
Thomas E. Baker

Professor Goldstein is to be congratulated for publishing a book for a primary audience numbering only nine (his “nonet”) with a wider secondary readership. As a member of his secondary readership, I found his basic premise appealing and his critique persuasive. Regrettably, his proposed reforms are neither. I am therefore doubtful that his book will influence his primary audience, at least not as much as he hopes or as much as I wish it would.

The author derives his basic premise from Chief Justice Marshall’s admonition in McCulloch: “[W]e must never forget, that it is a constitution we are expounding.” In performing this “expounding” function, Professor Goldstein insists that Supreme Court “communications [Supreme Court opinions] on behalf of and to We the People who ‘decided’ to establish the Constitution must be something that We can understand if We are to remain sovereign, if Our consent to the government is to be sustained.” (author’s emphasis and capitalization). The “thesis of this book,” in the words of the author, “is that the justices, as members of a collective body, have an obligation to maintain the Constitution, in opinions of the Court and also in concurring and dissenting opinions, as something intelligible—something that We the People of the United States can understand.” Functionally, this intelligibility is essential to allow “Us, the governed and the governors, a basis for discovering ‘faults’ in the Constitution and for deliberating and deciding whether to speak out and to seek the correction of its ‘errors’ in controversy before the Court or by amendment.” The author

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2. Alvin R. Allison Professor of Law, Texas Tech University.
likens the High Court's proper role to the Committees of Detail and Style at the Constitutional Convention of 1787.

Who could argue with Professor Goldstein's premise? Who could disagree with his prototypical examples: holding up Chief Justice Marshall's *McCulloch* as the successfully intelligible opinion and the various opinions in *Webster* as the failures? My only concern is that the author's premise might be misunderstood by some to claim an exaggerated role for judicial review, going beyond those two duly-constituted Committees. It seems clear to me that he is not advocating that the Supreme Court perform as a Council of Revision for the Constitution, a role the Philadelphia Convention wisely rejected. Properly understood, the obligation of intelligibility is an essential limitation on the power of the Court. It can act legitimately only within "the province and duty of the judicial department." The power of the sword and the purse were denied the federal judiciary so that it could demonstrate judgment; Supreme Court decisions should be well-grounded and not merely acts of will. Opinions that are intelligible help us to discern the difference.

The real strength of this book is Professor Goldstein's critique of four different lines of Supreme Court decisions. His four "opinion studies," presented in as many chapters, are meant "to provide a basis for assessing the adequacy of judicial opinions as communications about the Constitution." The author is not concerned with the result reached on the merits. Instead, his focus is the coherency of the Justices' written workproduct.

Discussing *Usery* and *Garcia,* the author complains that the opinion writing in this line of federalism decisions is characterized by obfuscation and disingenuousness. Analyzing *Cooper v. Aaron* and its aftermath, he concludes that the unanimous opinion for the
Court was written with a purposeful and misleading ambiguity regarding the difference between desegregation and integration. Comparing *Brown I*\(^\text{12}\) and *Brown II*,\(^\text{13}\) he chides the Justices for their equivocation between the first holding that racially segregated public schools violated the Constitution and the second holding that the equitable remedy was to be implemented “with all deliberate speed.” Finally, he argues that the oral summary Justice Powell read from the bench, announcing the *Bakke*\(^\text{14}\) decision, was much more accessible and comprehensible than the various, lengthy published opinions.

These four chapters are thoughtful and thorough accounts. Professor Goldstein carefully examines the opinions themselves—majority, concurring and dissenting—along with much of the previously published scholarship about these decisions. The reader is made to feel as if she is a student in the seminar the author has taught at the Yale University Law School for the last decade. It is as if Professor Goldstein has turned over to us his lecture notes. And we should be grateful.

It seems to me that Professor Goldstein should have chosen the better part of intellectual valor, and should have ended his book about twenty-five pages sooner. He could have chosen to conclude with his exhortation that “the justices consider fashioning for themselves canons of comprehensibility to guide their opinion-writing” and “provide themselves with an occasion to review . . . what they have written.” Then this book review would have ended here, probably with the typical reviewer’s cheap shot, wide of the mark to mix metaphors, to say that the author was long on criticism and short on constructive suggestions. Whether out of hubris or naiveté, Professor Goldstein chose to go on to “proffer, for purposes of illustration, some canons of comprehensibility and a process for making them operative.” I found this last chapter at best unhelpful and at worst unrealistic. It detracts from the rest of the book.

