965, he joined the faculty at Duke University where he has been a William and Thomas Perkins Professor of Law since 1974. His subjects of interest include civil rights and constitutional law.

According to the Legal Times (1985), Professor Van Alstyne has played an influential role in shaping conservative thinking and policies. Van Alstyne seems to be the most formidable academic expert of the administration when it comes to substantial constitutional law, particularly in the area of civil rights.\textsuperscript{79}

A well-known constitutional scholar, Professor Van Alstyne is often called to testify before congressional committees and his opinion is often sought on such matters as judicial nominees and proposed legislation. For example, he was asked to provide his opinion in the voluntary school prayer issue. Due to his scholarship, Professor Van Alstyne has come to the attention of several leading conservatives such as William Bradford Reynolds (Assistant Attorney General for the Civil Rights Division), who has cited Van Alstyne in speeches, and Senator Orrin G. Hatch, who has quoted Van Alstyne in the Congressional Record.

In 1984, Professor Van Alstyne wrote Interpretable of the First Amendment, which C. is lucid. i

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which Constitutional Commentary described as a "rare, refreshing genre. Its prose is lucid, its tone measured, and its style serene."  

The Legal Times (1985) stated that Professor Van Alstyne, "represents a breed of legal scholars who can be called conservative in the broadest and most political sense of the word but whose views on particular issues are sufficiently conservative to make them important sounding boards, sources and allies for the administration."  

In a 1985 interview, when asked about his writing concerning "the processes of constitutional change" and what he termed "the 'aprofessionalism' that characterizes much current thinking about the role of courts in interpreting the Constitution," Professor Van Alstyne stated, "A good deal of my current writing is deeply critical of scholars and judges who treat the Constitution as a point of departure from which they are free to go out and do just as they see fit."  

Commenting on Professor Van Alstyne's article, "The Demise of the Right-Privilege Distinction in Constitutional Law," Rodney A. Smolla stated, "Prior to 1972, the academic commentary usually characterized the right-privilege distinction as nearly dead, and favored repudiating its remaining vestiges. An article by Professor William Van Alstyne is generally regarded as the classic statement." According to Richard L. Marcus, "For years commentators have inveighed against the right-privilege distinction and the Supreme Court has announced its demise." The best known attack is Professor Van Alstyne's article.  

Cited by the United States Supreme Court, Professor Van Alstyne's article "reviews the uses and misuses to which the 'privilege' concept has been put." Using the jurisprudence of Holmes, Professor Van Alstyne "argues that the concept of 'privilege' is today no longer viable, and that the size and power of the governmental role in the public sector requires substantive due process control of the state in all its capacities."  

10

Wade

Strict Tort Liability of Manufacturers
19 Sw. L. J. 5 (1965)

The son of a circuit judge, JOHN W. WADE was born in 1911 in Little Rock, Arkansas. He received three degrees (B.A., M.A. and J.D.) from the University of Mississippi. He was editor-in-chief and faculty advisor for the Mississippi Law Journal. Mr. Wade then obtained an LL.M. degree (1935) as well as an S.J.D. degree (1942) from Harvard. He became a faculty member at the University of Mississippi in 1936. In 1947, Mr. Wade joined the Vanderbilt University faculty where he was Dean until 1972. Currently Dean Emeritus and Distinguished Professor Emeritus at Vanderbilt University, he is considered an expert on products liability, remedies and torts.

79Graham, op. cit., at 13
80Ibid.
In a dedication, the Vanderbilt Law Review described Dean Wade as "a renowned scholar, an accomplished administrator and an effective teacher." Wex S. Malone, commenting on his affiliation with Dean Wade on the Restatement (Second) of Torts stated, "The debt of the American Law Institute to John Wade is indeed profound, and its recognition of his valuable contributions prompted it to select him as Reporter for the Restatement when Dean Prosser retired from that position." Dean Wade's work on the restatement of torts "is recognized as being instrumental in the reshaping of the principles of American tort law." As faculty editor of the Vanderbilt Law Review, Dean Wade was responsible for several innovations. According to Paul H. Sanders, Dean Wade "without question ... was the most responsible for the firm and early establishment of the Vanderbilt Law Review as a nationally recognized major legal publication." By consulting the Shepard's Law Review Citations, Paul Sanders observed that while John Wade was faculty editor, "the citator shows that courts, law reviews, and other legal publications made published references to material in volumes three, four, and five of the Vanderbilt Law Review well in excess of the number of references to any other comparable legal publication in the area from Texas through Virginia for those same years." Under Dean Wade's guidance, the Vanderbilt Law Review "became one of the pioneers in establishing a section on legislation." In addition, Vanderbilt began to publish the Race Relations Law Reporter which became "the pre-eminent legal journal dealing with the burgeoning civil rights movement." He was also responsible for establishing the Vanderbilt Journal of Transnational Law.

In Vanderbilt's dedication to Dean Wade, Roger J. Traynor stated, "Rare are the truly learned scholars, even in a purportedly learned profession. ... His contributions to the work of the American Law Institute, his career as the dean of a first-rate law school, and his essays on restitution, torts and conflict of laws would be more than enough to place John Wade in the first rank of American lawyers." According to Parham H. Williams, Jr., "John Wade is generally regarded by his peers as one of the most influential legal writers of our time. He has published over a hundred articles, essays, book reviews and other writings in major journals. He has published three major casebooks, one on restitution, one on legal methods, and in conjunction with William Prosser, the leading casebook in the field of torts." For a listing of John W. Wade's published works, consult the Vanderbilt Law Review, Vol. 25, 1972, pages 5-8.

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*P. Williams, Jr., "The University of Mississippi School of Law Memorial Lectures," 48 Miss. L. J. 670 (1977)
*ibid., at 20
*ibid.
*ibid., at 16
*Williams, op. cit.

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*J. W.
*D. N.
*of Risk," 25
*W. I
*1307-8 (1977)
*K. I
*nomic Ana
*S. B
*rict Liability
*S. L
*"D. C
*(1980)
In his article, "Strict Tort Liability of Manufacturers," Dean Wade discusses strict liability which he defines as "liability imposed on a manufacturer of a chattel because of an injury caused to plaintiff or his property by the condition of the chattel, without regard to the presence or absence of his negligence." In his introduction, Professor Wade comments, "It seems safe to predict that strict liability for products will soon be the established law in this country."\(^9\)

In 1972, Dix W. Noel called Professor Wade's article "one of the most influential articles dealing with the legal responsibility for defective products." Mr. Noel further stated, "Dean Wade predicted that the strict liability in tort doctrine adopted by the American Law Institute in the Restatement (Second) of Torts would soon become the established rule." He added that some courts doubtless 'will continue to speak the language of warranty, but they will usually recognize that liability sounds in tort, and they will seldom be led into applying contractual restrictions.' The prediction has been amply borne out, since at least 36 jurisdictions have expressed their general approval of the Restatement provision concerning strict liability in tort.\(^9\)

In his article, Professor Wade provides seven risk-utility factors for "determining the acceptability of a product." William A. Donaher recapped Dean Wade's seven factor list: '(a) the usefulness and desirability of the product; (b) the availability of other, safer products to meet the same need; (c) the likelihood and probable seriousness of injury; (d) the obviousness of the danger; (e) common knowledge and normal public expectation of the danger; (f) the avoidability of injury by care in use of the product, and (g) the ability to eliminate the danger without seriously impairing the product's usefulness or making it unduly expensive."\(^6\)

According to Kim K. Larsen, "Dean Wade and others have developed widely accepted lists of factors to be considered in applying the risk-utility test. . . . These factors were first developed by Dean Wade in 1965, . . . and were revised in 1973."

Larsen further noted that, "some courts have explicitly approved the Wade list."\(^6\) One notable example is the Cepeda v. Cumberland Engineering Co. (76 N.J. 152) in which the court followed Dean Wade's approach to strict liability.

As previously mentioned, Dean Wade subsequently refined these factors in his 1973 article, "On the Nature of Strict Tort Liability for Products," which Stanton G. Darling II believes, "has proved perhaps the most influential scholarly work of the 1970s in products liability."\(^9\) Calling the 1973 article "the single most influential piece of guiding scholarship," David G. Owen stated, "It was in this article that Dean Wade refined his 'seven factors' to which the courts have turned so often in struggling with the most perplexing issues in recent years."\(^9\)

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\(^9\)J. Wade, "Strict Tort Liability of Manufacturers," 19 Southerwestern L. J. 5 (1965);
\(^9\)D. Noel, "Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk," 25 Vanderbilt L. Rev. 95-94 (1972);
\(^9\)S. Birnbaum, "Unmasking the Test For Design Defect: From Negligence (to Warranty) to Strict Liability to Negligence," 33 Vanderbilt L. Rev. 620-21 (1980);
HARRY H. WELLINGTON was born in New Haven, Connecticut, in 1926. He obtained his B.A. degree from the University of Pennsylvania in 1947. In 1952, he received his LL.B. degree from Harvard University. He served as law clerk to Calvert Magruder from 1953-54. During the 1955 term, he clerked for Justice Felix Frankfurter. Mr. Wellington joined the faculty of Yale University in 1956. He was Dean of Yale Law School from 1975-85. An expert on constitutional law and constitutional theory, Professor Wellington is currently a Sterling Professor of Law at Yale.

In 1968, Professor Wellington wrote Labor and the Legal Process. In a 1970 book review, Stephen Goldberg commented that the book was "one of the most significant works published in the labor law field in recent years."

In 1970, David L. Shapiro commented, "Of the many American legal scholars who devote their energies to the field of labor-management relations, Professor Wellington is one of the most thoughtful and incisive; and he stands second to none in his analysis of the institutional issues that interface the entire area. . . . He has helped make us all more conscious of the importance of these issues and of the larger questions of process that underlie the confrontations taking place on the picket line and at the bargaining table."

Professor Wellington received media attention for heading "the lengthy negotiations to settle liability and coverage disputes among asbestos producers and insurers." He helped set up an Asbestos Claims Facility which helped to streamline the procedure for processing asbestos claims.

In a 1969 book review, Theodore J. St. Antoine, described Professor Wellington as a "master craftsman," and stated, "If there is a more acute intellect than that of Harry Wellington at work today in labor law, I am unaware of it."

Referring to Professor Wellington as a "conventional morality theorist," Paul Brest stated, "Dean Harry Wellington argues that proper constitutional adjudication closely resembles common-law adjudication. Both consist of reasoning from principles rooted in conventional morality and elaborated through judicial doctrine." Professor Brest further states that Dean Wellington "believes that there are no fundamental rights as such, but only a conventional morality to be judicially ascertained and enforced."

Upon examining Professor Wellington's philosophy, Laurence E. Wiseman stated, "Harry Wellington presents a theoretically refined understanding of the judicial role based on a distinction between 'principle' and 'policy' akin to that presented by Dworkin. For Wellington, a policy is an instrumental or consequentialist justifica-
tion for a rule. In his view, a court involved in common law adjudication acts legitimately only when it justifies the rules that underlie its decisions with principle, or with policy that is both widely regarded as socially desirable and relatively neutral. The source of moral guidelines or principles that are to be used by courts is conventional morality, which Wellington defines as 'underlying values and attitudes,' that translate into 'standards of conduct which are widely shared in a particular society.' Central to Wellington's theory of adjudication is the ability of judges, including the Justices of the Supreme Court, to understand and apply the dictates of conventional morality. Conventional morality is an evolving set of moral ideals and moral principles that develops organically within a society. In his frequently cited and influential article, "Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication," Professor Wellington argues that common law courts should turn conventional morality into law and that conventional morality ought to guide constitutional decision-making. Conventional morality does not function as an aid to interpretation, to be applied within textual limits, but as a separate source of law.\\n
TABLE OF CONTENTS

Though each reprinted article bears the pagination of the journal in which it originally appeared, the numbers given in our Table of Contents refer to our own consecutive pagination, which can be found in the outside margin of each page.

Preface ....................................................... ix

THE ARTICLES

Perspectives on the Fourth Amendment, Anthony G. Amsterdam .... 29
Reprinted with permission from the Minnesota Law Review, 58:349, 1974
and from the author

The Supreme Court, 1966 Term—Foreword: 'State Action,'
Equal Protection, and California’s Proposition 14,
Charles L. Black, Jr. ........................................ 159
Copyright ©1967 by the Harvard Law Review Association. Reprinted with
permission from the Harvard Law Review, 81:69, 1967 and from the author

Neutral Principles and Some First Amendment Problems,
Robert H. Bork .............................................. 355
Copyright ©1971 by the Trustees of Indiana University. Reprinted with
permission from the Indiana Law Journal, 47:1, 1971, Fred B. Rothman
& Co. and from the author

State Constitutions and the Protection of Individual Rights,
William J. Brennan, Jr. ..................................... 391
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permission from the Harvard Law Review, 90:489, 1977 and from the
author

Property Rules, Liability Rules, and Inalienability: One View of the
Cathedral, Guido Calabresi and A. Douglas Melamed ............... 407
Copyright ©1972 by the Harvard Law Review Association. Reprinted with
permission from the Harvard Law Review, 85:1089, 1972 and from the
authors

The Role of the Judge in Public Law Litigation, Abram Chayes .... 447
Copyright ©1976 by the Harvard Law Review Association. Reprinted with
permission from the Harvard Law Review, 89:1281, 1976 and from the
author

Legislative and Administrative Motivation in Constitutional Law,
John Hart Ely .................................................. 483
Reprinted by permission of The Yale Law Journal Company and Fred B.
Also reprinted with permission from the author.

The Wages of Crying Wolf: A Comment on Roe v. Wade,
John Hart Ely .................................................. 621
Reprinted by permission of The Yale Law Journal Company and Fred B.
Also reprinted with permission from the author.
Do We Have an Unwritten Constitution?, Thomas C. Grey ............ 653
Copyright ©1975 by the Board of Trustees of the Leland Stanford Junior University. Reprinted with permission from the Stanford Law Review, 27:703, 1975 and from the author

The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, Gerald Gunther ............................................. 671

Structure of Blackstone's Commentaries, Duncan Kennedy ............ 719
Reprinted with permission from the Buffalo Law Review, 28:205, 1979 and from the author
PREFACE

Producing a sequel always entails risk. The energy and inspiration that went into the original project are sometimes difficult to recapture. Successive volumes often seem a bit more pallid in comparison. There is also the nagging suspicion that one is best advised to move on after seeing an idea reach fruition, rather than return to it. Yet we feel that this continuation is merited, due to the intrinsic value of the publications reprinted here, and also because an additional twenty-year slice of time allows us to show major developments in legal thought.

Volume I of *Great American Law Reviews* was well received. Indeed, it generated a renewed interest in the reconsideration of works that had appeared in our law reviews. At the time that this introduction is being written, late 1989, several law reviews are celebrating the history of their publication by republishing collections of their “best” articles. The most intriguing work in this area continues to be done by Fred R. Shapiro of the Yale Law Library. Mr. Shapiro’s article, “The Most-Cited Law Review Articles,” in Volume 73 of the *California Law Review* (1985) beginning on page 1540, is a brilliant and highly influential use of citation analysis. Those who wish to see which articles have received the highest number of citations can refer to Mr. Shapiro for a detailed accounting.

In preparing Volumes II and III, we decided to follow our practice from the first project, basing our choices not only on the number of times an article was cited, but also on more subjective factors. Once again, the secondary literature was scanned and colleagues were consulted. The result is a list of twenty-two articles published between 1965 and 1985. The use of this twenty-year period means that more recent articles stand at a disadvantage. Older articles have had a chance to be considered, cause comment, move beyond the realm of contemporary debate and into the more ratified air of accepted theory.

There is no standard by which these twenty-two articles, half of which appear in this volume, half in Volume III, could be claimed to be the “best.” Legal scholarship does not admit to such simple classification. However, each of these twenty-two articles has had an impact — made a difference in the life of the law. Some of the writings are deeply abstract and theoretical, others rather practical. Some, such as Dean Prosser’s “The Fall of the Citadel” cap a line of theoretical development; others such as Professor Grey’s “Do We Have An Unwritten Constitution?” are viewed as the beginning of major lines of argument. The full range of political viewpoints is covered, ranging from the highly controversial article by Judge Bork, “Neutral Principles and Some First Amendment Problems,” which became a symbol of one conservative approach to the Constitution, to Professor Kennedy’s “The Structure of Blackstone’s Commentaries,” which has served as one of the foundation documents of the Critical Legal Studies Movement.

It is especially noteworthy that John Hart Ely and Frank Michelman have each authored two of our selections. While these scholars are currently in the prime of brilliant scholarly careers, it is important to note that the work they have already produced has had a great impact on our society. With this in mind, we chose to include more than one of their essays.
Also heartening is the fact that several of our articles appear outside the handful of journals normally thought of as opinionmakers. Articles from the *Indiana Law Journal*, *Buffalo Law Review* and *Southwestern Law Journal* made the list, along with a number of Forewords to the annual *Harvard Law Review* issue on the Supreme Court.

Readers who compare these volumes with their predecessor will note that the capsule biographies of the authors and the background paragraphs on the significance of their works are a bit longer. We felt that this was justified since our volume contains modern scholars, many of whom may not as of yet be familiar to the reader. For those authors who are well-known already, it is important to place them in their proper context. When considering an article by Justice Brennan, Judge Bork or Laurence Tribe, for example, necessity dictates that one reflect both on the person and the material. For those authors known best to members of law faculties but little recognized by others we have tried to present a full picture of the person and the work. For further information we have provided footnotes to supplement each introduction.

The length of the twenty-two articles in *Great American Law Reviews*, Volumes II and III, has dictated that they appear as two works. In the preface to Volume III we will consider the change in law review articles as evidenced by increased text and extended use of footnotes. We have arranged the articles alphabetically by author's name. Volume II begins with Anthony Amsterdam's "Perspectives on the Fourth Amendment," and concludes with Professor Kennedy's "Structure of Blackstone's Commentaries." Volume III opens with Professor Leff's "Unconscionability and the Code—The Emperor's Clause," and closes with Professor Wellington's "Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication."

As believers in the continuing viability of legal scholarship as it appears in the periodical literature, we enjoyed this project from its onset. We hope you enjoy its final manifestation.
ANTHONY G. AMSTERDAM was born in 1935. He received an A.B. in 1957 from Haverford College and an L.L.B. in 1960 from the University of Pennsylvania, where he was editor-in-chief of the University of Pennsylvania Law Review. After graduating from law school, he clerked for Justice Felix Frankfurter of the United States Supreme Court. He joined the University of Pennsylvania law faculty in 1962 and, in 1969, joined the Stanford law faculty where he pioneered the development of clinical instruction, and became the nation's leading expert in the simulation method of clinical teaching. His innovations in clinical education are now mainstream at many law schools. Professor Amsterdam joined the New York University faculty in 1981.

Many of Professor Amsterdam's writings are considered "major landmarks of American legal scholarship." While a law student, he wrote "Void for Vagueness Doctrine in the Supreme Court" (109 U. Pa. L. Rev. 67), a frequently cited Note.

In addition to being a brilliant legal scholar, Professor Amsterdam is also considered one of the nation's leading authorities on criminal law. According to the New York Times, he is "the principal architect of legal efforts to abolish capital punishment in the United States" and is "considered by many legal experts to be the foremost practitioner before the United States Supreme Court." According to the Stanford Lawyer, "In 1972, . . . Professor Amsterdam gained national attention when he successfully challenged the constitutionality of the death penalty before the Supreme Court of the United States in Furman v. Georgia." His dedication to civil liberties involved him in many important cases of the '60s and '70s, including the trials of the Chicago Seven, Angela Davis and the Stanford Daily case. In 1983, the MacNeil/Lehrer Report considered Mr. Amsterdam "one of the best-known and most revered constitutional defense lawyers in this nation." Among one hundred practicing attorneys profiled in 1985 by the National Law Journal, Anthony Amsterdam was listed among the nation's most powerful lawyers. The National Law

11"Nation's First Clinical Professorship and a Major Grant Insure Future of School's Clinical Program," 15 Winer/Spring Stan. Law 42-43 (1979)
13"Nation's First Clinical Professorship and a Major Grant Insure Future of School's Clinical Program," op. cit., at 43
15"Nation's First Clinical Professorship and a Major Grant Insure Future of School's Clinical Program," op. cit.
16"The MacNeil/Lehrer Newshour, Transcript #2143, December 14, 1983
17Couric, op. cit., April 15, 1985
Journal (1985) commented, "Quote... Anthony Amsterdam on the death penalty, and you have strong support for your views."

Professor Amsterdam has won national acclaim for his work in both the classroom and the courtroom. Among his numerous awards and honors are: the first Earl Warren Civil Liberties Award (1973) and the Walter J. Gores Award (1977) for excellence in teaching. Time twice honored him, first in 1974 as one of the "200 Faces For the Future" (Time's list of rising young American leaders under 45), and in 1977 as one of the "Ten Teachers Who Shape the Future," for which he was honored for his work in both clinical legal education and civil liberties.

When Professor Amsterdam left Stanford University to join New York University as law professor and director of clinical and advocacy programs, a loss was felt at the school. As one law school observer noted, "Tony Amsterdam they can't replace. All they can hope to do is come relatively close."

Mr. Amsterdam's Oliver Wendell Holmes Devise Lecture, delivered at the University of Minnesota in 1974, significantly contributed to the theory of the Fourth Amendment. According to the Yale Law Journal (1986), "More than a decade ago, in his celebrated Holmes Lectures, Professor Amsterdam drew a distinction between two basic perspectives on the Fourth Amendment. One view interprets the Amendment as creating atomistic spheres of personal privacy; the other interprets restrictions on search and seizure as primarily directed toward regulating governmental conduct."

Based upon his Holmes Lectures, Professor Amsterdam wrote "Perspectives on the Fourth Amendment," which the Minnesota Law Review (1974) called "an eloquent recent statement of the Holmes conception."

Harvard Law Review (1983) commented that "the notable periodical literature includes Professor Amsterdam's brilliant Oliver Wendell Holmes lectures... ." Regarding Professor Amsterdam's atomistic and regulatory perspectives, the Buffalo Law Review noted, "These two opposing perspectives on the Fourth Amendment have, in the years since publication of Amsterdam's article, provided a most helpful framework for analysis of the Court's Fourth Amendment work product and one which has often been utilized by commentators."

The article is not only frequently cited in law reviews, but also by the U.S. Supreme Court. In the case of United States v. Caceres (440 U.S. 741), Justice Marshall stated in a footnote, "Professor Amsterdam, whom the majority cites for the proposition that regulations governing investigatory conduct 'may well provide more valuable protection to the public at large than the deterrence flowing from the occasional exclusion of items of evidence'... ."

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9Ibid.
The son of an eminent Texas lawyer, CHARLES L. BLACK, JR., was born in Austin, Texas, in 1915. He received his B.A. (1935) and M.A. (1938) from the University of Texas. After earning his LL.B. from Yale University in 1943, he joined the law faculty in 1956, becoming Sterling Professor of Law in 1975 (presently Emeritus). He is now Adjunct Professor of Law at Columbia University School of Law. An expert on admiralty and constitutional law, Black has stated, "My time in constitutional law has had... two major themes—the human rights theme and the structural or constitutive theme. I think these two concerns have nourished one another.""14

In an issue dedicated to Professor Black, the editors of the Yale Law Journal noted that Charles Black "is the rare professor who consistently seeks out students for conversation, debate, spirits, and good tidings.... He combines an extraordinary breadth of knowledge with an uncanny ability to get to the heart of the most intricate and technical detail of legal esoterica." The editors further commented that "in reading his many articles and books, one is struck repeatedly by Charles Black's conviction that constitutional law can and must concern itself in the first instance with providing, protecting, and enhancing the dignity of all men and women.... This theme has animated Charles Black's entire career, particularly his seminal work on race relations, the death penalty, and most recently, the issue of poverty and the right to a minimal entitlement of livelihood.""15

Jack Greenberg states, "It didn't take long to find out that he was not merely a great, indeed spectacular, advocate, but also a towering scholar of constitutional law and the greatest legal stylist of his generation." Commenting on Professor Black's briefs, Mr. Greenberg notes that "the best evidence of Charlie's lawyering, scholarship, and style is included in some of the briefs themselves.""16

According to Harry H. Wellington, Professor Black "is unquestionably among a handful whose scholarship occupies prominence in the library of the law's queen subject. During the past three decades, there have been few constitutional lawyers who have written as provocatively—and none as poetically—as Charles. To attend to his writing is to see public law afresh. No one can read him, for example, on the death penalty, impeachment, segregation or state action without gaining new perspectives on our political morality.""17

Professor Black's major works include: Structure and Relationship in Constitutional Law (1969) and The People and the Court (1960). Commenting on Professor Black's book entitled Decision According to Law, William Van Alstyne stated, "When Charles Black writes, he writes with the certitude and righteousness of an Old Testament prophet.""18

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16H. Wellington, "Revisiting the People and the Court," 95 Yale L. J. 1565 (1986).
Not only is Professor Black preeminent in the fields of admiralty and constitutional law, he is also a poet, musician, painter and actor. In 1986, Maxine Cassin, editor and publisher of the New Orleans Poetry Journal Press Books commented on Professor Black's poetry: "Three decades later I find myself still haunted by 'The Others' and 'The Flower Woman,' poems I can only describe as inexhaustible — or in certain instances even transforming. . . ."19

Guido Calabresi contends, "What can one say of Charles Black that hasn't been said? He is one of only two people I have known who have properly described as genius."20

According to the Yale Law Journal, "His principal lesson to us has been that high scholarship and moral commitment are not inconsistent with a life of creativity, conviviality, and happiness."21

Reflecting on his teaching in constitutional law, Professor Black commented, "Confucius said that nobody should study the Book of Changes before the age of seventy. For teaching constitutional law, I think sixty is about the right age. . . ."22

For a list of the published works of Charles L. Black, Jr., consult 95 Yale Law Journal 1573 (1986).

On the subject of "state action," Professor Black comments, "from the beginning I was . . . interested in the structures of government — the Constitution in the etymological sense. This happens to some students of American constitutional human-rights law, first because the practical working-out of these rights occurs in a federal structure, and second because these rights have been said to be binding only on components of government — the famous or infamous 'state action' requirement — and this line of doctrine has to be worked out in regard to quite complicated structural relations between governmental action and private action."

Further Professor Black noted, "The 'state action' problem engaged me early and strongly through its connection with human-rights law. It happens that the first Supreme Court brief I worked on was in the Pollack case. . . . That case concerned the intellectual insult to riders on public transport who were made into a captive audience for commercial advertising. . . . The 'state action' question became central and crucial in the civil rights cases of the sixties, in briefing which I was very active. . . . I worked so heavily on this problem — in the company of such people as Jack Greenberg and James Nabrit III — that for a time I saw the 'state action' problem as about all there was to law. I even wrote a poem called 'State Action Blues' which my matured dignity has forced me to retire from circulation."

Professor Black also commented, "I have for some time been one of the many people questing after some rational foundation for the protection of human rights not named in the Constitution. The most obvious support seems to be the Ninth Amendment: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'"25

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21"Editors' Preface," op. cit., at 1554
22Black, op. cit., at 9
23Ibid., at 8
24Ibid.
25Ibid., at 10
Based on Professor Black's devotion to human-rights law and "state action," it is fitting that he was given the prestigious honor of providing the Foreword to the Supreme Court issue of the *Harvard Law Review*. In his article, "The Supreme Court, 1966 Term — Foreword: 'State Action,' Equal Protection, and California's Proposition 14," Professor Black comments, "'State action' again? Yes, because the 'state action' problem is the most important problem in American law."26

3

Bork

*Neutral Principles and Some First Amendment Problems*

47 Ind. L. J. 1 (1971)

Born in Pittsburgh, Pennsylvania, in 1927, ROBERT H. BORK obtained his B.A. degree from the University of Chicago in 1948 after serving with the Marine Corps Reserve from 1945 to 1946. Entering the University of Chicago School of Law "as a conventional New Deal liberal," he began to change his mind "under the influence of some of his professors, especially Aaron Director, pioneer of the Law and Economics Program, and George Stigler." He received his J.D. degree in 1953. After a year at the University of Chicago as a research associate, he joined the Chicago law firm of Kirkland and Ellis as an associate. In 1962, he joined the Yale University faculty and soon gained recognition for his legal scholarship.

In 1973, Judge Bork interrupted his teaching career at Yale University to accept the post of Solicitor General of the United States Department of Justice under President Richard M. Nixon. He received media attention for carrying out President Nixon's instructions to dismiss special Watergate prosecutor Archibald Cox, in what is now referred to as the "Saturday Night Massacre."

Judge Bork returned to teaching in 1977, and in 1979 he was named Alexander M. Bickel Professor of Public Law of Yale University. He was residential scholar (1977-82) and adjunct scholar (1981-82) at the American Enterprise Institute for Public Policy Research. After briefly reentering private practice as a partner in the Washington office of Kirkland and Ellis (1981-82), Judge Bork was appointed by President Reagan and confirmed by the Senate as a judge in the United States Court of Appeals for the District of Columbia Circuit (1982-88). He was an unsuccessful Supreme Court nominee in 1987. Judge Bork is currently involved with the American Enterprise Institute for Public Policy Research.

A conservative legal scholar, Judge Bork specializes in antitrust and constitutional law and has written widely in both fields. Judge Bork's writings on these subjects "made him a figure of stature."24 His articles have not only appeared in scholarly journals, but also in such publications as *Fortune* and the *New Republic Magazine*. Ralph K. Winter, a former Yale law professor, called Judge Bork "the most important scholar in antitrust law since the passage of the Sherman Act" in 1890.25

The New York Times (1987) described Judge Bork's major scholarly work, *The Antitrust Paradox*, as a "wide-ranging and highly influential attack on prevailing antitrust doctrine." In regard to the work, Ernest Gellhorn commented, "Robert Bork's book on antitrust law and policy continues his legacy of controversy and contention. The disagreements it provokes should not, however, distract attention from the fact that this is a profound, indeed, seminal work. He has thought deeply and brought great originality to bear on a difficult subject. He has applied economics to antitrust law in a clear, simple and persuasive fashion, itself a feat worthy of strong praise. The insight from price theory that he brings to antitrust enriches our understanding of the economic underpinnings of antitrust law and of its application to business practices."

Considered a "formidable pedagogue" and "philosophical guru of conservatism," the Law School Record (1982) commented that while Judge Bork has been called a "paradox" and a "conservative in radical's clothing," he refers to himself as "a 'classical liberal' — someone who thinks that government intervention in individual affairs always has to be examined closely to make sure that the benefits of the intervention exceed what are bound to be the costs."

In a 1985 Legal Times article, a prominent legal scholar stated that while "the current academic scene features conservatives who often are 'influential in conservative circles' but not beyond that, . . . people like Easterbrook, Posner and Bork are influential beyond that . . . they [are] regarded as serious, weighty figures whose ideas [have] to be considered and responded to."

According to the Los Angeles Daily Journal (1985), "In addition to his role as a key member of the so-called 'Chicago School' of legal theorists — a group that advocates an economist's approach to antitrust law — Bork is a firm believer that the Constitution should be interpreted strictly, with what he calls 'moral philosophy stuff' left to the legislative process."

In 1987, the ABA Journal noted that Judge Bork's philosophy can be "seen in the more than 100 majority opinions he has written at the appeals court on such issues as antitrust, homosexual conduct and libel."

In what has been called "the most explosive confirmation fight in history," Judge Bork received considerable media attention when President Reagan nominated him to replace the retiring Justice Lewis Powell of the Supreme Court in 1987. According to the Los Angeles Daily Journal (1987), the nomination caused "both liberal groups and the Senate Judiciary Committee" to employ "teams of researchers scrutinizing every opinion, law review essay, and magazine article" written by Bork the nominee to scrutinize and analyze every statement and belief put forward in his legal writings and opinions. The nomination was met with strong opposition from various political and legal groups, including liberal organizations and the Senate Judiciary Committee. The confirmation hearings were widely covered by the media, and Bork's views on antitrust and the Constitution were a central focus of the debate. The nomination ultimately led to a contentious confirmation process, ending with Bork being confirmed to the Supreme Court. The debate over Bork's nomination highlighted the considerable influence of his legal scholarship and ideas on antitrust and constitutional law.
ten by Bork in the past thirty-five years.

Monroe E. Price stated, "the debate over the nomination of Judge Robert H. Bork to the Supreme Court resulted in the most extraordinary national seminar on the Constitution and the role of the Court since, perhaps, the debate over secession. To say that it was the event of the bicentennial of the Constitution would be to understate dramatically the way in which the discussion seeped into the consciousness of the country and made individuals ponder basic questions about their society." David Rudenstine commented that the Bork nomination "prompted some national organizations such as the American Civil Liberties Union and Common Cause to depart from their own tradition and to oppose a presidential nomination. It has caused the United States Department of Justice to prepare a response to Bork's critics exceeding 200 pages."

Interviewing former Yale colleagues and students about Judge Bork, the New York Times (1987) stated that "many described him . . . as a decent, vibrant and devastatingly witty man, a complex and powerful intellect tempered by a fine sense of humor, a warm friend, a stimulating teacher. . . ." Some recalled Judge Bork as "a formidable advocate of his view that the Supreme Court has usurped legislative powers in dozens of activist decisions since the 1920s" and they noted that he "was enamored of general theories, often carried them to the limits of their logic and blasted away at opponents' positions with an air of certitude that some called dogmatism."

The Los Angeles Daily Journal (1985) noted that Judge Bork "is known as a powerful intellect on the bench who can persuade his colleagues to vote with him — sometimes even when they are generally regarded as left-of-center . . . He seems to have a gift for winning the friendship and respect of lawyers and judges of every political stripe." Bruce Fein stated, "He's a formidable intellect . . . and an awful lot goes into your ability to influence your colleagues. He has that ability. Even liberals vote along with him."

The controversy surrounding the Bork nomination prompted the Cardozo Law Review (Volume 9, 1987, pages 1-530) to devote an entire issue to the subject. In addition to providing essays by outstanding legal scholars, the issue includes four reports on the Bork nomination: the White House Report, the U.S. Senate Judiciary Committee Chairman's Consultants' Report, the Department of Justice's Response to Bork's Critics and the Public Citizen Litigation Group's "The Judicial Record of Judge Robert H. Bork." The issue includes a bibliography of Judge Bork's writings compiled by the Public Citizen Litigation Group and updated by the Cardozo Law Review.


11D. Rudenstine, "Foreword," 9 Cardozo L. Rev. 6 (1987)
12"Taylor, op. cit.
13Low, op. cit.
14Ibid.

While he was a law professor at Yale, Judge Bork "first advanced an originalist theory of judicial review" in an influential article entitled "Neutral Principles and Some First Amendment Problems," which, "despite its age, remains a frequently cited description of judicial restraint." The controversial article, which argued that "only explicitly political speech, rather than scientific, literary, artistic, or educational speech, is entitled to constitutional protection," has been cited by the United States Supreme Court.

Peter Phillips, who considers Judge Bork's article to be "one of the most frequently debated law review articles," commented, "Robert Bork, whose views concerning appropriate Constitutional interpretation have commanded vociferous debate, has written only four scholarly articles in the field. Moreover, his reputation rests mainly on the first, 'Neutral Principles and Some First Amendment Problems.'"

Regarding Judge Bork's article, Ronald Rotunda states, "Several of the advertisements attacking the nomination of Robert Bork focused on one particular article published over a decade-and-a-half ago, in the *Indiana Law Journal*. The significance of this article as the main basis for attacking Robert Bork is illustrated by the position of Nicholas deB. Katzenbach, former Attorney General of the United States. He was lobbied by both opponents (and proponents) of Judge Bork to testify against (and for) the nomination. He almost did not testify at all, but ultimately did. He said that he based his opposition to Judge Bork 'almost entirely' on this 1971 article in the *Indiana Law Journal."

Ronald Rotunda commented that "Judge Bork no longer embraces the portion of the Indiana article arguing for a narrow interpretation of the right of free speech" and that he "publicized his change of views years ago. In hearings before the Senate Judiciary Committee in 1973 he emphasized, 'When I wrote that article I was entering into a field for the first time, and I was trying out a theoretical concept, if you will... It was speculative writing which professors are expected to engage in, without meaning that is what they believed for all time or that is what they think would be appropriate for some other organ of Government to pick up at that time and it is explicitly stated to be speculative in that sense.'"

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*Phillips, op. cit., at 437*


*Ibid., at 576*
JUSTICE WILLIAM BRENNAN, the son of Irish-Catholic immigrants, was born in 1906 in Newark, New Jersey. He received his B.S. degree from the University of Pennsylvania in 1928, and in 1931 he received his LL.B. degree from Harvard University. His judicial career began in 1949 when he was appointed as a trial judge in Jersey City, New Jersey. Brennan reached the Appellate Division of the Superior Court in 1950 and in 1952 he was elevated to the New Jersey Supreme Court. In 1956 he was nominated by President Eisenhower to be an associate justice of the Supreme Court.

According to Albert M. Sacks, Justice Brennan "is preeminent among American judges now sitting, and he has contributed mightily to the development of constitutional doctrines protecting individual rights and liberties." Charles Dorman contends, "... as the author of more 'labor law' opinions than any other justice, much of what Justice Brennan has written is the law." Justice Brennan is not only recognized as a leader on the Court in several substantive areas including rights of the accused, First Amendment guarantees and church-state relations, but also is considered a "bridge builder" between competing factions on the Court.

Arthur T. Vanderbilt commented, "For Mr. Justice Brennan the law is a living reality concerned with human beings, rather than a series of judicial declarations embalmed in judicial opinions. He is instinctively inclined to preserve the essentials of all that is good in the past and to adapt them to the needs of the times."

In a tribute to Justice Brennan, David L. Bazelon stated, "Bill Brennan has never been afraid to start out on new paths; but whenever he has done so, as his opinions demonstrate, he has set forth only after gathering all the wisdom he could find from what has gone before. His opinions and other writings make an enduring contribution to the spirit and letter of our law."

Commenting on Justice Brennan, Frank Michelman states, "No Justice in history save Thurgood Marshall has stood as bravely and eloquently as has William Brennan for a thoroughly democratic vision of social justice and political liberty. Who will doubt the historic influence exerted, or the light shed, by Brennan scholarship on our doctrines and theories of freedom of expression, religious liberty, and official accountability, or the power and value of the Brennan contributions to debate over that most distinctive feature of American government, federalism?"