My reader can decide just how helpful are the author’s “five overlapping and intertwined canons of comprehensibility”:

1. Use simple and precise language “level to the understanding of all.”
2. Write with candor and clarity.

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\(^\text{14}\) *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The regular publication that most resembles Justice Powell’s bench summary is *Preview of United States Supreme Court Cases*, published by the American Bar Association with the cooperation of the Association of American Law Schools and the American Newspaper Association Foundation. The author of this review serves as a Contributing Editor to *Preview.*
3. Acknowledge and explain deliberate ambiguity.
4. Be accurate and scrupulously fair in making attributions to another opinion in the case.
5. Incorporate in the text, rather than relegate to footnotes, material that is directly related to the reasons for the decision or to the meaning or breadth of the holding.\(^\text{15}\)

I will briefly make the case for a “reality check.”

It seems to me that the real problem with Supreme Court opinions is shared by this book. It is a problem of audience and emphasis. A Supreme Court opinion is written for multiple audiences.\(^\text{16}\)

The Justices, not infrequently, seek to communicate, to persuade and to guide the coordinate political branches at the national level and policymakers at the state level. On occasion, the Court speaks to scholars, historians and interested others.\(^\text{17}\)

There are three primary audiences, however, for every Supreme Court opinion: the citizenry, the parties before the Court and the Justices themselves.

The thesis of this book is that the citizenry audience—We the People—is ill-served by most of the opinion writing of the contemporary Justices. Professor Goldstein’s premise is that the Supreme Court has a constitutional responsibility to perform the role Ralph Lerner once described as the “republican schoolmaster.”\(^\text{18}\)

The contemporary Court most certainly confronts the citizenry on the important issues of the day. There is a “proper connection between judicial power and public opinion.”\(^\text{19}\)

One essential role for the High Court is to engage in “high political education,”\(^\text{20}\) always to be distinguished from the logical fallacy *argumentum ad populum* at the opposite extreme. While I agree that it can and should perform better in this role, I must defend the Court. The other two primary audiences ought to take precedence.\(^\text{21}\)

\(^{15}\) This canon seems to be more particular and less significant than the others and it is at least footnoteworthy to observe that it is found in a book which features both footnotes and endnotes.


\(^{20}\) Id.

Consider the audience of the litigants. The raison d'être for the written appellate opinion is to decide the "case or controversy" before the Court and to communicate the result and reasoning to the party litigants and their advocates. The power of judicial review itself springs from this essential judicial duty to interpret and to decide.\footnote{See Marbury, 5 U.S. (1 Cranch) at 177-78.} Evaluated from this perspective, the Justices' opinions are effective communications. Read the briefs in some cases before the Court. Then read the different opinions from the Court. They are written in the same language of the law and the same dialect of a court constitutionel. The Justices themselves have little patience with an advocate who narrowly focuses on the facts and issues of a particular case and ignores their larger import.\footnote{See Robert L. Stern, Eugene Gressman and Stephen M. Shapiro, Supreme Court Practice § 14.1 at 577-80 (BNA, 6th ed. 1986). But see Lyle Denniston, The Judicial Politics of Abortion, Am. Lawyer, June 1992 at 95; Abortion and the Law: A Day in Court After Years of Skirmishing: Excerpts From Supreme Court Arguments on Pennsylvania Abortion Law, N.Y. Times, Apr. 23, 1992, at B10, col. 1.} We should expect the same wide-angled decisionmaking from the Justices. Indeed, the present Court seems inclined to decide cases on the broadest basis.\footnote{See R.A.V. v. St. Paul, 112 S. Ct. 2538, 2542 n.3 (1992).} The audience of litigants and advocates arguably is well-served by contemporary opinion writing.

Consider the audience of the Justices. The implicit but telling criticism in this book is the somewhat paradoxical complaint that the Justices are writing too much for themselves and then are not taking their writings seriously. My somewhat inadequate response is that this problem is inherent in the common law methodology. The technique of stare decisis is in the control of the individual Justices who constitute the Court that is called on to decide the particular case. The deciding Court identifies the past precedents that apply and goes on to follow them or distinguish them, as it deems appropriate. Unlike the deference afforded an earlier Congress when the issue is one of statutory interpretation, what the earlier set of Justices intended in their previously published opinions does not control. The deciding Court's understanding of those earlier decisions, the principle the deciding Justices discern in past volumes of United States Reports, is all that matters.\footnote{See generally Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Thinking 7-} This is how Constitutional Law, to be distinguished from the Constitution, is written.

and revised. It is understandable, at least, and arguably appropriate, therefore, that the Justices writing opinions should be preoccupied with the audience of future Justices deciding future cases. While I agree with Professor Goldstein's criticism that the Justices may be slighting the audience of the general citizenry, I submit this is a matter of degree or emphasis and, furthermore, there is a good reason for it.  

Professor Goldstein suggests that the Justices enforce the canons of comprehensibility with a "final-phase conference", a confidential meeting with only the Justices present, patterned after the traditional conference, presently held after oral argument, at which the Justices discuss the merits of the cases, take tentative votes, and assign opinion writing:

The conference would provide members of the court with a focused opportunity to review together one another's work. It would be an occasion for meeting their institutional responsibility to ensure that the totality of opinions is comprehensible before the Court goes public.

Not!

The greatest opinions of Benjamin Cardozo, one of our greatest appellate judges, would not fare well under the canons. Justice Holmes's dissent in *Lochner*, the "greatest judicial opinion of the last hundred years," would fail Professor Goldstein's final examination. If such judicial giants would not earn an Honors grade, what grade can our incumbent Justices expect and what can we expect from them? I do not wish to join the debate over the strengths and weaknesses of the current Justices. I would suggest that some of them are not constitutionally able to write succinct and clear

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29. It is not logically organized, does not join issue sharply with the majority, is not scrupulous in its treatment of the majority opinion or of precedent, is not thoroughly researched, does not exploit the factual record, and is highly unfair to poor old Herbert Spencer. . . .


opinions.31 Others, who might be able, likely are not motivated to do so.32 And still others likely could not care less.33 Gathered together at a California-style editing session, I do not understand how the whole will be greater than the sum of its parts. I cannot imagine that the Justices would be willing even to try it. Earth to Yale: it ain't gonna' happen.

This leads me finally to consider what the Justices might do differently or better in an effort to respond to the criticisms Professor Goldstein levels at their opinions. I think that the worst logistical problem that needs to be solved is the so-called "June Crunch." When the Supreme Court holds about 40 percent of its nine-month caseload, including many of its most controversial and controverted cases, until the last month of the Term, as it did this past June, this phenomenon results in "an avalanche of hastily completed and poorly crafted decisions."34 A recent issue of *Judicature*, the official publication of the American Judicature Society, contained an editorial which concluded, "The end-of-term deluge of Supreme Court decisions makes it difficult for the press to report, and the public to understand, the work of the Court."35 The editorial suggested some examples of ways the Court might adjust its intramural procedures to avoid the June crunch: adopting an eight month deadline for all opinions; adjusting the tenure of law clerks; announcing some decisions during the summer recess; and even reconsidering the practice of being in recess during the summer months.36

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31. With all due respect for a jurist who has made important contributions to Constitutional Law, have you ever heard Justice White deliver a speech? See generally John M. Rogers, *"I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides*, 79 Ky. L. J. 439 (1990-91).


33. In an interview about how the Court operates, Justice Rehnquist was quoted to say:

I used to think, you know, if there were an expression in a footnote in an opinion that I disagreed with, that we're going to be stuck with that for years. Well, it turns out that any time five people decide that we're not stuck with the footnote, we're not stuck with the footnote! And things have a way of evolving on much more of a common-sense reaction to things than a strictly doctrinal approach, where A follows from B from C.


36. Id.
I would hope that veteran Court-watchers will focus on this
problem and propose creative solutions. Critiques like Professor
Goldstein's will help to draw attention to the problems with the
June opinions. The Justices seem to have solved past problems with
screening cases, as evidenced by the notable fall-off in the number of
cases granted review in the last few Terms.37 We can hope that
Professor Goldstein's audience nonet next will address the problems
caused by the June Crunch:

There are ways for the Court to maintain a current docket
without the cost associated with the end-of-term onslaught of
opinions. If, and as, the Court fashions an alternative, it will
again demonstrate leadership in accommodating the demands of
the judicial process to the public's interest in keeping abreast of
the work of its government.38

This kind of leadership would result in real progress towards the
goal of making the Constitution intelligible to We the People.39

**LEGAL HERMENEUTICS: HISTORY, THEORY, AND

*Paul Campos*2

I

Seven hundred years ago, amid the orange groves of Catalonia,
there lived a man named Abraham ben Samuel Abulafia. He was a
Spanish Jew whose only passion was the study of God's words, and
on a languid Mediterranean afternoon his sleep was troubled by a
voice in a dream:

The words of the Holy One, blessed be He, are not like our
words. Men speak and write with whatever signs chance might

37. Linda Greenhouse, *Washington Talk; Mystery for Court: Case of the Dwindling
Docket*, N.Y. Times, July 9, 1990, at 10, col. 4; Tony Mauro, *Light Schedule Leads to Tight
Deadlines*, Legal Times, Feb. 17, 1992, at 8. See generally Samuel Estreicher and John Sexton,
*Redefining the Supreme Court's Role* (Yale U. Press, 1986); Thomas E. Baker, *Siskel and

38. Editorial, 76 Judicature at 42 (cited in note 35). Not everyone is sanguine. See
Tony Mauro, *Relieving the Pain of the “June Crunch”*, Legal Times, July 20, 1992, at 12
(concluding “nothing can be done”).

39. See also *Report of the Federal Courts Study Committee* 164-65 (Apr. 2, 1990) (discussing
the importance of effective judicial communications with the press and public).
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lend them for giving form to their fragmentary thought. Yet the thoughts of the Divine Mind are whole and complete. Chance can play no role in His speech: His words are not like our words.