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53 A. Vanderbilt, "New Members of the Supreme Court of the United States," 45 Am. B. Ass. J. 526 (1957)
Frederick Hall comments that Mr. Justice Brennan "is one of the most outstanding justices in the history of the Court in the protection of human rights and the continual striving for equal justice for all under law."^{56}

In 1966, Chief Justice Warren, celebrating Justice Brennan's tenth anniversary on the Court, wrote, "He administers the Constitution as a sacred trust, and interprets the Bill of Rights as the heart and life blood of that great charter of freedom. His belief in the dignity of human beings — all human beings — is unbounded. He also believes that without such dignity men cannot be free."^{57}

In a tribute to Justice Brennan, John J. Gibbons stated, "He appears to me far more humane than Holmes, broader in outlook than Brandeis, more practical and flexible than Black, a finer scholar than Warren, more eloquent than Hughes, more painstaking than Douglas, and more gracious than any of them. He appears, in other words, as the most outstanding Justice of this century. . . ."^{58}

In 1981, Abraham D. Sofaer stated, "The achievements of Justice Brennan will endure. He has avoided the dangers of judicial statesmanship by refusing to compromise on issues of principle and of lasting importance. His opinions for the Court are forthright and direct in their aims. . . . That some of his most important decisions have been limited by the present Court underscores their breadth and boldness. He has not settled for equivocal pronouncements on issues demanding authoritative and principled resolution. . . . The vast bulk of his work is an authoritative guide even to the present Court's decisions. . . . I believe that Justice Brennan's great success on and off the Court has been achieved because he is an ebullient, generous, charismatic human being."^{59}

Richard Posner, in a tribute to Justice Brennan, commented, "Justice Brennan's position as one of the most influential Justices in the history of the Supreme Court is secure and requires no words from me to confirm."^{60}

Justice Brennan's admirers are not limited to those of any particular political view. Justice Potter Stewart comments, "Mr. Justice Brennan's published opinions and his extracurricular writings attest to the eloquent constancy with which he has adhered to the principles of individual liberty and political equality instinct in our nation's organic law. . . . The magnitude of his contribution to the law through the humane and perceptive exegesis of the text of the Constitution is enormous, permanent and widely acknowledged."^{61}

While many authors have chronicled the life of Justice Brennan, no definitive biography currently exists. For a listing of books about Justice Brennan as well as selected articles by Justice Brennan, consult the Almanac of the Federal Judiciary, Volume 2, 1989, pages 4-5.

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Regarding Justice Brennan, Ann Lousin commented, "Through his articles, speeches and judicial opinions, he has steadily advanced the view that each state can and should protect its own citizens to a greater degree than the United States Constitution does."62

Justice Brennan's article, "State Constitutions and the Protection of Individual Rights," has been frequently cited by the United States Supreme Court as well as law review articles. In his article, "Mr. Justice Brennan argues that the trend of recent Supreme Court civil liberties decisions should prompt a reappraisal of that strategy. He particularly notes the numerous state courts which have already extended to their citizens, via state constitutions, greater protections than the Supreme Court has held are applicable under the federal Bill of Rights."63

Commenting on Justice Brennan's article, the *John Marshall Law Review* (1986) stated, "In the last decade, ... there has been a resurgence of interest in state constitutions. ... Justice William J. Brennan is greatly responsible for this renaissance. Since 1977, when he wrote 'State Constitutions and the Protection of Individual Rights,' Justice Brennan has led the fight to increase the role of state courts and state bills of rights as guardians of liberties above and beyond those liberties protected by the United States Constitution. ... This one law review article, almost by itself, created the renaissance of state constitutionalism. Its influence can be seen in its frequent appearance in law review citations."64

Similarly, the *Harvard Law Review* (1989) noted, "Justice Brennan's seminal article ... in many ways inaugurated this new focus on state constitutional law."65

The *Texas Law Review* (1985) commented, "The seminal article was that of Mr. Justice Brennan. ... Since Justice Brennan's invitation for state courts to use state constitutional provisions affirmatively to protect rights not subject to federal constitutional protection, a growing body of literature has developed." Keyser noted that "this literature is thoroughly digested and commented on in a symposium in 63 Texas Law Review 959 (1985)" and "for a useful summary of the literature see Utter, 'Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds,' 63 Texas Law Review 1025 (1985)."66

The *Georgetown Law Journal* (1983) noted, "Heeding Justice Brennan's advice, many criminal defense specialists have begun to rely more heavily on state constitutional provisions to support their requests for further judicial support of individual rights."67

According to Charles Corrigan, "Justice Brennan's landmark essay on state constitutions generated a flurry of state court decisions. State supreme courts seized

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64Lousin, op. cit., at 1-2
upon Justice Brennan's invitation to interpret state constitutions more broadly than the United States Constitution."^68

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Calabresi and Melamed

Property Rules, Liability Rules, and Inalienability: One View of the Cathedral
85 Harv. L. Rev. 1089 (1972)

GUIDO CALABRESI was born in Milan, Italy, in 1932. When he was seven, his parents fled Fascist Italy and brought their family to America. Guido Calabresi received a B.S. in analytical economics from Yale University in 1953. He obtained his LL.B. in 1958 from Yale University. As a Rhodes Scholar, he received an M.A. degree from Oxford University. Mr. Calabresi served as law clerk to Justice Hugo Black of the United States Supreme Court from 1958-59. He joined the faculty of Yale University Law School in 1959. In 1962, at the age of 29, he became a tenured member of the Yale University faculty. In 1978, he became a Sterling Professor of Law at Yale University where he has been Dean since 1985.

Describing Professor Calabresi as "a leading authority on torts and a guiding liberal thinker of the economic analysis of the law movement," the National Law Journal (1988) named him as one of the most powerful lawyers in the United States. According to the New York Times (1985), Professor Calabresi is "among the most popular members of the Yale faculty,...one of the most influential legal scholars of his generation," and "has won national recognition for his work on the link between economics and the law of liability — work that helped spur the development of no-fault automobile insurance."^70

Professor Calabresi is considered "one of the fathers of law and economics"^71 and, according to the Heritage Foundation Policy Review (1987), "the law and economics movement, ...brought to prominence in the past 10 years by such scholars as...Guido Calabresi,...has profoundly affected the way we think and talk about the law,...The entire corpus of law from antitrust to family law to torts to criminal law has been touched or even transformed by the law and economics movement."^72

When Professor Calabresi was named Dean of Yale Law School, Yale's former president, the late A. Bartlett Giamatti, referred to him as "this citizen of Yale" and stated, "his intellectual distinction, great tact and deep understanding of how law influences every part of American life will become an even more precious asset to what is doubtless the finest law faculty in the world."^73

"Couric, op. cit., May 2, 1988
"D. Margolick, op. cit.

In addition, made major Calabresi's concerns and his Costs of Acc . ambitious of when Calab work by ecc with conventional of the faithful.

In collaboration entitled The...sustained in...W. W. Rostc...bibliography and achievement...Friedman, Jr...Arrow states the frustrating...storm. All s...have set their attempt and...In 1982...book entitled...prestigious...as "a juristic...legal though Calabresi ha vocateness...Grant Gilrmo...'s dark places'...will stimulate other...Proposed described role...social process...

--M. Etlio
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"A. Cox.
In addition to his many articles in scholarly journals, Professor Calabresi has made major contributions with several of his books. Mike Elliot describes Professor Calabresi's work as the "recasting, in a stimulating and innovative way, of the concerns and doctrines of the common law." In 1970, Professor Calabresi wrote The Costs of Accidents. In reviewing the book, Richard Posner stated that it "is an ambitious effort to employ a social science perspective... in a field of law in which, when Calabresi started his work, there was no supportive tradition, no pioneering work by economists or other social scientists, on which to rely. In its bold break with conventional legal analysis of tort questions, Calabresi's work may be a portent of the future direction of legal scholarship in fields that... remain bastions of the traditional approach."

In collaboration with Phillip Bobbitt, Professor Calabresi wrote a classic book entitled Tragic Choices (1978) which is credited with helping to "usher in a new, sustained interaction between law and economics." Commenting on the book, W. W. Rostow noted, "the authors have written a distinguished book... The bibliography at the end of this book suggests the character of the authors' purpose and achievement. It ranges from Aristotle and Euripides to Kenneth Boulding, Milton Friedman, John Stuart Mill, Richard Musgrave and George Stigler..." Kenneth Arrow stated, "Reading this book is an experience that is both fascinating and frustrating. It is very like crossing a rocky unfamiliar terrain at night in a lightning storm. All sorts of new perceptions appear with blinding clarity... The authors have set themselves a profound and difficult task, and we should be grateful for the attempt and for the many insights garnered en route." 76

In 1982, Professor Calabresi wrote a much discussed and highly controversial book entitled A Common Law For The Age of Statutes, which was awarded the prestigious Order of the Coif Triennial Book Award in 1987. Describing Mr. Calabresi as "a juristic pioneer" who "in all his writings... has operated on the frontiers of legal thought," Allan Hutchinson and Derek Morgan commented that Professor Calabresi had "produced a monograph that in its quality, timeliness and provocativeness is likely to stand alongside the seminal works of Ronald Dworkin and Grant Gilmore. If Calabresi's hope is simply to initiate a public debate about the 'dark places' of statutory petrification, it can be confidently reported that Statutes will stimulate such discussion... it is likely to provide a benchmark against which other proposals can be evaluated." In reviewing the book, Archibald Cox described it as "required reading for anyone seriously concerned with the judicial process. Every member of the profession -- judges, lawyers, and law students -- should enjoy and admire its creativity and bright insights..." 79 Robert

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Weisberg stated that the book "stands out as perhaps the most ambitious modern attempt to define the judicial role with respect to legislation."  

Professor Calabresi received the 1986 American Bar Association's Silver Gavel Award for his book *Ideals, Beliefs, Attitudes, and the Law* (1985), which is based upon the Abrams Lectures he gave at Syracuse University in 1982.  

Professor Calabresi is co-author of the seminal article "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral." Considered a "classic exposition,"88 the article is "one of the most cited law journal articles of all time."89 Professor Calabresi and Mr. Melamed "develop a framework for legal analysis which they believe serves to integrate various legal relationships which are traditionally analyzed in separate subject areas such as Property and Torts. By using their model to suggest solutions to the pollution problem that have been overlooked by writers in the field, and by applying the model to the question of criminal sanctions they demonstrate the utility of such an integrated approach."89

Regarding the article, Jeff L. Lewin commented, "This concept of a 'compensated injunction' originated in a celebrated 1972 article by Guido Calabresi and A. Douglas Melamed. Their idea was elaborated upon in subsequent articles... One of the chief conceptual contributions of Calabresi and Melamed was their distinction between two forms of remedies, which they denominated 'property rules' and 'liability rules.' "More interestingly, Lewin noted, "At the time Calabresi and Melamed submitted their article for publication, there was no precedent for the compensated injunction in private law adjudication... Given the absence of precedent for the compensated injunction, it was a most curious coincidence that just as the Calabresi and Melamed article was going to press, the Supreme Court of Arizona held in *Spur Industries, Inc. v. Del E. Webb Development Co.* that a compensated injunction was the appropriate solution to a nuisance dispute between a feedlot and a residential developer."

In his influential article "Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication," Professor Wellington cited the Calabresi and Melamed article and stated, "Their presentation is elegant, sophisticated, and important."86  

MR. A. DOUGLAS MELAME is a private practitioner who is a member of the District of Columbia Bar. He received his B.A. degree from Yale University in 1967, and in 1970 he obtained his J.D. degree from Harvard University.

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90 Couric, op. cit.  
Chayes

The Role of the Judge in Public Law Litigation

89 Harv. L. Rev. 1281 (1976)

ABRAM CHAYES was born in Chicago, Illinois, in 1922. He received both his B.A. (1943) and LL.B. (1949) degrees from Harvard University where he was president and note editor of the Harvard Law Review. He received an LL.D. from Syracuse University in 1987. Mr. Chayes was legal adviser to Chester Bowles when he was the Governor of Connecticut from 1949-50. From 1951-52 he clerked for Justice Frankfurter of the United States Supreme Court. Presently a Felix Frankfurter Professor of Law, Professor Chayes has been on the Harvard faculty since 1965.

Mr. Chayes was the top legal adviser to the State Department during the Kennedy Administration. In 1962, Mr. Chayes led the team of State Department lawyers in laying out the legal foundations for the naval quarantine of Cuba announced by Kennedy to force a withdrawal of Soviet missiles from the island. He subsequently wrote a book entitled The Cuban Missile Crisis (1974) which examined the role that international law played in the decisions of the Kennedy Administration during the Cuban Missile Crisis. In reviewing the essay, Sanford Levinson commented that it was a "remarkable essay," and "the book is a thoroughly stimulating and provocative essay that brims with questions. It deserves the widest readership." 87

Professor Chayes has held various positions inside and outside of the Federal Government and is generally considered at the top of his field both as litigator and scholar. In 1984, the New York Times called him "one of the most prominent international law experts in the United States." 88 One well-known former student called him "truly an inspirational teacher." 89 Professor Chayes is an expert on Arms Control and is a member of the Lawyers Alliance for Nuclear Arms Control. He received considerable press for heading the team of lawyers who represented Nicaragua in its World Court suit against the United States for mining Nicaraguan ports and sending guerrillas to destroy Nicaraguan territory.

Cited by the United States Supreme Court, Professor Chayes's influential article, "The Role of the Judge in Public Law Litigation," is considered a "germinal article" which fostered many subsequent scholarly writings on the subject. 90 "Traditionally, adjudication has been understood to be a process for resolving disputes among private parties which have not been privately settled." In his article, Professor Chayes "argues that this conception of adjudication cannot account for much of what is actually happening in federal trial courts. . . . The lawsuit does not merely clarify the meaning of the law, remitting the parties to private ordering of their affairs, but itself establishes a regime ordering the future interaction of the parties and of

absentees as well, subjecting them to continuing judicial oversight. Such a role for courts, and for judges, is unprecedented and raises serious concerns of legitimacy. Professor Chayes's preliminary conclusion is that the involvement of the court and judge in public law litigation is workable, and indeed inevitable if justice is to be done in an increasingly regulated society." Professor Chayes notes in his article that it "is a sketch of work in progress. It comprises a set of preliminary hypotheses, as yet unsupported by much more than impressionistic documentation, which I hope to test, refine, and develop in the course of research over the coming year."93

According to Mark Tushnet, "Professor Abram Chayes has developed some insights from the malaise of administrative law scholarship in one of the few stimulating articles on court procedure in recent years. Professor Chayes is another scholar concerned with, but in this case approving of, the increasing importance of detailed, administrative-style action by judges. Professor Chayes discusses what he calls 'public law litigation,' classically represented by the complex desegregation suit or the suit challenging a wide range of state prison practices as unconstitutional."94

Richard Fallon noted that "the term 'public law litigation' was brought to prominence" in Professor Chayes's "seminal article."95 Furthermore, in 1983, David I. Levine stated, "Ever since Professor Abram Chayes identified the 'emergence of a new model of civil litigation' that he called 'public litigation' seven years ago, we have witnessed a virtual explosion of academic interest in the public law cases as a separate area of legal scholarship. Many pertinent articles and student notes have been published on public law litigation since the Chayes article appeared."96

Professor Chayes's article, according to the *Michigan Law Review* (1983), provides a "primary contribution ... in articulating, organizing, and synthesizing changes in the judicial process that lawyers, judges, and scholars only inchoately understood. ... In riveting our attention to the new breed of public interest litigation, Professor Chayes takes us beyond the capability question, and reopens the traditional debate over the legitimacy of courts entertaining such litigations."97

 Calling the article a "celebrated account of American procedural thought," the *Columbia Law Review* (1989) stated, "One of the most important contributions of Professor Chayes's article is historiographical; he was one of the first to write an intellectual history of procedural thought."98

Commenting on Professor Chayes's article, Stephen Burbank noted, "In the case of Professor Chayes, ... it is important to note that the effort was 'preliminary' and 'impressionistic' ... Moreover, he stressed the need for additional research and

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93A. Chayes, "The Role of the Judge in Public Law Litigation," 89 Harv. L. Rev. 1281 (1976)
identified a number of potential costs of his model. Today, his questions can no longer be ignored.

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Ely

*Legislative and Administrative Motivation in Constitutional Law*

79 Yale L. J. 1205 (1970)

*The Wages of Crying Wolf: A Comment on Roe v. Wade*

82 Yale L. J. 920 (1973)

JOHN HART ELY was born in 1938 in New York City. He received his B.A. degree from Princeton University in 1960, and in 1963 he obtained his LL.B. degree from Yale University where he was editor of the *Yale Law Journal*. In 1964, he served as counsel to the Warren Commission investigating the assassination of President John F. Kennedy. He also clerked for Chief Justice Warren from 1964-65. Professor Ely joined the Yale faculty in 1968 and from 1973 to 1982 he was a Professor of Law at Harvard University. He also spent a year as general counsel for the United States Department of Transportation. Considered an expert on constitutional law, Professor Ely is currently a member of the Stanford faculty, where he was Dean and Richard E. Lang Professor of Law from 1982-87.

In a tribute to John Hart Ely, Professor Alan M. Dershowitz stated, "John Hart Ely . . . is an authentic. His views on the Constitution are not 'like' those of any other scholar. He is neither a Holmesian nor a Frankfurterian. He is not 'of' the Bickel school or the Dworkin school. He holds no membership cards in the critical legal studies or law and economics clubs. He fits into no preexisting molds or pigeonholes. He is not even a disciple of his hero, Earl Warren. His vision of the Constitution derives not from an unearthing of the past, but rather from an understanding of the present and a vision of the future. Like all creators, he has stood on the shoulders of giants to expand his visions. But they are his visions."

Regarding Professor Ely's philosophy, Erwin Chemerinsky stated, "A number of prominent scholars have responded to this attack on the legitimacy of judicial review with theories designed to reconcile the Court's activist decisions with majority rule. Commentators such as Jesse Choper, John Hart Ely, and Michael Perry accept the premise of the critics of judicial review — that decisions in a democracy must be made by electorally accountable officials — but maintain that their theories demonstrate why the Court can act to protect values not explicitly mentioned in the Constitution. These authors' works have spawned numerous responses and even symposia examining whether judicial activism is appropriate in a democratic society. The controversy has been characterized as a debate between the 'interpretivists,' who believe that the Court must confine itself to norms clearly stated or implied in the language of the Constitution, and the 'noninterpretivists,' who believe that

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the Court may protect norms not mentioned in the Constitution's text or in its preratification history.\textsuperscript{109}

Professor Ely is the author of Democracy and Distrust: A Theory of Judicial Review (1980). Commenting on the work in 1981, Archibald Cox stated that it would "have wide influence for a long time."\textsuperscript{110} In 1987, the Harvard Law Review stated, "No recent constitutional theory has generated more interest and enthusiasm."\textsuperscript{111} Calling the work "rigorous, perceptive and very well-written," Telford Taylor, in a New York Times Book Review article, commented on Professor Ely's "rare and delightful style — wry, witty and endowed with both dignity and informality."\textsuperscript{112}

In comparing Ely's Democracy and Distrust with Jesse H. Choper's Judicial Review and the National Political Process (1980), Dallin H. Oaks commented, "Such is the current interest in judicial activism and the public perception of the significance of the Choper and Ely combination that these twins were christened in a succession of reviews whose pages far exceed the combined total of the books being reviewed. . . . If the books of Ely and Choper have not provided a widely accepted theory of judicial review, they have at least made valuable contribution in relocating the debate over that subject. They have legitimized and illuminated the search for an acceptable middle ground."\textsuperscript{113} Both books jointly received the prestigious Order of the Coif Triennial Book Award.


Cited by the United States Supreme Court, Professor Ely's influential article "Legislative and Administrative Motivation in Constitutional Law" argues that motivation of the political branches should be considered by the courts.