When he awoke from this dream he could not remember it, but he knew he had heard and then forgotten something of infinite value. With a head still heavy from sleep and the burden of his loss, he turned to the beginning of the sacred books. He read a single word: Bereshith. In the beginning. What, he asked himself, is the beginning of this beginning? It is a single letter: beth. Why would the Holy One, blessed be He, choose to begin all beginning with this letter? How (he pondered) are we instructed to begin—meals, marriages, Torah study? With a blessing (Spanish: bendicion, Hebrew: baruch). Blessing begins with beth; He, too, begins the first beginning with a blessing.

II

The arcane techniques of the Cabalists, which assumed that even the very letters of the sacred texts—their order, their numerical significance, their occurrence in other words—were full of meaning, followed logically, one might even say inexorably, from their interpretive assumptions. Foremost among these was their knowledge that the text’s author was an all-knowing, omnipotent Being. Such an author would necessarily produce an absolute text: that is, a perfect, noncontingent work, the product of an infinite intelligence, whose meanings would be ineluctably adequate to every conceivable interpretive situation.

The extreme nature of Cabalistic interpretation flowed from the complexity of the task they set for themselves. Having been given a text which by definition contained the answer to any significant question, the Cabalists knew that finding that answer must be a matter of discovering a sufficiently complex method for decoding the plenitude of meanings hidden among the letters of the sacred text. Hence they developed the fantastically elaborate interpretive system set forth in their most famous work, The Book of Splendor, also known as The Zohar.3

III

Seven hundred years later, a group of distinguished authors have furthered the development of a somewhat different hermeneu-

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3. An excellent introduction to this literature is Gershom G. Scholem, Major Trends in Jewish Mysticism (Schoken Books, rev. ed. 1946).
tic discourse. Legal Hermeneutics joins Sanford Levinson’s and Steven Mailloux’s earlier collection of essays in announcing the arrival of yet another European model which threatens to cut into the market share of domestic legal theory.

Although “hermeneutics” can mean simply “interpretation,” the word has become most commonly associated with the interpretive theories of the German philosopher Hans-Georg Gadamer. Legal Hermeneutics confirms the trend: fully half the essays in this collection advocate an essentially Gadamerian approach to interpretation. For example, consider Jerry Stone’s description of the Aristotelian concept of praxis, i.e., “the reflective application of one’s tradition”:

But praxis cannot occur without dialogue between the two horizons [that is, between the respective epistemic fields of the reader and the text], and fortunately our present horizon is not so confining as to preclude such a dialogue, says Gadamer. Just as our physical horizon moves ahead as we approach it, so our cultural horizon expands as we reach its edges, edges where we dialogically engage our past horizon—our tradition—as it meets us in its own linguistic form.

Gerald Bruns sees Gadamer’s vision of law as a potentially therapeutic force that could, if properly understood, save legal thinkers from oscillating between shallow formalism and fashionable despair:

[L]egal theory generally needs to loosen up its notion of rationality... Gadamer’s notion of hermeneutics, which attempts

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4. Legal Hermeneutics includes essays by: Fred Dallmayr on the hermeneutic contribution to the ongoing struggle to distinguish law from politics; Gerald L. Bruns on the limits of language, legal and otherwise; Peter Goodrich on the social history of sixteenth-century English legal apologetics; James Farr on Francis Lieber’s introduction of European hermeneutics to the American legal system of the 1830s; Jerry H. Stone on the intersection of theory and practice in theological exegesis; Terence Ball on the flaws inherent in any originalist account of constitutional meaning; Drucilla Cornell on the (in her view) misuse of the philosophy of Derrida by certain critical legal scholars to support a radically skeptical concept of the ethical; David Couzens Hoy, critiquing the intentionalist account of textual meaning put forth by Steven Knapp and Walter Benn Michaels; Steven Knapp and Walter Benn Michaels, replying to Hoy’s critique; Ken Kress on the relationship between arguments about legal indeterminancy and disputes concerning legal legitimacy; Lief H. Carter on his experiences during a week-long judicial retreat which he attended in order to determine whether judges were “foundationalist” or “pragmatic” in their jurisprudential practices; Michael J. Perry on why he believes constitutional theory matters to constitutional practice; Gregory Leyh on how an hermeneutic theory could improve legal education; and Stanley Fish, who comments on the other essays in the collection.


6. Gadamer’s account of the hermeneutic inquiry is favorably received in the essays by Dallmayr, Bruns, Stone, Ball, Hoy, Perry and Leyh.
(among other things) to clarify the practical rationality of life in terms of phronesis [practical reason] as against procedural and instrumentalist reasoning, shows at least that one does not have to choose between uncritical, implausible accounts of legal reasoning and apocalyptic visions of crisis, irrationality, skepticism, nihilism, and despair.

And Gregory Leyh suggests that a Gadamerian account of the phenomenology of judging might be a useful addition to the law school syllabus.

[Gadamer's] account of legal judgment illuminates a mental operation the attainment of which is one objective of a humanistically oriented education in law. One thing a student might acquire from studying the phenomenology of judging is that the making of sound judgments—in law as in life—is not a matter of appealing to universals, original meanings, or inflexible rules.

William Eskridge has summed up the Gadamerian approach to interpretation:

Hermeneutics stresses the multidimensional complexity of [legal] interpretation and, even more, the importance of an interpreter's attitude rather than her method. The hermeneutical attitude is open rather than dogmatic, critical rather than docile, inquiring rather than accepting.7

A skeptical reader might note that all these suggestions seem to fall under the heading of “exhortation”8 or (less politely) “moral cheerleading.”9 Indeed, hermeneutic theory appears to be joining “pragmatism” and “contextualism” in the race to deploy the greatest number of platitudes per square inch of law review paper.

Now platitudes are not necessarily bad things. But do we really need any more books and articles imploring us to reason “dialectically,” to interpret “contextually,” to be suspicious of “rigid rules and inflexible categories”? The legal literature is enduring a blizzard of texts that often read like nothing so much as a series of annotated fortune cookies.

Which is a shame. For hermeneutics, or more broadly “the turn toward interpretation,” does have a valuable role to play in the development of legal thought.

IV

Samuel Johnson is supposed to have remarked that, if he heard the world was about to come to an end, he would move to Holland because everything happened there thirty years later than everywhere else. Legal scholarship is only now beginning to confront certain fundamental questions of semantic meaning ("What does it mean to 'interpret' a text? What is a 'text'?") that have been at the center of philosophical and literary critical debates for a generation.

For instance, more than a decade has passed since the literary critics Steven Knapp and Walter Benn Michaels unleashed a comprehensive attack on linguistic formalism that has not, to my knowledge, been successfully answered. Their critique of formal accounts of semantic meaning must be dealt with, directly or indirectly, by anyone who aspires to give a coherent account of textual interpretation. And yet, although their pieces are often cited in the fancier legal literature on interpretation, the continuing assumptions of that literature—that there is a difference between textual and contextual meaning, that "authorial intent" is an interpretive method, and that one can therefore choose how to interpret a text—provide evidence of the superficial fashion in which their work has been (mis)understood.

The inadequacy of the standard legal academic responses to ideas imported from other disciplines has been lamented often enough. The current arguments about interpretation provide yet another example of this tendency. All the fundamentally interesting questions are begged at the very beginning of the enterprise: instead of inquiring into questions of how texts come to have meanings, or, more radically, whether they have meanings, the ontological status of "the text of the —" as an adequate mode of signification is simply assumed, so that we can turn at once to the unspeakably important task of informing Hercules, J., about the fas-

cinating new brand of interpretation that will speed us toward social justice on issues X, Y and Z.

Like some sort of secular Cabalist, the legal hermeneutician erects his stupendously elaborate interpretive structure around statutes, legislative histories, administrative orders and, of course, judicial opinions, without first pausing to reflect on whether these linguistic emanations are capable of supporting the burden of the meanings he assumes they must contain. That these bureaucratized texts are capable of the semantic tasks required of them is, for the hermeneutic interpreter, not a conclusion, but rather an article of faith.

V

Aspiring legal hermeneuticians would do well to heed Meir Dan-Cohen’s recent comments on sincerity as an essential attribute of textual meaning. Dan-Cohen refers to the ubiquitous AT&T operator’s automatic use of the phrase “Thank you for using AT&T” as an example of a purely “strategic” utterance; that is, as a statement which has primarily an institutional rather than a linguistic meaning:

If the telephone operator’s recitation of thanks is not designed to express his gratitude, what is it designed to do? The answer is suggested by the bureaucratic setting in which the utterance is made. . . . Seen in this light, the point of the operator’s mock politeness is rather clear: it simply serves the business purpose of trying to secure customers’ continued patronage. This rather obvious interpretation of the “thank you” practice marks it as an instance of strategic communication: the utterance does not perform its usual linguistic function indicated by its [presumptive] content (i.e., the expression of the speaker’s gratitude) but is rather used for a predetermined purpose that is ulterior to that function and that content.13

Dan-Cohen’s observations might lead one to compare with each other such disparate texts as:

In the beginning, gods create the heavens and the earth,

and

(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon

in any way as legislative history in construing or applying, any
 provision of this Act that relates to Wards Cove—business neces-
sity/cumulation/alternative business practice, and

and

Thank you for using AT&T.

The first text could once be read—can perhaps still be read—as
a fountain of infinite meaning; the last statement is properly un-
derstood not as a text, but as a literally mindless and therefore semanti-
cally meaningless utterance: a product of bureaucratic imperatives
rather than of any signifying agent.