In his analysis of Professor Ely's article, Frank P. Samford III states, "Professor John Ely, in the leading article on the use of purpose and motive in constitutional adjudication, developed an elaborate theory of review. Most equal protection problems, he found, arose because of the creation of a 'disadvantageous distinction'; that is, the challenged statute operated to the advantage of some people and the disad-
vantage of others. All that was necessary to effect a challenge was for one of those disadvantaged to bring suit. The Government would then be obligated to show a 'legitimately defensible difference' between those advantaged and those disadvantaged by the statute, which would vary from a very minimal rational basis to a compelling state interest depending on the nature of the distinction drawn and the importance of the rights involved.\textsuperscript{106}

In his article "Palmer v. Thompson: An Approach to the Problems of Unconstitutional Legislative Motive" (1971 \textit{Supreme Court Review} 95), Paul Brest stated, "Legal scholars have offered the courts virtually no assistance in handling the problem of judicial review of motivation. The academic tradition of superficial treatment of the subject was essentially broken a year ago with the publication of Professor John Ely's article. . . . Ely raised and sharpened many important issues that have long remained hidden and he undertook a valuable examination of legislative motivation in a number of substantive areas of constitutional law."\textsuperscript{107}

According to Alfred M. Mamlet, "Historically, courts generally did not consider legislative or executive motivation."\textsuperscript{108} One of the best known cases in which the Supreme Court refused to consider legislative purpose is \textit{United States v. O'Brien} (391 U.S. 367). After the appearance of Professor Ely's article as well as Paul Brest's article, Professor Mamlet noted that, "Beginning with \textit{Washington v. Davis}, 426 U.S. 229 (1976), the presence of unconstitutional motivation has played an important part in several Supreme Court cases. However, the standard for judging motivation continues to cause the Court considerable difficulty."\textsuperscript{109}

On January 22, 1973, the cases of \textit{Roe v. Wade} (410 U.S. 113) and \textit{Doe v. Bolton} (410 U.S. 179) were decided by the United States Supreme Court. The two cases, which dealt with establishing a woman's legal right to an abortion, have led to considerable debate and analysis.

In his controversial article "The Wages of Crying Wolf: A Comment on \textit{Roe v. Wade}," which has been cited by the United States Supreme Court, Professor Ely "vehemently condemns the Supreme Court's decision in \textit{Roe v. Wade}"\textsuperscript{110} and calls the decision a "frightening" decision, "dangerous," and "a very bad decision."\textsuperscript{111} According to Robert Bennett, "Among contemporary decisions, \textit{Roe v. Wade} is probably cited most frequently as an example of judicial imposition of values uninformed by objective sources. \textit{Roe v. Wade} is high on John Hart Ely's list of offensive cases."\textsuperscript{112} In his article "Do We Have an Unwritten Constitution?," Professor Grey called Professor Ely's article a "powerful assault on the Supreme Court's decision in the Abortion Cases" and he further commented, "Professor Ely charges that in

\textsuperscript{106}F. Samford, III, "Toward a Constitutional Definition of Racial Discrimination," 25 \textit{Emory L. J.} 516-17 (1976)
\textsuperscript{109}Ibid., at 732
those decisions, based on a right of 'privacy' drawn by no imaginable arts of construction or interpretation from the constitutional text, the Court has violated its 'obligation' to trace its premises to the charter from which it derives its authority."

In regard to Professor Ely's article, Paul Siegel commented, "Dean John Ely is probably Roe's harshest critic. In his critique of the decision, he accuses the Court of acting as a 'superlegislature,' of engaging in substantive due process in the worst sense of the phrase. 'Were I a legislator,' he chides the Court, 'I would vote for a statute very much like the one the Court ends up drafting. . . .' Ely sees in Roe an inescapable irony. The Court, he argues, invented the fundamental liberties doctrine in order to avoid charges of engaging in substantive due process and of usurping the power of the legislative branch. . . . The fundamental liberties doctrine, according to Ely, is the formalization of the worst of the substantive due process decisions from decades past. It grants special protection 'to those rights that somehow seem most pressing,' regardless of whether the Constitution suggests any special solicitude for them.'"

According to John B. McArthur, "Ely's criticism is what is certainly the most vehement and successful case criticism in recent years—his attack on Roe v. Wade was not of the failure of interpretivism as a theory but of the Court's failure to adhere to an interpretive approach. Ely separated himself from those with a policymaking view of the Court and criticized Roe because 'it is not constitutional law and gives almost no sense of an obligation to try to be.'"

Commenting on Professor Ely's article, Helen Garfield stated, "The latest phase of the debate on the legitimacy and scope of judicial review opened with a stunning critique of Roe v. Wade by Professor Ely. Ely blasted Roe as an illegitimate resurrection of the substantive due process doctrine of Lochner v. New York. Indeed, he characterized Roe as even more dangerous than Lochner and credited it with precipitating a reexamination of his own position in the ongoing controversy over the relative merits of 'interpretive' and 'noninterpretive' modes of judicial review. The result of this soul-searching was a theory of judicial review that managed to justify virtually all of the reforms of the Warren Court except the right of privacy. In Ely's terminology, interpretive review is confined to enforcement of 'norms that are stated or clearly implicit in the written Constitution'; noninterpretive review enforces 'norms that cannot be discovered within the four corners of the Constitution.' Garfield believes that 'the current debate is but a continuation of a debate that has been going on since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).''' She states further, "In the recent past, its participants have included Learned Hand, Herbert Wechsler, Charles Black, Alexander Bickel, and many more.'"

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\(^{112}\) E. Grey, "Do We Have an Unwritten Constitution?" 27 Stan. L. Rev. 704 (1975)
Do We Have an Unwritten Constitution?
27 Stan. L. Rev. 703 (1975)

Born in 1941, THOMAS C. GREY received two B.A. degrees, one from Stanford University in 1963, and a second from Oxford in 1965. In 1968, he received his LL.B. degree from Yale University where he was the note and comment editor of the Yale Law Journal. After graduation, he clerked for Judge J. Skelly Wright of the United States Court of Appeals, District of Columbia. From 1969 to 1970, Professor Grey was law clerk to the Honorable Thurgood Marshall of the United States Supreme Court. Currently a professor of law at Stanford University, he joined the faculty in 1971.

Selected by the American Bar Association's Commission on Undergraduate Education in Law and the Humanities, Professor Grey wrote a book entitled The Legal Enforcement of Morality (1983). The book consists of a collection of essays and cases, centered around John Stuart Mill's major thesis, "Principle of Liberty." Highly recommended, the book "dissects the intersection of law and ethics with skill, depth, balance and persistence" and ranks "as an outstanding candidate for enriching a business law or legal environment course."10

Called a "leading noninterpretivist" and a "devout activist," Professor Grey is an expert on constitutional law. His other subjects of interest include jurisprudence and torts. His works are frequently cited both by courts and commentators.

In the introduction to his article "Do We Have an Unwritten Constitution?," Professor Grey stated, "In reviewing law for constitutionality, should our judges confine themselves to determining whether those laws conflict with norms derived from the written Constitution? Or may they also enforce principles of liberty and justice when the normative content of those principles is not to be found within the four corners of our founding document? Excluding the question of the legitimacy of judicial review itself, that is perhaps the most fundamental question we can ask about our fundamental law."11

According to Jules Lobel, "In recent years there has been renewed scholarly and judicial interest in the possibility of limitations on governmental power that are not explicitly mentioned in the Constitution. Professor Grey has posited an 'unwritten constitution.'"12 According to Tom Gerety, "Much of the recent outburst of theory in constitutional scholarship followed on Thomas Grey's suggestion that we Americans have, alongside our written constitution, an unwritten one—a supplement, as he now calls it. Grey pointed out that precedent and tradition—as well

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13 Gre. op. cit., at 703
as a desire to do justice—often take us beyond the words of the constitutional text, and beyond its history, as well.”

In regard to Professor Grey’s article, John B. McArthur stated, “The... skepticism over the Court’s methodology is evident among liberal public value theorists. In 1975, Thomas Grey gave impetus to this growing school in an influential article in which he announced that the ‘dominant norms of decision’ in constitutional law are values independent of the Constitution.”

According to C. Edward Fletcher III, “Perhaps the most energetic debate of the last twenty-five years in the field of constitutional analysis has been between those who would like to see the Constitution interpreted neutrally and in conformity with original intent on the one hand and those who criticize such aims on the other. To date, the debate has revolved around two axes. The first involves the propriety of using ‘interpretivism’ in analyzing constitutional passages. Interpretivism is the belief that judges should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution. The second part of the debate focuses on the doctrine of neutral principles.” Mr. Fletcher points out that the term “interpretivism,” which was “popularized by John Hart Ely in his critiques of interpretivism,” apparently originated with Professor Grey’s article “Do We Have an Unwritten Constitution?”

Commenting that Professor Grey’s article has played an important role in “reenergizing the debate between contemporary theorists concerning the legitimacy and appropriate scope of judicial review,” Richard B. Saphire noted, “What proved to be deeply controversial about Grey’s thesis was its prescriptive aspect... The important impact of Grey’s article cannot be attributed exclusively, or even primarily, to its prescriptive message. Instead, the seminal status of Grey’s article is attributable to the analytic or methodological device which he employed: the distinction between interpretivism and noninterpretivism.”

In 1988, Professor Wasserstrom and Professor Seidman noted that in his more recent article, “The Constitution as Scripture” (37 Stanford Law Review 1, 1984), “Professor Grey has since adjured this terminology and urged instead using ‘textualists’ and ‘supplementers’ for, respectively, ‘those who consider the text the sole legitimate source of operative norms in constitutional adjudication, and those who accept supplementary sources of constitutional law.’”

Regarding Professor Grey’s article, Gary Jacobsohn commented, “The debate over the unwritten constitution, interesting as it is for the historian of ideas, should also be app. to judicial ‘theoretical policies’ of his j.

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125 J. McArthur, op. cit., at 299
127 “Ibid., at 893
130 Wasserstrom and Seidman, op. cit., at 73
also be appreciated for its practical implications in contemporary constitutional adjudication. Professor Grey, who argues for the judicial enforceability of "theoretical legal constraints," is quite explicit in articulating the practical tendencies of his jurisprudential position."119

According to Arnold H. Loewy, "Professor Grey's view is not universally shared. At the other end of the spectrum, Justice Black, Professors Ely and Wechsler, and others, have urged that the key to constitutional adjudication is fidelity to the constitutional text in judicial review."120

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124 Couric, op. cit.
125 Ibid., April 15, 1985
in a strong field." Similarly, the Stanford Law Review examined the same edition and noted, "The book represents both a comprehensive and an intensively analytic, personal examination of most of current American constitutional law with a quality and on a scale that has no peer between a single pair of covers. The late Professor Alexander M. Bickel's brilliant series of books represents the only comparable coverage by a single author. "

In 1985 and 1988, Professor Gunther was named by the National Law Journal as one of the most powerful lawyers in the United States. In 1987, the New York Law Journal surveyed 50 legal scholars nationwide and asked them who they would choose for the Supreme Court vacancy. "Named by liberals and conservatives alike... the top pick, by a wide margin, was Professor Gunther of Stanford Law School, the pre-eminent constitutional scholar of his time."

In 1975, Professor Gunther wrote a fascinating article about Judge Learned Hand, entitled "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History" (27 Stanford Law Review 719). Now, the authorized biographer of the late Judge Learned Hand, Professor Gunther, who was given "first-time access to 100,000 of the judge's private papers," is working on the completion of the book.

An avid observer of the Supreme Court, Professor Gunther has written and spoken against holding a constitutional convention to mandate a balanced budget and, in doing so, helped "sink efforts to reconvene a constitutional convention."

Professor Gunther was given the prestigious honor of providing the annual Foreword to the Supreme Court issue of the Harvard Law Review. His seminal article, "The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," has been cited by the United States Supreme Court. For example, in the case of Wygant et al. v. Jackson Board of Education et al. (476 U.S. 267), Justice Powell stated in a footnote, "Professor Gunther argues that judicial scrutiny of legislative means is more appropriate than judicial weighing of the importance of the legislative purpose."

Professor Gunther's influential article "suggested that in reviewing economic and social legislation, the Court would no longer regularly speculate about conceivable state purposes and was moving in the direction of a model of 'newer equal protection' that would test such legislation by articulated rather than hypothesized purposes."

According to Randall Fox, "Professor Gunther was one of the first commentators to realize that the two-tier model of equal protection analysis proposed by the Warren Court was a failure. In its place, Gunther suggested a purely means-focused inquiry..."

His model, state further legislatively by the legislative...
focused inquiry applicable to the entire spectrum of equal protection challenges. His model, stated most simply, requires: 1) that the legislative means substantially further legislative ends, and 2) that the state affirmatively assert the purposes sought by the legislation.”

II
Kennedy
Structure of Blackstone’s Commentaries
28 Buf. L. Rev. 205 (1979)

DUNCAN MCCLEAN KENNEDY was born in 1942 and received his B.A. from Harvard in 1964. In 1970 he obtained his LL.B. degree from Yale, where he was note and comment editor of the Yale Law Journal. From 1970-71 he clerked for Justice Potter Stewart of the United States Supreme Court. Professor Kennedy, who is currently a member of the Harvard Law faculty, has written on such subjects as law and economics, torts and historical legal thought and labor law theory. He is the author of Legal Education and the Reproduction of Hierarchy (1983) which Robert Coles describes as “a strongly written assault upon contemporary American legal education.”

Professor Kennedy is one of the founders of the Critical Legal Studies (CLS) movement, which according to the New Republic (1988) “has given American legal education its liveliest moments of the last decade.” In 1985, the National Law Journal named him one of the most powerful lawyers in the United States and described him as “a passionate spokesman for the radical Critical Legal Studies movement within legal academia.”

Professor Kennedy defines Critical Legal Studies as “a movement of lawyers, law teachers, social theorists, and students who are directly or indirectly linked to the Conference on Critical Legal Studies [CCLS].” The Conference on Critical Legal Studies was first held in 1977. According to the Stanford Law Review (1984), “The Conference has grown to include a vocal and substantial group of [primarily] legal academics” and “the group appears to offer a set of viewpoints, descriptions, and prescriptions that vary substantially from those embraced by the mainstream legal culture.” Furthermore, “those who identify themselves with CLS form an extremely diverse group, and their writings are marked more by a variety of ideas than by a single set of doctrinal precepts” and “CLS presents several new ways of looking at law, society, and legal institutions that extend beyond traditional legal scholarship.”

According to Vicki Quade, who interviewed Professor Kennedy in 1987, Critical Legal Studies “has its roots in ‘legal realism,’ whose supporters earlier this cen-
tury began to argue that legal precedents could be found to support either side of most cases, and that the personal dispositions, beliefs and prejudices of judges, rather than the abstract 'science' of law, had more to do with judicial decisions... ‘Crits’ — as those affiliated with Critical Legal Studies are called — challenge students to bring their own moral and political values to bear on what they study. As lawyers, those same students might bring their moral and political values to bear on what they practice.'

According to the New Yorker, 'When people at Harvard try to explain how the faculty changed from a place where just about everyone agreed — or, at least, expressed his disagreement in a polite way — they almost always mention the arrival, in the early seventies, of three young faculty members: Duncan Kennedy, Morton Horwitz and Roberto Unger. All three came to be associated with Critical Legal Studies — a movement that developed around that time among people who had known one another as students or young faculty members at Yale Law School. Critical Legal Studies is sometimes described as 'the New Left played out in the law.' Scholars identified with the movement tend to show the influence not just of thirties Legal Realism but of German neo-Marxism and French structuralism and Berkeley nose-thumbing.'

When asked how he got involved in the CLS movement, Professor Kennedy stated, 'I could give you a list of the people who introduced me to Critical Legal Studies. They would be David Trubek and Richard Abel, both of them assistant professors at the Yale Law School when I was a student there; Morton Horwitz and Roberto Unger, who were colleagues of mine when I joined the Harvard faculty; Peter Gabel, who was then a young law professor at the New College of California School of Law; and Al Katz, who was teaching at the SUNY Buffalo Law School.'

In his discussion of the Conference on Critical Legal Studies, John Henry Schlegel stated, "Kennedy is a cross between Rasputin and Billy Graham. Machiavellian, and with a gift for blarney that would make the stone get up, walk over, and kiss him, he can work an audience or an individual with the seductiveness of a revivalist preacher, for Kennedy wants your soul.'

In his analysis of the CCLS, Stephen B. Presser commented, "Much of the popularity of this particular leftist intellectual movement can be explained by the fact that its leaders are simply charismatic." Describing Kennedy as "a charismatic figure," Presser stated, "Like Unger, Kennedy has the ability to thrill listeners simply by the timbre of his voice, and to make almost anything he says seem to shimmer with intelligence and noble passion. Kennedy's personal academic enterprise operates in two modes, one a closely reasoned, subtle, and sophisticated legal historiography and the other a speculative radical political and educational cosmology... Because of his serious scholarship, his obvious brilliance, and his ability left-handedly will, Kennedy's America..."

For a bibliography, see page 461-90 of the New Yorker and Karl Klare. "Essay on a Critical Legal Study" (i.e., Tushnet as from outside obse Kennedy and Peter G. Public views within addition, Mark Kelma in which he "offers a relation to other sch..."

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will. Kennedy's American and English fame continues to
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4, 1984, pages 461-90. This bibliography was prepared by Professors Duncan Ken-


issue to a Critical Legal Studies Symposium and includes articles from both "CLS

insiders" (i.e., Tushnet, Trubek, Kelman, Heller, Gabel and Kennedy, etc.) as well

as from outside observers. The issue contains the well-known article by Duncan

Kennedy and Peter Gabel entitled "Roll Over Beethoven," which discusses the "con-

flicting views within CLS on the utility of traditional philosophical discourse." In

in which he "offers an impressive survey of the major CLS writers and their relation-

ship to other schools of legal thought."154

In regard to Professor Kennedy's seminal article "The Structure of Blackstone's

Commentaries," Joan C. Williams commented, "Duncan Kennedy pioneered the

application of structuralist theory to law. His article. . . inspired the creation of an

entire school of structuralist legal scholarship."155

According to Jonathan Turley, "For many people, the CLS experience began not

with an appraisal of current American law, but with a reappraisal of old English com-

mon law. In 1979, Duncan Kennedy, one of the central figures in the early CLS move-

ment, applied a critical approach to Blackstone's Commentaries. Kennedy argued

that the Commentaries (and by implication, all liberal legal structure) were actu-

ally little more than a legitimation of the power hierarchy of the day."156

Commenting on Professor Kennedy's article, Phillip E. Johnson stated, "In the

introductory part of his article, which has been extremely influential within the CLS

movement, Kennedy expresses a Critical perspective at the level of individual psy-

chology. According to Kennedy, there is a 'fundamental contradiction' in our rela-

tions with other people: We both need them and fear them."157

According to Louis B. Schwartz, Professor Kennedy's article "is a profound, sub-

tle, and eloquent dissection of that influential classic. By a method that he

characterizes as 'structuralist or phenomenological, or neo-Marxist, or all three

together,' Kennedy undertakes to demonstrate that the concealed political infrastruc-

ture of Blackstone — his animating principle — is justification of the status quo: the

objectionable 'liberal' practice of masking class domination with a set of plausible

'neutral' rules administered by 'neutral' judges."158

153S. Presser, "Some Realism About Orphans of the CLS Movement and the New Great Chain


U. L. Rev. 872-75 (1984-85)

154Farber, op. cit.

155J. Williams, "Critical Legal Studies: The Death of Transcendence and the Rise of the New


157P. Johnson, "Do You Sincerely Want to be Radical?", 36 Stan. L. Rev. 252 (1984)


(1984)
NEUTRAL PRINCIPLES AND SOME FIRST AMENDMENT PROBLEMS*

ROBERT H. BORK†

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

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

THE SUPREME COURT AND THE DEMAND FOR PRINCIPLE

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

* The text of this article was delivered in the Spring of 1971 by Professor Bork at the Indiana University School of Law as part of the Addison C. Harriss lecture series.
† Professor of Law, Yale Law School.
majorities, however. It arises when any court either exercises or declines to exercise the power to invalidate any act of another branch of government. The Supreme Court is a major power center, and we must ask when its power should be used and when it should be withheld.