And as for that atrocious middle sentence? No doubt a pla-
toon of dauntless hermeneuticians are already at work, striving to
make it the best legal utterance it can be. Nevertheless, we should
consider the possibility that, at the end of the millennium, amid the
soulless machines that construct our bureaucratized texts, the law’s
words may not be like our words after all.

DECIDING TO DECIDE: AGENDA SETTING IN THE
UNITED STATES SUPREME COURT. By H.W. Perry,

_Dan T. Coenen_ 2

When Phil Frickey asked me to review _Deciding to Decide_, he
predicted I would not be able to set the book down. He was right.
Forged from firsthand interviews with five Supreme Court Justices
and 64 former Supreme Court clerks, H.W. Perry’s book provides a
fascinating inside look at the Court’s case-selection process. The
book was of special interest to me both because I once served as a
law clerk and because I did so during the very time period Perry

15. As Joseph Vining puts it, “Words themselves cannot speak.” For a fascinating
meditation on the implications of bureaucratic processes for the production and interpreta-

1. Associate Professor of Government, Harvard University.
2. Associate Professor of Law, University of Georgia. Copyright © 1993, Dan T.
Coenen. The author thanks the following friends who commented on this review: Peter J.
Kalis, Geoffrey P. Miller, William J. Murphy, Robert V. Percival, Paul Schectman, James C.
Smith, David O. Stewart, Michael J. Wahoske and Rebecca H. White.
focused on in his research. The book, however, is of such quality and interest that it deserves a far wider audience than the strange stratum of readers I represent.

Three points about the book should be made up front. First, its author is a political scientist. Having read this far, some of my comrades at the bar will promptly scratch this volume from their bedside book list. They shouldn’t. Perry shows a sensitivity to lawyers, to lawyering and to the lawyerly aspects of Supreme Court decisionmaking. He also minimizes (although he falls short of avoiding altogether) the jargon and analytic overkill that too often mar the writings of political scientists and legal academicians alike.

Second, the author’s distinctive approach to his subject deserves commendation. The book is built around direct quotations—443 of them according to my own unofficial count—of statements made by the interviewed Justices and clerks to Perry under a pledge of anonymity. Problems lurk in basing research on unidentified sources; there is no way, after all, to double-check whether clerk “C34” said what clerk “C34” is said to have said. Unlike its distant cousin The Brethren, however, this book will leave behind few suspicions that confidentially supplied information has been recast or presented out of context. The book does contain some useful cocktail-party material. But a discernible effort to soft-pedal the sensational, together with the inherent plausibility of the statements Perry has collected, signals that this work reflects an appropriate sense of scholarly rigor.

Third, and somewhat surprisingly, the book concentrates on the Supreme Court’s case-selection operations more than a decade

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4. For illustrations of these same tendencies, one need only consult the prior work of the author of this review. (Mea culpa!)

5. One Justice, for example, was less than wholly complimentary about Chief Justice Burger’s handling of the conference “discuss list”: “Some [cases] that the chief justice puts on, frankly I don’t know why they are on, and sometimes he doesn’t know. . . . That is one of the things that make me think his law clerks do it.” The clerks of “Justice A” also are singled out for some bad press. Other clerks report that Justice A’s clerks “treated the cert. pool more cavalierly than the others,” (quoting “C62”), “were more persistently ideological” and seemed “uniquely unsympathetic” to in forma pauperis petitions (quoting C48). One clerk opined that this pattern might have reflected the fact that “Justice A is the only justice [she knew] who tried to pick clerks who were ideologically compatible with himself” (quoting C47). Another clerk critical of Justice A’s chambers, however, noted that “then again, when I was clerking on the Court, most of the clerks were a lot more liberal than their justices.” Perry informs us that the Justices may consider the caliber of counsel in deciding whether to grant cert. We learn also that several D.C. circuit judges “often write a dissent to attract the attention of a particular justice.” I was surprised to discover that, at least in former days, clerks outside the cert. pool sometimes would “go swimming” by consulting pool memos before advising their own non-pool Justices about pending petitions.
ago. Much has changed in the meantime, particularly in terms of Court personnel. It would be too much to say, however, that there has been a fundamental retooling of the Court’s case-review process. The principal value of this book thus lies not in its offering of an interesting history, but in its potential to provide useful insights about the workings of the Court today.

The key contribution of Perry’s book comes from its collection of extensive information about the Justices’ behavior in making certiorari decisions. Perry notes the well-known “Rule of Four,” but also teaches us that the Court uses a “Rule of Five,” a “Rule of Six,” a “Rule of Just Four,” and a practice of “Joining Three.” Perry explodes the myth that the Justices vote on the basis of “juniority”; in fact, voting begins with the Chief Justice and then proceeds from the most senior to the most junior Justice. Perry also persuasively challenges the common belief that the Chief Justice wields a much stronger influence over Supreme Court agenda setting than do his brother and sister Justices. In particular, although the Chief Justice first formulates the “discuss list” of cases slated for full consideration at conference, each associate Justice may single-handedly and freely add to the list any of the cases that the Chief Justice has omitted.

Perry’s research shows that there is virtually no discussion of pending cert petitions among the Justices either before or at the Conference. In the pre-Conference period, “interchamber discussion is rare.” One Justice goes so far as to say that: “Never have I had anyone call me or suggest how I ought to vote.” (Emphasis added.) As to conferring at the Conference itself, one Justice puts it

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6. The Court’s mandatory appellate jurisdiction also has been largely eliminated, see infra note 19, and there have been changes in the size of the cert pool, as well as in the practices of some cert pool participants. See infra notes 8 and 10.

7. Perry describes the “Rule of Five” this way: “There are certain issues of law . . . for which coalitions on the Court have rigidified into a 5-4 block. The minority block can muster the four votes to grant cert., but everyone on the Court knows that they will lose on the merits. The result is that the four do not insist that the case be heard. One area where this phenomenon of four dissenters has occurred is obscenity.” The “Rule of Six” applies to summary dispositions on the merits; in particular, Perry’s research reveals that the Court follows a convention requiring six votes, rather than five, to rule on the merits without briefing and argument. The “Rule of Just Four” (my own term) refers to a “new norm [that] has recently developed” at the Court: “when a case has only four votes, the chief justice may ask if the case can be relisted to see if any of the four want to reconsider.” Apparently, relisting in such circumstances is common. The practice of “Joining Three” is a middle-ground manner of voting on cert that an individual Justice may use; instead of voting to grant or to deny, the Justice may vote to “join three” and thus supply the key vote to grant only if three other Justices desire plenary review.
this way: “When we go over [cert petitions], there is not a lot of
time . . . . Most all of us have our ideas and they are pretty firm
when we come in . . . . We generally just vote.”

Such descriptions will disappoint those who seek high drama in
the operations of the Court. Indeed, Perry views his own mission
largely in terms of “sensitiz[ing] the reader to the mundane nature
of much of the agenda-setting process . . . .” At the same time,
Perry neither minimizes the importance of that process nor misses
the point that it incorporates controversial features. Two of those
features—the extensive use of law clerks in the case-selection pro-
cess and the role played by “political considerations” as the Justices
vote—are of special interest to Perry.

II

Perry observes that “one cannot talk about the agenda-setting
process without talking about the law clerks.” Clerks in all cham-
bers long have been involved in the certiorari process, and the clerks
of eight of the Justices now combine their efforts in generating the
elaborate work of the cert pool.8

The basic operation of the pool is no secret.9 For each case
before the Court, one pool memo is drafted by one clerk of one
Justice who participates in the pool. The completed pool memo—
which, according to Perry, is usually two to five pages long—then is
distributed to all other participating Justices’ chambers. Today,
participating Justices handle the circulated pool memo in two differ-
ent ways. Some Justices require one of their own clerks to review
and provide a “markup” of each circulated pool memo before it
goes to the Justice. In other chambers, the Justice reviews the pool
memo with no markup and involves one of the Justice’s own clerks
only if a particular memo triggers an interest in a second look.
Perry’s research indicates that, in either event, Justices in very few
cases consult the petition itself.10

Is this a good way to run a railroad? Perry is skeptical. He
wonders, in particular, whether the pool memo system produces the

8. Here lies one significant change in the cert process in the last dozen years. Thus, in
1980, only five Justices (Burger, White, Blackmun, Powell and Rehnquist) were members of
the pool. Today, all the Court’s members, except Justice Stevens, are pool participants. In-
terestingly, two of the Justices interviewed by Perry expressed concern about expanding the
size of the pool. See pp. 53-55.
9. See, e.g., William H. Rehnquist, The Supreme Court: How It Was, How It Is 263-64
(William Morrow, 1987) (“Supreme Court”).
10. Notably, during the time period focused on by Perry in his research, all participat-
ing Justices required a markup. The emergence of some Justices who review pool memos
without markups thus reflects another (and, in my view, undesirable) change in the cert pro-
cess during the last dozen years.
efficiencies it is designed to achieve in that it requires clerks to prepare full-blown memos even for cases plainly not destined for plenary review. He also floats the recurring question whether the cert pool vests too much power in recent law school graduates not appointed by the President, not confirmed by the Senate, and marked by a noticeable wetness behind the ears.