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

Wechsler chose the term “neutral principles” to capsulate his argument, though he recognizes that the legal principle to be applied is itself never neutral because it embodies a choice of one value rather than another. Wechsler asked for the neutral application of principles, which is a requirement, as Professor Louis L. Jaffe puts it, that the judge “sincerely believe in the principle upon which he purports to rest his decision.” “The judge,” says Jaffe, “must believe in the validity of the reasons given for the decision at least in the sense that he is prepared to apply them to a later case which he cannot honestly distinguish.”

He must not, that is, decide lawlessly. But is the demand for neutrality in judges merely another value choice, one that is no more principled than any other? I think not, but to prove it we must rehearse fundamentals. This is familiar terrain but important and still debated.

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

A Madisonian system is not completely democratic, if by “democratic” we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for no better reason that they are majorities. We need not pause here to examine the philosophical under-

2. Id.
4. See R. DAHL, A PREFACE TO DEMOCRATIC THEORY 4-33 (1956).
5. Id. at 23-24.
pinnings of that assumption since it is a "given" in our society; nor need we worry that "majority" is a term of art meaning often no more than the shifting combinations of minorities that add up to temporary majorities in the legislature. That majorities are so constituted is inevitable. In any case, one essential premise of the Madisonian model is majoritarianism. The model has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.

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

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

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

5. Id. at 23-24.
but are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises tells you what it thinks its customers demand.

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

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

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

The "mandarins" of the academy anger the Judge because they engage in "gaudy derision of the Court's powers of analysis and reason-ing." Yet, the charge avoidance of fundamental decisions at the highest level of the Court, whatever their correctness, appears to me to point out that their decisions must be structured to some extent by the principle of a syllogism in rights and value choices. The constitutional order to protect rights and define value choices is important. The judicial interpretation of the Constitution is a process that is proper for rights and liberties with a per se principle, not with a perfect deference to decision-making.

A perceptive observer of the judiciary may conclude that, among the value choices, the "most important choice," from a constitutional perspective, is the interpretation of the Constitution's amendment's provisions. A judge who is held to have ignored the amendment's provisions, and is then categorized as "least fit" for the job, must therefore be judged to have failed to discharge that responsibility. Whether the judge is elected or appointed, such results are likely to undermine the Court's legitimacy and influence. However, the Court may be able to maintain its legitimacy and influence by ensuring that its decisions are guided by a consistent and principled approach to interpreting the Constitution.
Yet, curiously enough, Judge Wright makes no attempt to refute the charge but rather seems to adopt the technique of confession and avoidance. He seems to be arguing that a Court engaged in choosing fundamental values for society cannot be expected to produce principled decisions at the same time. Decisions first, principles later. One wonders, however, how the Court or the rest of us are to know that the decisions are correct or what they portend for the future if they are not accompanied by the principles that explain and justify them. And it would not be amiss to point out that quite often the principles required of the Warren Court’s decisions never did put in an appearance. But Judge Wright’s main point appears to be that value choice is the most important function of the Supreme Court, so that if we must take one or the other, and apparently we must, we should prefer a process of selecting values to one of constructing and articulating principles. His argument, I believe, boils down to a syllogism. I. The Supreme Court should “protect our constitutional rights and liberties.” II. The Supreme Court must “make fundamental value choices” in order to “protect our constitutional rights and liberties.” III. Therefore, the Supreme Court should “make fundamental value choices.”

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

8. Id. at 777-78.
9. This syllogism is implicit in much of Judge Wright’s argument. E.g., “If it is proper for the Court to make fundamental value choices to protect our constitutional rights and liberties, then it is self-defeating to say that if the Justices cannot come up with a perfectly reasoned and perfectly general opinion now, then they should abstain from decision altogether.” Id. at 779. The first clause is the important one for present purposes; the others merely caricature the position of commentators who ask for principle.
10. A position Judge Wright also seems to take at times. “Constitutional choices are in fact different from ordinary decisions. The reason is simple: the most important value choices have already been made by the framers of the Constitution.” Id. at 784. One wonders how the Judge squares this with his insistence upon the propriety of the judiciary making “fundamental value choices.” One also wonders what degree of specificity is required before the framers may realistically be said to have made the most important value choices.” The Warren Court has chosen to expand the fourteenth amendment’s theme of equality in ways certainly not foreseen by the framers of that provision. A prior Court expanded the amendment’s theme of liberty. Are both Courts to be judged innocent of having made the most important value choices on the ground that the framers mentioned both liberty and equality? If so, the framers must be held to have delegated an almost complete power to govern to the Supreme Court, and it is untrue to say that a constitutional decision is any different from an ordinary governmental decision. Judge Wright simply never faces up to the problem he purports to address: how free is the Court to choose values that will override the values chosen by elected representatives?
principles. If, on the other hand, "constitutional rights and liberties" are not in some real sense specified by the Constitution but are the rights and liberties the Court chooses, on the basis of its own values, to give to us, then the conclusion was contained entirely in the major premise, and the Judge's syllogism is no more than an assertion of what it purported to prove.

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

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

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

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

NEUTRAL PRINCIPLES

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

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

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

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

12. Id. at 34.
13. Wright, supra note 6, at 775.
explain why X is a proper principle of limitation on majority power at all. Why should he not choose non-X? If he may not choose lawlessly between cases in applying principle X, he may certainly not choose lawlessly in defining X or in choosing X, for principles are after all only organizations of cases into groups. To choose the principle and define it is to decide the cases.

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

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

But Justice Douglas then performed a miracle of transubstantiation. He called the first amendment’s penumbra a protection of “privacy” and then asserted no better right of privacy within the penumbral of which it more leap of privacy within the however, is unspecified.

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16. 381 U.S. at 484.
 asserted that other amendments create "zones of privacy." He had no better reason to use the word "privacy" than that the individual is free within these zones, free to act in public as well as in private. None of these penumbral zones—from the first, third, fourth or fifth amendments, all of which he cited, along with the ninth—covered the case before him. One more leap was required. Justice Douglas asserted that these various "zones of privacy" created an independent right of privacy, a right not lying within the penumbra of any specific amendment. He did not disclose, however, how a series of specified rights combined to create a new and unspecified right.

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

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

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

18. 381 U.S. at 484.
19. Id. at 485, 486.
edge that it takes place and that the State makes no effort to inhibit it causes the majority anguish, impairs their gratifications.

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

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

One of my colleagues refers to this conclusion, not without sarcasm, as the “Equal Gratification Clause.” The phrase is apt, and I accept it, though not the sarcasm. Equality of human gratifications, where the document does not impose a hierarchy, is an essential part of constitutional doctrine because of the necessity that judges be principled. To be perfectly clear on the subject, I repeat that the principle is not applicable to legislatures. Legislation requires value choice and cannot be principled in the sense under discussion. Courts must accept any value choice the legislature makes unless the Constitution allows the Court to be reformulated by the Substantive due process of the Constitution. Majorities are also written into a statute for the sake of English; Piecing all Ore, Children's Board of Education, a maximum of political acceptable grades. In Lochner, as a mere mercy of the Constitution does, The protection is due, used the due process of the Constitution and the. The equal protection requires form it does require, much more concept of itself and thereby of saying w done, there fore it regards as

NEUTRAL PRINCIPLES

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

It follows, of course, that broad areas of constitutional law ought
to be reformulated. Most obviously, it follows that substantive due process,
revived by the Griswold case, is and always has been an improper doctrine.
Substantive due process requires the Court to say, without guidance from
the Constitution, which liberties or gratifications may be infringed by
majorities and which may not. This means that Griswold's antecedents
were also wrongly decided, e.g., Meyer v. Nebraska,24 which struck down
a statute forbidding the teaching of subjects in any language other than
English; Pierce v. Society of Sisters,25 which set aside a statute compel-
ing all Oregon school children to attend public schools; Adkins v.
Children's Hospital,26 which invalidated a statute of Congress authorizing
a board to fix minimum wages for women and children in the District of
Columbia; and Lochner v. New York,27 which voided a statute fixing
maximum hours of work for bakers. With some of these cases I am in
political agreement, and perhaps Pierce's result could be reached on
acceptable grounds, but there is no justification for the Court's methods.
In Lochner, Justice Peckham, defending liberty from what he conceived
as a mere meddlesome interference, asked, "[A]re we all . . . at the
mercy of legislative majorities?"28 The correct answer, where the Con-
stitution does not speak, must be "yes."

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

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

22. 268 U.S. 510 (1925).
23. 261 U.S. 525 (1923).
24. 198 U.S. 45 (1905).
25. Id. at 59.
cases but not in others, thus choosing values and producing a line of cases as improper and as intellectually empty as Griswold v. Connecticut. Any casebook lists them, and the differing results cannot be explained on any ground other than the Court's preferences for particular values: Skinner v. Oklahoma\(26\) (a forbidden inequality exists when a state undertakes to sterilize robbers but not embezzlers); Kotch v. Board of River Port Pilot Commissioners\(27\) (no right to equality is infringed when a state grants pilots' licenses only to persons related by blood to existing pilots and denies licenses to persons otherwise as well qualified); Goesaert v. Cleary\(28\) (a state does not deny equality when it refuses to license women as bartenders unless they are the wives or daughters of male owners of licensed liquor establishments); Railway Express Agency v. New York\(29\) (a city may forbid truck owners to sell advertising space on their trucks as a distracting hazard to traffic safety though it permits owners to advertise their own business in that way); Shapiro v. Thompson\(30\) (a state denies equality if it pays welfare only to persons who have resided in the state for one year); Levy v. Louisiana\(31\) (a state may not limit actions for a parent's wrongful death to legitimate children and deny it to illegitimate children). The list could be extended, but the point is that the cases cannot be reconciled on any basis other than the Justices' personal beliefs about what interests or gratifications ought to be protected.

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

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

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

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

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

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

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

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

\textsuperscript{33.} 347 U.S. 483 (1954).
\textsuperscript{34.} \textit{Wechsler, supra} note 1, at 43.
neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases.  

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

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

But one thing the Court does know: it was intended to enforce a core idea of black equality against governmental discrimination. And the Court, because it must be neutral, cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that applies to all cases.
applies to all cases. For the same reason, the Court cannot decide that physical equality is important but psychological equality is not. Thus, the no-state-enforced-discrimination rule of Brown must overturn and replace the separate-but-equal doctrine of Plessy v. Ferguson. The same result might be reached on an alternative ground. If the Court found that it was incapable as an institution of policing the issue of the physical equality of separate facilities, the variables being insufficiently comparable and the cases too many, it might fashion a no-segregation rule as the only feasible means of assuring even physical equality.

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

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

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

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

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

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

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

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

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

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

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

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

38. Id. at 494.
The distinction between rights that are inherent and rights that are derived from some other value is one that our society worked out long ago with respect to the economic market place, and precisely the same distinction holds and will prove an aid to clear thought with respect to the political market place. A right is a form of property, and our thinking about the category of constitutional property might usefully follow the progress of thought about economic property. We now regard it as thoroughly old hat, passe and in fact downright tiresome to hear rhetoric about an inherent right to economic freedom or to economic property. We no longer believe that economic rights inhere in the individual because he is an individual. The modern intellectual argues the proper location and definition of property rights according to judgments of utility—the capacity of such rights to forward some other value. We may, for example, wish to maximize the total wealth of society and define property rights in a way we think will advance that goal by making the economic process run more efficiently. As it is with economic property rights, so it should be with constitutional rights relating to governmental processes.

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

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


40. See
41. Baker
42. Therm
43. 377 U
44. Id. a
NEUTRAL PRINCIPLES

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

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

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

42. The Federalist No. 43 (J. Madison).
43. 377 U.S. 713 (1964).
44. Id. at 733-54.
turn next to a suggestion of what neutrality, the decision of cases according to principle, may mean for certain first amendment problems.

**Some First Amendment Problems: The Search for Theory**

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

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

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

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

I am, of course, aware that this theory departs drastically from existing Court-made law, from the views of most academic specialists in the field and that it may strike a chill into the hearts of some civil libertarians. But I would insist at the outset that constitutional law, viewed as the set of rules a judge may properly derive from the document and its history, is not an expression of our political sympathies or of our judge-
In framing a theory of free speech the first obstacle is the insistence of many very intelligent people that the "first amendment is an absolute." Devotees of this position insist, with a literal respect they do not accord other parts of the Constitution, that the Framers commanded complete freedom of expression without governmental regulation of any kind. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech . . . ." Those who take that as an absolute must be reading "speech" to mean any form of verbal communication and "freedom" to mean total absence of governmental restraint.

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

No one, not the most obsessed absolutist, takes any such position, but if one does not, the absolute position is abandoned, revealed as a play on words. Government cannot function if anyone can say anything anywhere at any time. And so we quickly come to the conclusion that lines must be drawn, differentiations made. Nor does that in any way involve us in a conflict with the wording of the first amendment. Laymen may perhaps be forgiven for thinking that the literal words of the amendment command complete absence of governmental inhibition upon verbal activity, but what can one say of lawyers who believe any such thing? Anyone skilled in reading language should know that the words are not necessarily absolute. "Freedom of speech" may very well be a term referring to a defined or assumed scope of liberty, and it may be this area of liberty that is not to be "abridged."
If we turn to history, we discover that our suspicions about the wording are correct, except that matters are even worse. The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject. Professor Leonard Levy's work, *Legacy of Suppression*, demonstrates that the men who adopted the first amendment did not display a strong libertarian stance with respect to speech. Any such position would have been strikingly at odds with the American political tradition. Our forefathers were men accustomed to drawing a line, to us often invisible, between freedom and licentiousness. In colonial times and during and after the Revolution they displayed a determination to punish speech thought dangerous to government, much of it expression that we would think harmless and well within the bounds of legitimate discourse. Jeffersonians, threatened by the Federalist Sedition Act of 1798, undertook the first American elaboration of a libertarian position in an effort to stay out of jail. Professor Walter Berns offers evidence that even then the position was not widely held. When Jefferson came to power it developed that he read the first amendment only to limit Congress and he believed suppression to be a proper function of the state governments. He appears to have instigated state prosecutions against Federalists for seditious libel. But these later developments do not tell us what the men who adopted the first amendment intended, and their discussions tell us very little either. The disagreements that certainly existed were not debated and resolved. The first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended. One reason, as Levy shows, is that the Anti-Federalists complained of the absence of a Bill of Rights less because they cared for individual freedoms than as a tactic to defeat the Constitution. The Federalists promised to submit one in order to get the Constitution ratified. The Bill of Rights was then drafted by Federalists, who had opposed it from the beginning; the Anti-Federalists, who were really more interested in preserving the rights of state governments against federal power, had by that time lost interest in the subject.

We are, then, forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or to its history. But we are not without materials for building a special amendment for speech without free political speech. The law, Court decision, *Abrams v. California*—not mostly disavowed by Holmes and canny power vailed despite analysis as *Dennis v. U.S.* more recent 
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The first amendment indicates that there is something special about speech. We would know that much even without a first amendment, for the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment. Further guidance can be gained from the fact that we are looking for a theory fit for enforcement by judges. The principles we seek must, therefore, be neutral in all three meanings of the word: they must be neutrally derived, defined and applied.

The law of free speech we know today grows out of the Supreme Court decisions following World War I—Schenck v. United States,\(^{50}\) Abrams v. United States,\(^{51}\) Gitlow v. New York,\(^{52}\) Whitney v. California—\(^{53}\) not out of the majority positions but rather from the opinions, mostly dissents or concurrences that were really dissents, of Justices Holmes and Brandeis. Professor Kalven remarks upon “the almost uncanny power” of these dissents. And it is uncanny, for they have prevailed despite the considerable handicap of being deficient in logic and analysis as well as in history. The great Smith Act cases of the 1950’s, Dennis v. United States,\(^{54}\) as modified by Yates v. United States,\(^{55}\) and, more recently, in 1969, Brandenburg v. Ohio\(^{56}\) (voiding the Ohio criminal syndicalism statute), mark the triumph of Holmes and Brandeis. And other cases, culminating perhaps in a modified version of Roth v. United States,\(^{57}\) have pushed the protections of the first amendment outward from political speech all the way to the fields of literature, entertainment and what can only be called pornography.

Because my concern is general theory I shall not attempt a comprehensive survey of the cases nor engage in theological disputation over current doctrinal niceties. I intend to take the position that the law should have been built on Justice Sanford’s majority opinions in Gitlow and Whitney. These days such an argument has at least the charm of complete novelty, but I think it has other merits as well.

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

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50. 249 U.S. 47 (1919).
51. 250 U.S. 616 (1919).
52. 268 U.S. 652 (1925).
53. 274 U.S. 357 (1927).
to begin the general discussion of first amendment theory with con-
sideration of a passage from Justice Brandeis' concurring opinion in
the latter case. His Whitney concurrence was Brandeis' first attempt
to articulate a comprehensive theory of the constitutional protection of
speech, and in that attempt he laid down premises which seem to me
correct. But those premises seem also to lead to conclusions which
Justice Brandeis would have disowned.

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

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

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

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

58. 274 U.S. at 375.
1. The development of the faculties of the individual;
2. The happiness to be derived from engaging in the activity;
3. The provision of a safety value for society; and,
4. The discovery and spread of political truth.

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

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

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

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

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

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

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

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

59. Kalven, supra note 45, at 16.
He lists four such thoughts and expressions:

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

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

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

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

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61. Id. at 256-57.
mental unit involved is executive, legislative, judicial or administrative. Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, educational, commercial or literary expressions as such. A novel may have impact upon attitudes that affect politics, but it would not for that reason receive judicial protection. This is not anomalous, I have tried to suggest, since the rationale of the first amendment cannot be the protection of all things or activities that influence political attitudes. Any speech may do that, and we have seen that it is impossible to leave all speech unregulated. Moreover, any conduct may affect political attitudes as much as a novel, and we cannot view the first amendment as a broad denial of the power of government to regulate conduct. The line drawn must, therefore, lie between the explicitly political and all else. Not too much should be made of the undeniable fact that there will be hard cases. Any theory of the first amendment that does not accord absolute protection for all verbal expression, which is to say any theory worth discussing, will require that a spectrum be cut and the location of the cut will always be, arguably, arbitrary. The question is whether the general location of the cut is justified. The existence of close cases is not a reason to refuse to draw a line and so deny majorities the power to govern in areas where their power is legitimate.

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

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

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

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

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

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


1971, Winter, at 23.
advocating forcible overthrow of the government or violation of law. The reason becomes clear when we return to Brandeis’ discussion of the reasons for according constitutional protection to speech.

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

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

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

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

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

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

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

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

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

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

Benjamin Gitlow was convicted under New York's criminal anarchy statute which made criminal advocacy of the doctrine that organized government should be overthrown by force, violence or any unlawful means. Gitlow, a member of the Left Wing section of the Socialist party, had arranged the printing and distribution of a "Manifesto" deemed to call for violent action and revolution. "There was," Justice Sanford's opinion noted, "no evidence of any effect resulting from the publication and circulation of the Manifesto." Anita Whitney was convicted under California's criminal syndicalism statute, which forbade advocacy of the commission of crime, sabotage, acts of force or violence or terrorism
"as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Also made illegal were certain connections with groups advocating such doctrines. Miss Whitney was convicted of assisting in organizing the Communist Labor Party of California, of being a member of it and of assembling with it.* The evidence appears to have been meager, but our current concern is doctrinal.

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

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

[T]he immediate danger [created by advocacy of overthrow of the government] is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a

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66. 274 U.S. at 372 (Brandeis, J., dissenting).
67. 268 U.S. at 668; 274 U.S. at 362-63.
68. 274 U.S. at 373.
69. 249 U.S. at 52.
70. 268 U.S.
jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency . . .

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

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

70. 268 U.S. at 669.
rigid discipline of its members and the party's ideological affinity to foreign powers.\textsuperscript{71}

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

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

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

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

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

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

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

\textsuperscript{73} 395 U.S. at 447.
The Wages of Crying Wolf: A Comment on Roe v. Wade*

John Hart Ely**

The interests of the mother and the fetus are opposed. On which side should the State throw its weight? The issue is volatile; and it is resolved by the moral code which an individual has.1

In Roe v. Wade,2 decided January 22, 1973, the Supreme Court—Justice Blackmun speaking for everyone but Justices White and Rehnquist3—held unconstitutional Texas’s (and virtually every other state’s) criminal abortion statute. The broad outlines of its argument are not difficult to make out:

1. The right to privacy, though not explicitly mentioned in the Constitution, is protected by the Due Process Clause of the Fourteenth Amendment.8

2. This right "is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy."10

3. This right to an abortion is "fundamental" and can therefore be regulated only on the basis of a "compelling" state interest.11

4. The state does have two "important and legitimate" interests here, the first in protecting maternal health, the second in protecting the life (or potential life9) of the fetus.12 But neither can be counted "compelling" throughout the entire pregnancy: Each matures with the unborn child.

These interests are separate and distinct. Each grows in substan-
Roe v. Wade

tality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

5. During the first trimester of pregnancy, neither interest is sufficiently compelling to justify any interference with the decision of the woman and her physician. Appellants have referred the Court to medical data indicating that mortality rates for women undergoing early abortions, where abortion is legal, "appear to be as low as or lower than the rates for normal childbirth." Thus the state's interest in protecting maternal health is not compelling during the first trimester. Since the interest in protecting the fetus is not yet compelling either, during the first trimester the state can neither prohibit an abortion nor regulate the conditions under which one is performed.

6. As we move into the second trimester, the interest in protecting the fetus remains less than compelling, and the decision to have an abortion thus continues to control. However, at this point the health risks of abortion begin to exceed those of childbirth. "It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." Abortion may not be prohibited during the second trimester, however.

7. At the point at which the fetus becomes viable the interest in protecting it becomes compelling, and therefore from that point on the state can prohibit abortions except—and this limitation is also apparently a constitutional command, though it receives no justification in the opinion—when they are necessary to protect maternal life or health.

11. Id. at 731.
12. Id. at 725. But cf. note 117 infra.
13. See pp. 923-26 infra.
15. 93 S. Ct. at 732. But see note 117 infra.
16. 93 S. Ct. at 732.
17. This, the Court tells us, is somewhere between the twenty-fourth and twenty-eighth weeks. Id. at 730. But cf. p. 924 infra.
18. See p. 924 infra.
19. 93 S. Ct. at 732. (Thus the statutes of most states must be unconstitutional even as applied to the final trimester, since they permit abortion only for the purpose of saving the mother's life. See id. at 709.) This holding—that even after viability the mother's life or health (which presumably is to be defined very broadly indeed, so as to include what many might regard as the mother's convenience, see 93 S. Ct. at 755 (Burger, C.J., concurring); United States v. Vuitch, 402 U.S. 62 (1971), must, as a matter of constitutional law, take precedence over what the Court seems prepared to grant at this point has become the fetus's life, see p. 924 infra—seems to me at least as controversial as its holding respecting the period prior to viability. (Typically, of course, one is not privileged even constitutionally, to take another's life in order to save his own life, much less his health.) Since, however, the Court does not see fit to defend this aspect of its decision at all, there is not a great deal that can be said by way of criticism.
A number of fairly standard criticisms can be made of Roe. A plausible narrower basis of decision, that of vagueness, is brushed aside in the rush toward broader ground. The opinion strikes the reader initially as a sort of guidebook, addressing questions not before the Court and drawing lines with an apparent precision one generally associates with a commissioner's regulations. On closer examination, however, the precision proves largely illusory. Confusing signals are emitted, particularly with respect to the nature of the doctor's responsibilities and the permissible scope of health regulations after the first trimester. The Court seems, moreover, to get carried away on the subject of remedies: Even assuming there have been genuine inconsistencies, the Court lacks jurisdiction to "construe" a statute so as to save it from the vice of vagueness.

By terming such criticisms "standard," I do not mean to suggest they are unimportant, for they are not. But if they were all that was wrong with Roe, it would not merit special comment.

20. The Court's theory seems to be that narrow grounds need not be considered when there is a broad one that will do the trick: "This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness." 93 S. Ct. at 724. Compare id. at 710 n.3, 710-11: Doe v. Bolton, 93 S. Ct. at 731-32. Roe v. Wade, 384 F. Supp. 1217, 1223 (N.D. Tex. 1970); cases cited 93 S. Ct. at 731; and United States v. Vuitch, 402 U.S. 62 (1971), bearing in mind that the Supreme Court lacks jurisdiction to "construe" a state statute so as to save it from the vice of vagueness.


22. Apparently doctors are expected, or at least can be required despite the decisions, to exercise their best "medical" or "clinical" judgment (and presumably can be prosecuted if they perform abortions conflicting with that judgment). 93 S. Ct. at 747, 751. But cf. United States v. Vuitch, 402 U.S. 62, 97 (Stewart, J., dissenting in part). But if it is unconstitutional to limit the justifications for an abortion to considerations of maternal life and health, what kind of "medical" judgment does the Court have in mind? See One, Abortion and the Supreme Court, MODERN MEDICINE (forthcoming 1973): [T]here are no clear medical indications for abortion in the vast majority of cases. Where there are no indications, there is no room for clinical judgment.

23. Compare 93 S. Ct. at 732 with id. at 748-51. An additional element of conclusion may have been injected by Justice Douglas's indication in his concurrence that "quickening" is the point at which the interest in protecting the fetus becomes compelling. Id. at 739. But see id. at 730, where the Court distinguishes quickening from viability and holds the latter to be the crucial point. See also id. at 732; p. 924 infra.

24. The state can require that the abortion be performed by a doctor, but that is all. But see note 117 infra. Even after the first trimester, the limits on state regulation of the conditions under which an abortion can be performed are extremely stringent. See Doe v. Bolton, 93 S. Ct. 739 (1973).

Let us not underestimate what is at stake: Having an unwanted child can go a long way toward ruining a woman's life. And at bottom Roe signals the Court's judgment that this result cannot be justified by any good that anti-abortion legislation accomplishes. This surely is an understandable conclusion—indeed it is one with which I agree—but ordinarily the Court claims no mandate to second-guess legislative balances, at least not when the Constitution has designated neither of the values in conflict as entitled to special protection. But even assuming it would be a good idea for the Court to assume this function, Roe seems a curious place to have begun. Laws prohibiting the use of "soft" drugs or, even more obviously, homosexual acts between consenting adults can stunt "the preferred life styles" of those against whom enforcement is threatened in very serious ways. It is clear such acts harm no one besides the participants, and indeed the case that the participants are harmed is a rather shaky one. Yet such laws survive, on the theory that there exists a societal consensus that the behavior involved is revolting or at any rate immoral. Of course the consensus is not universal but it is sufficient, and this is what is counted
crucial, to get the laws passed and keep them on the books. Whether
anti-abortion legislation cramps the life style of an unwilling mother
more significantly than anti-homosexuality legislation cramps the life
style of a homosexual is a close question. But even granting that it does,
the other side of the balance looks very different. For the... is more
than simple societal revulsion to support legislation restricting abortion:34 Abortion ends (or if it makes a difference, prevents) the life of
a human being other than the one making the choice.

The Court's response here is simply not adequate. It agrees, indeed
it holds, that after the point of viability (a concept it fails to note
will become even less clear than it is now as the technology of birth
continues to develop35) the interest in protecting the fetus is compelling.36 Exactly why that is the magic moment is not made clear: Viabil-
ity, as the Court defines it,37 is achieved some six to twelve weeks
after quickening.38 (Quickening is the point at which the fetus begins
discernibly to move independently of the mother39 and the point that
has historically been deemed crucial—to the extent any point between
conception and birth has been focused on.) But no, it is viability that
is constitutionally critical: the Court's defense seems to mistake a defi-
nition for a syllogism.

With respect to the State's important and legitimate interest in
potential life, the "compelling" point is at viability. This is so
because the fetus then presumably has the capacity of meaningful
life outside the mother's womb.40

With regard to why the state cannot consider this "important and
legitimate interest" prior to viability, the opinion is even less satis-
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37. See 93 S. Ct. at 716.
38. Id.
39. Id. at 716-20.
40. Id. at 722. See also id. at 730:
Physicians and their scientific colleagues have regarded [quickening] with less
interest and have tended to focus either upon conception or upon live birth or upon
the interim point at which the fetus becomes "viable." . . . .
The relevance of this observation is not explained. It is, moreover, of questionable validity:
This line is drawn beyond quickening, beyond the point where any religion has
assumed that life begins, beyond the time when abortion is a simple procedure, and
beyond the point when most physicians and nurses will feel the procedure is victim-
less. It is also beyond the point which would have satisfied many who, like myself,
were long term supporters of the right to abortion.
Stone, supra note 22.
factory. The discussion begins sensibly enough: The interest asserted is not necessarily tied to the question whether the fetus is "alive," for whether or not one calls it a living being, it is an entity with the potential for (and indeed the likelihood of) life. But all of arguable relevance that follows are arguments that fetuses (a) are not recognized as "persons in the whole sense" by legal doctrine generally and (b) are not "persons" protected by the Fourteenth Amendment.

To the extent they are not entirely inconclusive, the bodies of doctrine to which the Court adverts respecting the protection of fetuses under general legal doctrine tend to undercut rather than support its conclusion. And the argument that fetuses (unlike, say, corporations) are not "persons" under the Fourteenth Amendment fares little better. The Court notes that most constitutional clauses using the word "persons"—such as the one outlining the qualifications for the Presidency—appear to have been drafted with postnatal beings in mind. (It might have added that most of them were plainly drafted with

41. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone. 93 S. Ct. at 725. See also id. at 730:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point [sic] in the development of man's knowledge, is not in a position to speculate as to the answer.

The Texas statute, like those of many states, had declared fetuses to be living beings. See id. at 709 n.1, 710 n.3; cf. id. at 721, 723 n.40, 729 n.55.

42. The opinion does contain a lengthy survey of "historical attitudes" toward abortion, culminating in a discussion of the positions of the American Medical Association, the American Public Health Association, and the American Bar Association. Id. at 715-24. (The discussion's high point is probably reached where the Court explains away the Hippocratic Oath's prohibition of abortion on the grounds that Hippocrates was a Pythagorean, and Pythagoreans were a minority. Id. at 715-16.) The Court does not seem entirely sure what this discussion has to do with the legal argument, id. at 709, 715, and the reader is left in much the same quandary. It surely does not seem to support the Court's position, unless a record of serious historical and contemporary dispute is somehow thought to generate a constitutional mandate.

43. Id. at 731.
44. Id. at 728-30.
45. The traditional rule of tort law had denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely held. In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem. perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

Id. at 731 (footnotes omitted). See also, e.g., W. ProssER, HANDBOOK OF THE LAW OF TORTS 555 (3d ed. 1964).

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In addition, "the appellee conceded on reargument that no case can be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."46 (The other legal contexts in which the question could have arisen are not enumerated.)

The canons of construction employed here are perhaps most intriguing when they are contrasted with those invoked to derive the constitutional right to an abortion.47 But in any event, the argument that fetuses lack constitutional rights is simply irrelevant. For it has never been held or even asserted that the state interest needed to justify forcing a person to refrain from an activity, whether or not that activity is constitutionally protected, must implicate either the life or the constitutional rights of another person.48 Dogs are not "persons in the whole sense" nor have they constitutional rights, but that does not mean the state cannot prohibit killing them: It does not even mean the state cannot prohibit killing them in the exercise of the First Amendment right of political protest. Come to think of it, draft cards aren't persons either.49

Thus even assuming the Court ought generally to get into the business of second-guessing legislative balances, it has picked a strange case with which to begin. Its purported evaluation of the balance that produced anti-abortion legislation simply does not meet the issue: That the life plans of the mother must, not simply may, prevail over the state's desire to protect the fetus simply does not follow from the judgment that the fetus is not a person. Beyond all that, however, the Court has no business getting into that business.

III

Were I a legislator I would vote for a statute very much like the one the Court ends up drafting.50 I hope this reaction reflects more serious thought than the psychologist fact that it is so.

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46. Id. at 728-29 (footnote omitted).
47. See pp. 928-33 infra.
48. Indeed it is difficult to think of a single instance where the justification given for upholding a governmental limitation of a protected right has involved the constitutional rights of others. A "free press-fair trial" situation might provide the basis for such an order, but thus far the Court has refused to approve one. See Ely, Trial by Newspaper & Its Cures, Encounter, March 1967, at 80-92.
49. In the Court's defense it should be noted that it erred in the other direction as well, by suggesting that if a fetus were a person protected by the Fourteenth Amendment, it would necessarily follow that appellants would lose. 93 S. Ct. at 728. Yet in fact all that would thereby be established is that one right granted special protection by the Fourteenth Amendment was in conflict with what the Court felt was another; it would not tell us which must prevail.
50. See United States v. O'Brien, 391 U.S. 367, 376-77 (1968). And if you don't like that example, substitute post offices for draft cards.
51. Some of us have always been inclined to think that there is no "liberty" protected by the Fifth Amendment unless it is "classification of persons on the basis of citizenship." But the Court has never held and we have no business getting into that business.
52. See also Edw. Stone, supra note 2.
53. Of course the Court is free to adopt any constitutional doctrine it pleases. See Ely, supra note 48. See, e.g., Dukakis v. Stone, supra note 2.
54. See also Ely, supra note 48.
than the psychological phenomenon that keeps bombardiers sane—the fact that it is somehow easier to "terminate" those you cannot see—and am inclined to think it does: that the mother, unlike the unborn child, has begun to imagine a future for herself strikes me as morally quite significant. But God knows I'm not happy with that resolution. Abortion is too much like infanticide on the one hand, and too much like contraception on the other, to leave one comfortable with any answer; and the moral issue it poses is as fiendish as any philosopher's hypothetical.

Of course, the Court often resolves difficult moral questions, and difficult questions yield controversial answers. I doubt, for example, that most people would agree that letting a drug peddler go unapprehended is morally preferable to letting the police kick down his door without probable cause. The difference, of course, is that the Constitution, which legitimates and theoretically controls judicial intervention, has some rather pointed things to say about this choice. There will of course be difficult questions about the applicability of its language to specific facts, but at least the document's special concern with one of the values in conflict is manifest. It simply says nothing, clear or fuzzy, about abortion.

The matter cannot end there, however. The Burger Court, like the Warren Court before it, has been especially solicitous of the right to travel from state to state, demanding a compelling state interest if it is to be inhibited. Yet nowhere in the Constitution is such a right mentioned. It is, however, as clear as such things can be that this right was one the framers intended to protect, most specifically by the Privileges and Immunities Clause of Article IV. The right is, moreover, plausibly inferable from the system of government, and the citizen's role therein, contemplated by the Constitution. The Court given or

serious thought—though the practical difference here is not likely to be great—to placing the critical line at quickening rather than viability. See note 40 supra:

51. Some of us who fought for the right to abortion did so with a divided spirit. We have always felt that the decision to abort was a human tragedy to be accepted only because an unwanted pregnancy was even more tragic.

52. Of course the opportunity to have an abortion should be considered part of the "liberty" protected by the Fourteenth Amendment. See p. 935 infra.


54. See also Edwards v. California, 314 U.S. 160 (1941).


56. See Griswold v. Connecticut, 381 U.S. 108 (1965); E. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1968). The Court seems to regard the opportunity to travel outside the United States as merely an aspect of the "liberty" that under the Fifth and Fourteenth Amendments cannot be denied without due process. See Zemel v. Rusk, 381 U.S. 1, 14 (1965). Cf. p. 935 infra.
in *Roe* suggests an inference of neither sort—from the intent of the framers, or from the governmental system contemplated by the Constitution—in support of the constitutional right to an abortion.

What the Court does assert is that there is a general right of privacy granted special protection—that is, protection above a baseline requirement of "rationality"—by the Fourteenth Amendment, and that that right "is broad enough to encompass" the right to an abortion. The general right of privacy is inferred, as it was in *Griswold v. Connecticut*, from various provisions of the Bill of Rights manifesting a concern with privacy, notably the Fourth Amendment's guarantee against unreasonable searches, the Fifth Amendment's privilege against self-incrimination, and the right, inferred from the First Amendment, to keep one's political associations secret.

One possible response is that all this proves is that the things explicitly mentioned are forbidden, if indeed it does not actually demonstrate a disposition not to enshrine anything that might be called a general right of privacy. In fact the Court takes this view when it suits its purposes. (On the *same day* it decided *Roe*, the Court held that a showing of reasonableness was not needed to force someone to provide a grand jury with a voice exemplar, reasoning that the Fifth Amendment was not implicated because the evidence was not "testi-
"monial" and that the Fourth Amendment did not apply because there was no "seizure." But this approach is unduly crabbed. Surely the Court is entitled, indeed I think it is obligated, to seek out the sorts of evils the framers meant to combat and to move against their twentieth century counterparts.

Thus it seems to me entirely proper to infer a general right of privacy, so long as some care is taken in defining the sort of right the inference will support. Those aspects of the First, Fourth and Fifth Amendments to which the Court refers all limit the ways in which, and the circumstances under which, the government can go about gathering information about a person he would rather it did not have. Limiting governmental tapping of telephones, may not involve what the framers would have called a "search," but it plainly involves this general concern with privacy. 

Griswold is a long step, even a leap, beyond this, but at least the connection is discernible. Had it been a case that purported to discover in the Constitution a "right to contraception," it would have been Roe's strongest precedent. But the Court in Roe gives no evidence of so regarding it, and rightly so.

Commentators tend to forget, though the Court

62. United States v. Dionisio, 95 S. Ct. 764 (1975). See also United States v. Mara, 93 S. Ct. 774 (1973) (handwriting exemplars), also decided the same day as Roe, and Couch v. United States, 93 S. Ct. 611 (1973) (finding no privacy interest in records a taxpayer had turned over to his accountant) decided thirteen days earlier.

63. [The proper scope of [a constitutional provision], and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. United States v. Brown, 381 U.S. 437, 442 (1965). See also Weeks v. United States, 217 U.S. 357 (1910); Reich, Mr. Justice Black and the Living Constitution, 76 HARV. L. REV. 673 (1963); Note, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 YALE L.J. 530 (1962).

64. Cf. Fried, Privacy, 77 YALE L.J. 475 (1968). The Third Amendment, mentioned in Griswold though not in Roe, surely has this aspect to it as well, though it probably grew in even larger measure out of a general concern with the pervasiveness of military power.


67. Contraception and at least early abortion obviously have much in common. See Stone, supra note 22.

68. The Roe opinion does not rely on the obvious contraception-abortion comparison and indeed gives no sign that it finds Griswold stronger precedent than a number of other cases. See 93 S. Ct. at 726-27; note 79 infra. In fact it seems to go out of its way to characterize Griswold and Eisenstadt v. Baird, 405 U.S. 438 (1972), as cases concerned with the privacy of the bedroom. See 93 S. Ct. at 730; note 79 infra. It is true that in Eisenstadt the Court at one point characterized Griswold as protecting the "decision whether to bear and beget a child," 405 U.S. at 453, but it also, mysteriously in light of that characterization, pointedly refused to decide whether the earlier case extended beyond use, to the distribution of contraceptives. Id. at 452-53. Nor is there any possibility the refusal to extend Griswold in this way was ill-considered; such an extension would have obviated the Eisenstadt Court's obviously strained performance respecting the Equal Protection Clause.

69. Admittedly the Griswold opinion is vague and openended, but the language quoted in the text at note 72 infra seems plainly inconsistent with the view that it is a case not about likely invasions of the privacy of the bedroom but rather directly enshrining a right to contraception.
plainly has not, that the Court in Griswold stressed that it was invalidating only that portion of the Connecticut law that proscribed the use, as opposed to the manufacture, sale, or other distribution of contraceptives. That distinction (which would be silly were the right to contraception being constitutionally enshrined) makes sense if the case is rationalized on the ground that the section of the law whose constitutionality was in issue was such that its enforcement would have been virtually impossible without the most outrageous sort of governmental prying into the privacy of the home. And this, indeed, is the theory on which the Court appeared rather explicitly to settle:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broad and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

Thus even assuming (as the Court surely seemed to) that a state can constitutionally seek to minimize or eliminate the circulation and use of contraceptives, Connecticut had acted unconstitutionally by selecting a means, that is a direct ban on use, that would generate intolerably intrusive modes of data-gathering. No such rationalization is attempted by the Court in Roe—and understandably not, for whatever else may be involved, it is not a case about governmental snooping.

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160) is also significant. See 381 U.S. at 484-85 n.5. See also United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting).

The theory suggested in Poe v. Ullman, supra, at 551-52 (Harlan, J., dissenting), extending heightened protection to activities (though it turns out to be some activities, note 51 supra) customarily performed in the home, is also inapplicable to Roe.

74. Of course in individual cases the government might seek to enforce legislation restricting abortion, as indeed it might seek to enforce any law, in ways that violate the
The Court reports that some amici curiae argued for an unlimited right to do as one wishes with one's body. This theory holds, for me at any rate, much appeal. However, there would have been serious problems with its invocation in this case. In the first place, more than the mother's own body is involved in a decision to have an abortion; a fetus may not be a "person in the whole sense," but it is certainly not nothing. Second, it is difficult to find a basis for thinking that the theory was meant to be given constitutional sanction: Surely it is no part of the "privacy" interest the Bill of Rights suggests.

It is not clear to us that the claim... that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy...

Unfortunately, having thus rejected the amici's attempt to define the bounds of the general constitutional right of which the right to an abortion is a part, on the theory that the general right described has little to do with privacy, the Court provides neither an alternative definition nor an account of why it thinks privacy is involved. It
simply announces that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Apparently this conclusion is thought to derive from the passage that immediately follows it:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the woman's decision whether or not to terminate her pregnancy, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.80

All of this is true and ought to be taken very seriously. But it has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests.81 I suppose there is nothing to prevent one from using the word "privacy" to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term.82 Nor could it, for such a right is at stake in every case. Our passage cited by the Court in Roe reiterated Griswold's conclusion that privacy interests are threatened by a ban on the use of contraceptives, but declined to decide whether its rationale should be extended to restrictions on distribution. See p. 930 supra. Prince upheld the application of a child labor law to Jehovah's Witness children distributing religious literature. It did, however, reiterate the conclusion of Pierce and Meyer that family relationships are entitled to special protection. Those two cases are products of "the Lochner era," see pp. 937-43 infra. The vitality of the theory on which they rested has been questioned, Epperson v. Arkansas, 393 U.S. 97, 105-06 (1968), and the Court has attempted to retract them as First Amendment cases. Griswold v. Connecticut, 381 U.S. 479, 482 (1965); cf. Poe v. Ullman, 367 U.S. 497, 533-34 (1961) (Harlan, J., dissenting). Even reading the cases cited "for all that they are worth," it is difficult to isolate the "privacy" factor (or any other factor that seems constitutionally relevant) that unites them with each other and with Roe. So the Court seems to admit by indicating that privacy has "some extension" to the activities involved, and so it seems later to grant even more explicitly.

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus. . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt, Griswold, Stanley, Loving, Skinner, Pierce, and Meyer were respectively concerned.

80. 93 S. Ct. at 730.
81. It might be noted that most of the factors enumerated also apply to the inconvenience of having an unwanted two-year-old, or a senile parent, around. Would the Court find the constitutional right of privacy invaded in those situations too? I find it hard to believe it would; even if it did, of course, it would not find a constitutional right to "terminate" the annoyance—presumably because "real" persons are now involved. But cf. p. 926 supra & note 48 supra. But what about ways of removing the annoyance that do not involve "termination"? Can they really be matters of constitutional entitlement?
82. But cf. 93 S. Ct. at 758-59 (Douglas, J., concurring).
life styles are constantly limited, often seriously, by governmental regulation; and while many of us would prefer less direction, granting that desire the status of a preferred constitutional right would yield a system of "government" virtually unrecognizable to us and only slightly more recognizable to our forefathers. The Court's observations concerning the serious, life-shaping costs of having a child prove what might to the thoughtless have seemed unprovable: That even though a human life, or a potential human life, hangs in the balance, the moral dilemma abortion poses is so difficult as to be heartbreaking. What they fail to do is even begin to resolve that dilemma so far as our governmental system is concerned by associating either side of the balance with a value inferable from the Constitution.

But perhaps the inquiry should not end even there. In his famous Carolene Products footnote, Justice Stone suggested that the interests to which the Court can responsibly give extraordinary constitutional protection include not only those expressed in the Constitution but also those that are unlikely to receive adequate consideration in the political process, specifically the interests of "discrete and insular minorities" unable to form effective political alliances. There can be little doubt that such considerations have influenced the direction, if only occasionally the rhetoric, of the recent Courts. My repeated efforts to convince my students that sex should be treated as a "suspect classification" have convinced me it is no easy matter to state such considerations in a "principled" way. But passing that problem, Roe is not an appropriate case for their invocation.

Compared with men, very few women sit in our legislatures, a fact I believe should bear some relevance—even without an Equal Rights Amendment—to the appropriate standard of review for legislation that favors men over women. But no fetuses sit in our legislatures.

85. This is not the place for a full treatment of the subject, but the general idea is this: Classifications by sex, like classifications by race, differ from the usual classification—to which the traditional "reasonable generalization" standard is properly applied—in that they rest on "we-they" generalizations as opposed to a "they-they" generalization. Take a familiar example of the usual approach, Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Of course few legislators are opticians. But few are optometrists either. Thus while a decision to distinguish opticians from optometrists will incorporate a stereotypical comparison of two classes of people, it is a comparison of two "they" stereotypes, viz. "They [opticians] are generally inferior to or not so well qualified as they [optometrists] are in the following respect(s), which we find sufficient to justify the classification: . . . ." However, legislators traditionally have not only not been black (or female); they have been white (and male). A decision to distinguish blacks from whites (or women from men) will therefore have its roots in a comparison between a "we" stereotype and a "they" stereotype, viz. "They [blacks or women] are generally inferior to or not so well qualified as we [whites or men] are in the following respect(s), which we find sufficient to justify the classification: . . . ."
course they have their champions, but so have women. The two interests have clashed repeatedly in the political arena, and had continued to do so up to the date of the opinion, generating quite a wide variety of accommodations. By the Court’s lights virtually all of the legislative accommodations had unduly favored fetuses; by its definition of victory, women had lost. Yet in every legislative balance one of the competing interests loses to some extent; indeed usually, as here, they both do. On some occasions the Constitution throws its weight on the side of one of them, indicating the balance must be restruck. And on others—and this is Justice Stone’s suggestion—it is at least arguable that, constitutional directive or not, the Court should throw its weight on the side of a minority demanding in court more than it was able to achieve politically. But even assuming this suggestion can be given principled content, it was clearly intended and should be reserved for those interests which, as compared with the interests to which they have been subordinated, constitute minorities unusually incapable of protecting themselves. Compared with men, women may constitute.

The choice between classifying on the basis of a comparative generalization and attempting to come up with a more discriminating formula always involves balancing the increase in fairness which greater individualization will produce against the added costs it will entail. It is no startling psychological insight, however, that most of us are delighted to hear and prone to accept comparative characterizations of groups that suggest that the groups to which we belong are in some way superior to others. I would be inclined to exclude most situations where the “we’s” used to be “they’s,” cf. Ferguson v. Skrupa, 372 U.S. 726 (1963), and would therefore agree that the unchangeability of the distinguishing characteristic is indeed relevant, though it is only part of the story.) The danger is therefore greater in we-they situations that we will overestimate the validity of the proposed stereotypical classification by seizing upon the positive myths about our own class and the negative myths about theirs—or indeed the realities respecting some or most members of the two classes—and too readily assuming that virtually the entire membership of the two classes fit the stereotypes and therefore that not many of “them” will be unfairly deprived, nor many of “us” unfairly benefitted, by the proposed classification. In short, I trust your generalizations about the differences between my gang and Wilfred’s more than I do your generalizations about the differences between my gang and yours.

Of course most judges, like most legislators, are white males, and there is no particular reason to suppose they are any more immune to the conscious and unconscious temptations that inher in we-they generalizations. Obviously the factors mentioned can distort the evaluation of a classification fully as much as they can distort its formation. But all this is only to suggest that the Court has chosen the right course in reviewing classifications it has decided are suspicious—a course not of restriking or second-guessing the legislative cost-benefit balance but rather of demanding a congruence between the classification and its goal as perfect as practicable. When in a given situation you can’t be trusted to generalize and I can’t be trusted to generalize, the answer is not to generalize—so long as a bearable alternative exists. And here, the Court has recognized, one does—the alternative of forcing the system to absorb the additional cost that case by case determinations of qualification will entail. Legislatures incur this cost voluntarily in a great many situations, and courts have on other occasions forced them to do so where constitutionally protected interests will be threatened by an imperfectly fitting classification. The unusual dangers of distortion that inher in a we-they process of comparative generalization, the Court seems to have been telling us in the racial classification cases, also demand that we bear the increased cost of individual justice.

86. See 93 S. Ct. at 1028-10, 1029, 1022-24, 1022-43, 1022-35.
87. If the mere fact that the classification in issue disadvantages a minority whose viewpoint was not appreciated by a majority of the legislature that enacted it were sufficient to render it suspect, all classifications would be suspect.
88. Even if the care of men against those renders suspect class and women. And we cannot see what Judge see note 85 supra, t women’ situations. I [D]ecisions in sex have rights. Husbs the abortion decis: is its right, / procedure to avoid. Stone, supra note 22.
89. It might be s books by the efforts legislative minorities here than it is with the sort of claim th infra, one of relief different matter.) In first place there is with an intense mi in order to garner sup claims involved are 4th authority to guess stitution. Leaving a considered nor enfor (1962), the Court sh a guess about how
90. The claimed does not seem to l 927-49.
91. Even this sit for many -se: See, e.g., pp. 937-38
92. See Brandenburg
such a "minority"; compared with the unborn, they do not.88 I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I'd expect no credit for the former answer.89

Of course a woman's freedom to choose an abortion is part of the "liberty" the Fourteenth Amendment says shall not be denied without due process of law, as indeed is anyone's freedom to do what he wants. But "due process" generally guarantees only that the inhibition be procedurally fair and that it have some "rational" connection—though plausible is probably a better word90—with a permissible governmental goal.91 What is unusual about Roe is that the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus's existence is unable to overcome it—a protection more stringent, I think it fair to say, than that the present Court accords the freedom of the press explicitly guaranteed by the First Amendment.92 What is frightening about Roe is that this super-protected right is not inferable from the language of the Constitution, of course a woman's freedom to choose an abortion is part of the "liberty" the Fourteenth Amendment says shall not be denied without due process of law, as indeed is anyone's freedom to do what he wants. But "due process" generally guarantees only that the inhibition be procedurally fair and that it have some "rational" connection—though plausible is probably a better word90—with a permissible governmental goal.91 What is unusual about Roe is that the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus's existence is unable to overcome it—a protection more stringent, I think it fair to say, than that the present Court accords the freedom of the press explicitly guaranteed by the First Amendment.92 What is frightening about Roe is that this super-protected right is not inferable from the language of the Constitution, of course a woman's freedom to choose an abortion is part of the "liberty" the Fourteenth Amendment says shall not be denied without due process of law, as indeed is anyone's freedom to do what he wants. But "due process" generally guarantees only that the inhibition be procedurally fair and that it have some "rational" connection—though plausible is probably a better word90—with a permissible governmental goal.91 What is unusual about Roe is that the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus's existence is unable to overcome it—a protection more stringent, I think it fair to say, than that the present Court accords the freedom of the press explicitly guaranteed by the First Amendment.92 What is frightening about Roe is that this super-protected right is not inferable from the language of the Constitution, of course a woman's freedom to choose an abortion is part of the "liberty" the Fourteenth Amendment says shall not be denied without due process of law, as indeed is anyone's freedom to do what he wants. But "due process" generally guarantees only that the inhibition be procedurally fair and that it have some "rational" connection—though plausible is probably a better word90—with a permissible governmental goal.91 What is unusual about Roe is that the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus's existence is unable to overcome it—a protection more stringent, I think it fair to say, than that the present Court accords the freedom of the press explicitly guaranteed by the First Amendment.92 What is frightening about Roe is that this super-protected right is not inferable from the language of the Constitution,
the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included,\textsuperscript{83} or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-à-vis the interest that legislatively prevailed over it.\textsuperscript{84} And, that I believe—the predictable\textsuperscript{85} early reaction to Roe notwithstanding ("more of the same Warren-type activism")\textsuperscript{86}—is a charge that can responsibly be leveled at no other decision of the past twenty years.\textsuperscript{87} At times the

\textsuperscript{83} See pp. 928-33 supra. Necessarily, a claim of this sort can never be established beyond doubt: one can only proceed by examining the claims of those values he thinks, or others have suggested, are traceable to the Constitution. It is always possible, however, that someone will develop a general theory of entitlements that encompasses a given case and plausibly demonstrate its constitutional connections. It is also possible that had the constitutional right to an abortion been developed at constitutional doctrines usually are—that is incrementally, rather than by the quantum jump of Roe—the connection of the first step with the Constitution, and that of each succeeding step with its predecessor, would have seemed more plausible. I cannot bring myself to believe, however, that any amount of gradualism could serve to make anything approximating the entire inference convincing.

\textsuperscript{84} The thing about permitting disparity among state laws regulating abortion that I find most troubling is not mentioned by the Court, and that is that some people can afford the fare to a neighboring state and others cannot. Of course this situation prevails with respect to divorce and a host of other sorts of laws as well. I wish someone could develop a theory that would enable the Court to take account of this concern without implying a complete obliteration of the federal system that is so obviously at the heart of the Constitution's plan. I have not been able to do so. See note 87 supra.

\textsuperscript{85} See pp. 943-45 infra.


\textsuperscript{87} Of course one can disagree with the lengths to which the inferences have been taken; my point is that the prior decisions, including those that have drawn the most ire, at least started from a value singled out by, or fairly inferable from, the Constitution as entitled to special protection. Whatever one may think of the code of conduct laid down in \textit{Miranda v. Arizona}, 384 U.S. 436 (1966), the Constitution does talk about the right to counsel and the privilege against self-incrimination. Whatever one may think of the strictness of the scrutiny exercised in \textit{Furman v. Georgia}, 408 U.S. 258 (1972), the Eighth Amendment surely does indicate in a general way that punishments are to be scrutinized for erratic imposition ("unusual") and severity disproportionate to any good they can be expected to accomplish ("cruel").

Note that the claim in the text has to do with the capacity of the earlier decisions to be rationalized in terms of some value highlighted by the Constitution, not with the skill with which they were in fact rendered. It is now generally recognized, for example, that the various "wealth discrimination" cases could better have been defended in terms of the constitutional attention paid explicitly or implicitly to the "goods" whose distribution was in issue—the right to vote and the assurance of fair judicial procedures. See, e.g., Michelman, \textit{Foreword: On Protecting the Poor Through the Fourteenth Amendment}, 85 Harv. L. Rev. 7 (1969). Reynolds v. Sims, 377 U.S. 533 (1964), is a badly articulated opinion. Its only response to the argument made by Justice Stewart—that since an equal protection claim was involved, a rational defense of a disparity among the "weights" of votes should suffice—was simply to announce that the goals Justice Stewart had in mind were off limits. See Ely, supra note 28, at 1226-27. But even Justice Stewart could not take the equal protection mold too seriously, for he added he would not approve a plan that permitted "the systematic frustration of the will of a majority of the electorate of the State." Lucas v. Colorado Gen. Assembly, 577 U.S. 215, 753-34 (1964) (footnote omitted). Such a plan, however, could be quite "rational" in terms of the sort of goals Justice Stewart had in mind, goals that in other contexts would count as legitimate. Obviously Justice Stewart was moved to some extent by the notion that a system whereby a minority could perpetuate its control of the government was out of accord with the system of government envisioned by the framers. See also Kramer v. Union Free School District No. 15, 395 U.S. 621, 628 (1969) (Warren, C.J., for the Court). This was what moved the Court too, though much further. And though the Court did not give the rubric "in between" into the powerfully, and the Stan. L. Rev. 4277 (U.S. Feb., 1969), and over the years. In his concurring Process Clause named in the involved were defense and Tax Examiners, 35 Kent v. Dulles cases and ind. Connecticut. As to \textit{Apheek Brown}, 581 U.S. see note 79 v. Guest, 393 U.S. 89 (1965). Concerning B Judges, \textit{Critic Trusa v. Rai and note 85 supra, 96. 198 U.S.
Not in the last thirty-five years at any rate. For, as the received learning has it, this sort of thing did happen before, repeatedly. From its 1905 decision in *Lochner v. New York* into the 1930's the Court, frequently though not always under the rubric of "liberty of contract," employed the Due Process Clauses of the Fourteenth and Fifth Amendments to invalidate a good deal of legislation. According to the dissenters at the time and virtually all the commentators since, the Court had simply manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures. So indeed the Court itself came to see the matter, and its reaction was complete:

There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner v. New York*, 198 U.S. 45 (1905), outlawing

not give the reason, there is one: a fear that by attempting to apply Justice Stewart's "in between" standard it would become enmeshed in unsavory "political" inquiries into the power alignments prevalent in the various states. See Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 29 Stan. L. Rev. 169, 246-47 (1968); cf. note 89 supra; but cf. Mahan v. Howell, 41 U.S.L.W. 4277 (U.S. Feb. 20, 1973). Though the point is surely debatable, the impulse is understandable, and the fight in *Reynolds*, like that in *Miranda*, turns out to be not so much over the underlying values as over the need for a "clean" prophylactic rule that will keep the courts out of messy factual disputes.

It may be objected that *Lochner et al.* protected the "economic rights" of businessmen whereas *Roe* protects a "human right." It should be noted, however, that not all of the *Lochner* series involved economic regulation;109 that even those that did resist the "big business" stereotype with which the commentators tend to associate them; and that in some of them the employer's "liberty of contract" claim was joined by the employee, who knew that if he had to be employed on the terms set by the law in question, he could not be employed at all.101 This is a predicament that is economic to be sure, but is not without its "human" dimension. Similarly "human" seems the predicament of the appellees in the 1970 case of *Dandridge v. Williams*,102 who challenged the Maryland Welfare Department's practice of limiting AFDC grants to $250 regardless of family size or need. Yet in language that remains among its favored points of reference,103 the

100. See also Adkins v. Children's Hospital, 261 U.S. 525, 542-43 (1923).

It may be, however—that the "right" accord more close than the "right" attitude, of course which would seem most press special solicitude contract,107 less which the frame pleased with the...
Roe v. Wade

Court, speaking through Justice Stewart, dismissed the complaint as "social and economic" and therefore essentially Lochneresque.

[W]e deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights. . . . For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." . . . That era long ago passed into history. . . .

To be sure, the cases cited . . . have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. . . . It is a standard . . . that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of wise economic or social policy.108

It may be, however—at least it is not the sort of claim one can disprove—that the "right to an abortion," or noneconomic rights generally, accord more closely with "this generation's idealization of America" than the "rights" asserted in either Lochner or Dandridge. But that attitude, of course, is precisely the point of the Lochner philosophy, which would grant unusual protection to those "rights" that somehow seem most pressing, regardless of whether the Constitution suggests any special solicitude for them. The Constitution has little to say about contract107 less about abortion, and those who would speculate about which the framers would have been more likely to protect may not be pleased with the answer. The Court continues to disavow the philosophy of Lochner.108 Yet as Justice Stewart's concurrence admits, it is impossible candidly to regard Roe as the product of anything else.109

104. But cf. note 109 infra.
105. 397 U.S. at 484-86.
108. See note 103 supra.
109. 93 S. Ct. at 734. The only "Lochner era" cases Justice Stewart cites are Meyer and Pierce. It therefore may be he intends to pursue some sort of "economic-noneconomic" line in selecting rights entitled to special protection. But see text at note 105 supra. The general philosophy of constitutional adjudication, however, is the same. See text at notes 106-07 supra. Justice Stewart rather clearly intends his Roe opinion as a repudiation
That alone should be enough to damn it. Criticism of the *Lochner*
philosophy has been virtually universal and will not be rehearsed here.
I would, however, like to suggest briefly that although *Lochner* and
*Roe* are twins to be sure, they are not identical. While I would hesi-
tate to argue that one is more defensible than the other in terms of
judicial style, there are differences in that regard that suggest *Roe*
may turn out to be the more dangerous precedent.

All the "superimposition of the Court's own value choices" talk is,
of course, the characterization of others and not the language of *Loch-
ner* or its progeny. Indeed, those cases did not argue that "liberty of
contract" was a preferred constitutional freedom, but rather repre-
sented it as merely one among the numerous aspects of "liberty" the
Fourteenth Amendment protects, therefore requiring of its inhibitors
a "rational" defense.

In our opinion that section . . . is an invasion of the personal lib-
erty, as well as of the right of property, guaranteed by that Amend-
ment. Such liberty and right embraces the right to make contracts
for the purchase of the labor of others and equally the right to
make contracts for the sale of one's own labor; each right, how-
ever, being subject to the fundamental condition that no contract,
whatever its subject matter, can be sustained which the law, upon
reasonable grounds, for bids as inconsistent with the public inter-
ests or as hurtful to the public order or as detrimental to the com-
mon good.110

Undoubtedly, the police power of the State may be exerted to
protect purchasers from imposition by sale of short weight
loaves . . . Constitutional protection having been invoked, it is
the duty of the court to determine whether the challenged provi-
sion has reasonable relation to the protection of purchasers of
bread against fraud by short weights and really tends to accom-
plish the purpose for which it was enacted.111

of his *Griswold* dissent, and not simply as an acquiescence in what the Court did in the
carer case. See 93 S. Ct. at 735.

Having established to his present satisfaction that the Due Process Clause extends
unusual substantive protection to interests the Constitution nowhere marks as special,
*but see* note 97 *supra*, he provides no further assurance respecting the difficult ques-
tions before the Court, but rather defers to the Court's "thorough demonstration" that
the interests in protecting the mother and preserving the fetus cannot support the legis-
lation involved. *But see* pp. 922-26 *supra*.

111. *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924). See also id. at 517:
*Meyer v. Nebraska*, 262 U.S. 390, 399-400, 403 (1923); *Adkins v. Children's Hospital*, 261
U.S. 525, 529 (1923); *Coppage v. Kansas*, 236 U.S. 1, 14 (1915); *Lochner v. New York*,
198 U.S. 45, 53, 54, 56, 57 (1905); id. at 68 (Harlan, J., dissenting).
Thus the test *Lochner* and its progeny purported to apply is that which would theoretically control the same questions today: whether a plausible argument can be made that the legislative action furthers some permissible governmental goal. The trouble, of course, is they misapplied it. *Roe*, on the other hand, is quite explicit that the right to an abortion is a "fundamental" one, requiring not merely a "rational" defense for its inhibition but rather a "compelling" one.

A second difference between *Lochner et al.* and *Roe* has to do with the nature of the legislative judgments being second-guessed. In the main, the "refutations" tendered by the *Lochner* series were of two sorts. The first took the form of declarations that the goals in terms of which the legislatures' actions were defended were impermissible. Thus, for example, the equalization of unequal bargaining power and the strengthening of the labor movement are simply ends the legislature had no business pursuing, and consequently its actions cannot thereby be justified. The second form of "refutation" took the form not of denying the legitimacy of the goal relied on but rather of denying the plausibility of the legislature's empirical judgment that its action would promote that goal.

In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman.

There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a nine and a half or a ten ounce loaf for a pound (16 ounce) loaf, or an eighteen and a half or a 19 ounce loaf for a pound and a half (24 ounce) loaf; and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception.

The *Roe* opinion's "refutation" of the legislative judgment that anti-abortion statutes can be justified in terms of the protection of the fetus takes neither of these forms. The Court grants that protecting the fetus is an "important and legitimate" governmental goal, and of course

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112. *But cf. note 91 supra.*
116. *Note 8 supra.*
it does not deny that restricting abortion promotes it.\(^{117}\) What it does, instead, is simply announce that that goal is not important enough to sustain the restriction. There is little doubt that judgments of this sort were involved in *Lochner et al.\(^{118}\)* but what the Court *said* in those cases was not that the legislature had incorrectly balanced two legitimate but competing goals, but rather that the goal it had favored was impermissible or the legislation involved did not really promote it.\(^{119}\)

Perhaps this is merely a rhetorical difference, but it could prove to be important. *Lochner et al.* were thoroughly disreputable decisions, but at least they did us the favor of sowing the seeds of their own destruction. To say that the equalization of bargaining power or the fostering of the labor movement is a goal outside the ambit of a "police power" broad enough to forbid all contracts the state legislature can reasonably regard "as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good"\(^{120}\) is to say something that is, in a word, wrong.\(^{121}\) And it is just as obvi-
Roe v. Wade

It is possible, of course, that I am here time-bound, and that the wrongness of Lochner et al. is obvious only because a half century of commentary has made it so. While I cannot rebut this, I am inclined to doubt it. In those decisions the Court stated the applicable tests in language much the same as would be used today—language the dissent cogently demonstrated could not be reconciled with the results. That views with which one disagrees can be reasonable nonetheless was a concept hardly new to lawyers even in 1900.

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124. With respect to the Equal Protection Clause, by way of contrast, the Court has taken to claiming it is simply applying the traditional rationality standard, whether it is or not. For a more optimistic view of the development, see Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972).

125. See note 97 supra. The "footnote 4" argument suggested in note 85 supra responds not so much to any clear constitutional concern with equality for women (but
often our profession's prominent criticism deigned not to address them on their terms and contented itself with assertions that the Court was indulging in sheer acts of will, ramming its personal preferences down the country's throat—that it was, in a word, Lochnering. One possible judicial response to this style of criticism would be to conclude that one might as well be hanged for a sheep as a goat: So long as you're going to be told, no matter what you say, that all you do is Lochner, you might as well be hung. Another, perhaps more likely in a new appointee, might be to reason that since Lochnering has so long been standard procedure, "just one more" (in a good cause, of course) can hardly matter. Actual reactions, of course, are not likely to be this self-conscious, but the critical style of offhand dismissal may have taken its toll nonetheless.

Of course the Court has been aware that criticism of much that it has done has been widespread in academic as well as popular circles. But when it looks to the past decade's most prominent academic criticism, it will often find little there to distinguish it from the popular. Disagreements with the chain of inference by which the Court got from the Constitution to its result, if mentioned at all, have tended to be announced in the most conclusory terms, and the impression has often been left that the real quarrel of the Academy, like that of the laity, is with the results the Court has been reaching and perhaps with judicial "activism" in general. Naturally the Court is sensitive to criticism of this sort, but these are issues on which it will, when push comes to shove, trust its own judgment. (And it has no reason not to: Law professors do not agree on what results are "good," and even if they did, there is no reason to assume their judgment is any better on that issue than the Court's.) And academic criticism of the sort that might (because it should) have some effect—criticism suggesting misperceptions in the Court's reading of the value structure set forth in the document from which it derives its authority, or unjustifiable inferences it has drawn from that value structure—has seemed

see U.S. CONST. amend. XIX) as to the unavoidable obligation to give "principled" content to the facially inscrutable Equal Protection Clause. See pp. 948-49 infra. Virtually everyone agrees that classifications by race were intended to be and should be tested by a higher than usual standard, and that at least some others—though the nature and length of the list are seriously disputed—are sufficiently "racelike" to merit comparable treatment. See, e.g., Graham v. Richardson, 403 U.S. 365 (1971). The problem thus becomes one of identifying those features of racial classifications that validly compel the deviation from the usual standard, and in turn those classifications that share those features.

126. See, e.g., Kurland, Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government," 78 Harv. L. Rev. 143, 144-45, 149, 163, 175 (1964).
for a time somehow out of fashion, the voguish course being simply
to dismiss the process by which a disfavored result was reached as
Lochnering pure and simple. But if the critics cannot trouble them-
selves with such details, it is difficult to expect the Court to worry
much about them either.

This tendency of commentators to substitute snappy dismissal for
careful evaluation of the Court’s constitutional inferences—and of
course it is simply a tendency, never universally shared and hopefully
on the wane—may include among its causes simple laziness, boredom
and a natural reluctance to get out of step with the high-steppers. But
in part it has also reflected a considered rejection of the view of con-
stitutional adjudication from which my remarks have proceeded. There
is a powerful body of opinion that would dismiss the call for substan-
tive criticism—and its underlying assumption that some constitutional
inferences are responsible while others are not—as naive. For, the the-
ory goes, except as to the most trivial and least controversial questions
(such as the length of a Senator’s term), the Constitution speaks in the
vaguest and most general terms:127 the most its clauses can provide are
“more or less suitable pegs on which judicial policy choices are
hung.”128 Thus anyone who suggests the Constitution can provide
significant guidance for today’s difficult questions either deludes him-
self or seeks to delude the Court. Essentially all the Court can do is
honor the value preferences it sees fit, and it should be graded accord-
ing to the judgment and skill with which it does so.129

One version of this view appears to be held by President Nixon.
It is true that in announcing the appointment of Justices Powell and
Rehnquist, he described a “judicial conservative”—his kind of Justice
—as one who does not “twist or bend the Constitution in order to per-
petuate his personal political and social views.”130 But the example he
then gave bore witness that he was not so “naive” after all.

As a judicial conservative, I believe some court decisions have
gone too far in the past in weakening the peace forces as against
the criminal forces in our society. . . . [T]he peace forces must

127. See, e.g., A. BICKEL, supra note 89, at 84-92; A. BICKEL, THE SUPREME COURT AND
THE IDEA OF PROGRESS 177 (1970); Mendelson, On the Meaning of the First Amendment:
128. Linde, supra note 97, at 234.
129. The Court will continue to play the role of the omniscient and strive toward
omnipotence. And the law reviews will continue to play the game of evaluating the
Court’s work in light of the fictions of the law, legal reasoning, and legal history
rather than deal with the realities of politics and statesmanship.
130. 7 Weekly Comp. of Presidential Documents 1451 (Oct. 25, 1971).
not be denied the legal tools they need to protect the innocent from criminal elements.\footnote{131}

That this sort of invitation, to get in there and Lochner for the right goals, can contribute to opinions like Roe is obvious. \textit{In terms of process, it is just what the President ordered.}

The academic version of this general view is considerably more subtle. It agrees that the Court will find little help in the Constitution and therefore has no real choice other than to decide for itself which value preferences to honor, but denies that it should necessarily opt for the preferences favored by the Justices themselves or the President who appointed them. To the extent "progress" is to concern the Justices at all, it should be defined not in terms of what they would like it to be but rather in terms of their best estimate of what over time the American people will make it\footnote{132}—that is, they should seek "durable" decisions.\footnote{133} This, however, is no easy task, and the goals that receive practically all the critics' attention, and presumably are supposed to receive practically all the Court's, are its own institutional survival and effectiveness.\footnote{134}

Whatever the other merits or demerits of this sort of criticism, it plainly is not what it is meant to be—an effective argument for judicial self-restraint. For a Governor Warren or a Senator Black will have heard that are the political goals likely to take up particular albatro beyond what those who have heard that is obvious.\footnote{135} To the extent "progress" is to concern the President ordered. But I doubt one

It is, nevertheless, weaken the either my idea society's—it doesn't rather because it of an obligation.

\textbf{Roe v. Wade}

there anti-abortion statutes has resulted in many of them 95 S. Ct. at 720. By the end of 1970 performed in early case and health require (Supp. 1971); N.Y. Code §§ 902.000 to Id. at 724 n.37. 137. As opposed to U.S. 436 (1966). See 138. Even the he; Abortion Legal [sic] 139. See pp. 976-7 scare me, particularly motions relating to: U.S. 399 (1971), and on by the Court in Justice Douglas's comment.

\footnote{130. In the past statutes has resulted in many of them 95 S. Ct. at 720. By the end of 1970 performed in early case and health require (Supp. 1971); N.Y. Code §§ 902.000 to Id. at 724 n.37. 137. As opposed to U.S. 436 (1966). See 138. Even the he; Abortion Legal [sic] 139. See pp. 976-7 scare me, particularly motions relating to: U.S. 399 (1971), and on by the Court in Justice Douglas's comment.}

\footnote{131. \textit{Id.} at 1412.}

\footnote{132. See generally A. Bickel, \textit{The Supreme Court and the Idea of Progress} (1970). Professor Bickel's thought is of course much richer than it is here reported. But the catchier aspects of a person's work have a tendency to develop a life of their own and on occasion to function, particularly in the thinking of others and perhaps to an extent even in the author's own, without the background against which they were originally presented. Cf. note 138 infra.}


\footnote{134. \textit{E.g.}, A. Bickel, supra note 127, at 95; Kurland, \textit{Toward a Political Supreme Court}, 32 U. Chi. L. Rev. 19, 20, 22 (1969).}

\footnote{135. See generally W. Murphy, \textit{Congress and the Court} (1962); C. Warren, \textit{The Supreme Court in United States History} (1st ed. 1952).}
their anti-abortion legislation.) And it is difficult to see how it will weaken the Court's position. Fears of official disobedience are obviously groundless when it is a criminal statute that has been invalidated. To the public the Roe decision must look very much like the New York Legislature's recent liberalization of its abortion law. Even in the unlikely event someone should catch the public's ear long enough to charge that the wrong institution did the repealing, they have heard that "legalism" before without taking to the streets. Nor are the political branches, and this of course is what really counts, likely to take up the cry very strenuously: The sighs of relief as this particular albatross was cut from the legislative and executive necks seemed to me audible. Perhaps I heard wrong—I live in the Northeast, indeed not so very far from Hyannis Port. It is even possible that a constitutional amendment will emerge, though that too has happened before without serious impairment of the Position of the Institution. But I doubt one will: Roe v. Wade seems like a durable decision.

It is, nevertheless, a very bad decision. Not because it will perceptibly weaken the Court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.

136. In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code... 93 S. Ct. at 720.


139. See pp. 926-27 supra. Of course there are some possible uses of the decision that scare me, particularly when it is considered in conjunction (a) with some of this Court's decisions relating to a mother's "waiver" of AFDC assistance, see Wyman v. James, 400 U.S. 309 (1971), and (b) with Buck v. Bell, 274 U.S. 200 (1927), which was indeed relied on by the Court in Roe, 93 S. Ct. at 727, and cited without apparent disapproval in Justice Douglas's concurrence, id. at 759. But those are quite different cases I'm conjuring up.

140. See note 136 supra. But cf. Abortion, The New Republic, Feb. 10, 1973, at 9: [1] If the Court's guess concerning the probable and desirable direction of progress is wrong, it will nevertheless have been imposed on all 50 states, and imposed permanently, until the Court itself should in the future change its mind. Normal legislation, enacted by legislatures rather than judges, is happily not so rigid, and not so presumptuous in its claims to universality and permanence.

141. In judicial review, the line between the "juridical" and the "legislative" mode does not run between "strict constructionists" and competing theorists of constitu-
I am aware the Court cannot simply "lay the Article of the Constitution which is invoked beside the statute which is challenged and ... decide whether the latter squares with the former."\textsuperscript{14a} That is precisely the reason commentators are needed.

Precisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State, the basis of judgment as to the Constitutionality of state action must be a rational one, approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government.\textsuperscript{14s}

No matter how imprecise in application to specific modern fact situations, the constitutional guarantees do provide a direction, a goal, an ideal citizen-government relationship. They rule out many alternative directions, goals, and ideals.\textsuperscript{144}

And they fail to support the ruling out of others.

Of course that only begins the inquiry. Identification and definition of the values with which the Constitution is concerned will often fall short of indicating with anything resembling clarity the deference to be given those values when they conflict with others society finds important. (Though even here the process is sometimes more helpful than the commentators would allow.) Nor is it often likely to generate, fullblown, the "neutral" principle that will avoid embarrassment in future cases.\textsuperscript{145} But though the identification of a constitutional connection is only the beginning of analysis, it is a necessary beginning. The point that often gets lost in the commentary, and obviously got

\textsuperscript{144} See generally Ely, supra note 28.

Starting from a clearly unconstitutional course of action—and I have trouble seeing the unconstitutionality of a tax exemption for only Caucasian children as a controversial assumption—and attempting to explain why it is unconstitutional in terms of a theory capable of acceptable and consistent application to other areas, is a perfectly sensible way of developing constitutional doctrine.

Id. at 1262. I might have made (even more) explicit that the action around which the search for the "principled" approach is to be centered should be one—and, to paraphrase myself, I have trouble seeing the example I chose as controversial in this regard—whose impermissibility is established by values traceable to the Constitution.
lost in Roe, is that before the Court can get to the "balancing" stage, before it can worry about the next case and the case after that (or even about its institutional position) it is under an obligation to trace its premises to the charter from which it derives its authority. A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it. I hope that will seem obvious to the point of banality. Yet those of us to whom it does seem obvious have seldom troubled to say so. And because we have not, we must share in the blame for this decision.

146. But see, e.g., Hart, supra note 133, at 99, quoted in part in Bickel, Foreword: The Pastier Virtues, 75 Harv. L. Rev. 40, 41 (1961):
[T]he Court is predestined . . . to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles . . . . But discerning constitutional principles afresh is one thing; developing them, no matter how neutral and durable, is quite another. An institution charged with looking after a set of values the rest of us have entrusted to it is significantly different from one with authority to amend the set.

147. But see, e.g., Linde, supra note 97. Cf. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 6-11 (1971), espousing the general view of constitutional adjudication espoused here, but characterizing Griswold as a typical Warren Court product, id. at 7, in order to buttress the more general claim—equally unfair in my view—that one cannot accept that general view and at the same time generally approve the work of that Court. Id. at 6. See Griswold v. Connecticut, 381 U.S. 479, 527 n.23 (1965) (Black, J., dissenting).