My own view is that, all things considered, the cert pool works remarkably well. Indeed, the value of the pool lies in its creation of precisely the type of efficiencies that permit the Justices themselves to control the certiorari process. It may be that the cert pool does not create efficiencies for the clerks, for clerks do spend time on cases that are not certworthy. The important point, however, is that the pool creates enormous efficiencies for the Justices. It does so by providing in standardized fashion and concentrated form the key information from all papers filed in each case to the participating Justices themselves. The cert pool, moreover, generates benefits beyond efficiency. In effect, the pool ensures that at least one person at the Court will thoroughly read all important cert-related papers in each case and reflect on them in a focused and relatively unhurried fashion. A proper sensitivity to the human beings who are litigants before the Court—including those who file long-shot petitions—counsels that no less than this measure of process should be afforded.

More fundamentally, the cert pool contributes to the agenda-setting process a heightened level of care and regularity that well serves the overriding end of generating sound cert rulings. A simple way in which the cert pool aids decisionmaking by the Justices is by systematizing the presentation to the Justices of basic information about each case: from what court the case arises; who authored that court’s opinion; who else (if the case is from a circuit court) was on the panel; who, if anyone, was in dissent; whether and by whom any amicus brief was submitted; and whether the petition was timely filed. Perry’s research teaches that all this information is relevant to the Justices, and the formal pool-memo system ensures that they receive it. Moreover, the key considerations that go into any cert ruling—“conflict with other courts, general importance, and perception that the decision is wrong in the light of Supreme Court precedent”—are few in number and concern the sort of essentially objective “factors . . . that a well-trained law clerk is capable of evaluating.”

The pool system also facilitates a salutary

11. Rehnquist, Supreme Court at 266 (cited in note 9). Most important, as Perry observes: “Much of a clerk’s time on cert. is spent trying to determine if there is indeed the conflict that the petition alleges.” Because this exercise calls more for technical skill than
attention to detail that nine freelancing chambers probably could not provide. The focused attention of the pool-memo drafter, for example, is more likely to disclose beneath-the-surface procedural problems than the necessarily more superficial examination of a larger group of clerks, each of whom must wade through ten times more petitions.

Another advantage of the pool system is that it generates a formal written memorandum for each filed case that, in addition to identifying the facts and the contentions of the parties, sets forth a proposed result and supporting reasons. Each such memo then is reviewed by a number of other clerks, the memo writer's own Justice, and all other Justices participating in the pool. Apart from providing an elaborate safeguard against oversights and misjudgments by the memo writer, this system both facilitates an efficient form of "dialogue" about cases and creates a powerful incentive for the initial memo writer to do careful and honest work. As Perry has learned, law clerks are, by and large, hard-driven high achievers who develop profound loyalties to their own Justices; to such persons, producing written work that brings disrepute on themselves and their chambers is little less than a heart-stopping prospect. In addition, because clerks spend only one short year at the Court, they are largely immune from the ennui and resulting carelessness that long-term exposure to the details of cert work might bring.12

Most important, the memo writer's work produces an articulated line of reasoning (indeed, two lines of reasoning if it triggers a markup) to which each participating Justice must consciously respond. Having to deal with a pointed written analysis—more so than leafing through a stack of papers or chatting hurriedly with a clerk—forces the Justice to focus on and formulate with some care her or his own thoughts about each case. In short, the cert pool, like other sound governmental structures, takes advantage of natural human tendencies, and imposes a series of checks on key participants in the decisionmaking process.

There is, I suspect, a widespread belief among practitioners that the certiorari process is not a careful one, given the discretion-

12. Another former clerk, who wrote to me about an earlier draft of this review, expressed much the same point of view: "One of the biggest surprises to me when we were clerking was the extraordinary care given to the processing of cert petitions. I had assumed that the sheer numbers of petitions would guarantee that many worthwhile cases fell through the cracks. Yet I had the clear impression that this simply did not happen. Perhaps that was a product of the cert pool working remarkably well, as you indicate. By implicitly forcing the authors of pool memos to articulate some reason for denying cert, the pool guaranteed that someone took great care in reviewing each individual petition."
ary nature of cert decisions, the Court's enormous caseload, and the
greater visibility and perceived importance of merits rulings and
opinion writing. My own strong sense, however, is that the
Supreme Court's cert work is conducted with considerable care. In-
deed, I am tempted to say (particularly now that it is so common
for lower appellate courts to decide cases without argument, with-
out publication, and sometimes without opinion) that the Supreme
Court's certiorari process affords no less meaningful procedural
protection than most litigants receive in most merits decisions in
most American appellate courts.13

The cert process, after all, involves an elaborate montage of
procedures. The cert pool ensures that each case is considered by
eight Justices in a regularized process built on a focused, written
assessment made by an observer who has strong incentives to do
good work. The double-checking of pool memos by clerks in partic-
ipating Justices' chambers, together with the existence of one Jus-
tice who operates entirely outside the pool, provides a safeguard
against undue reliance on an incomplete or misleading memo writ-
ten by a single clerk. In contrast to the situation often faced by
lower appellate courts, the Supreme Court usually has at least one
useful lower court opinion, and sometimes two or three, to help illu-
mine the issues in the case. The formulation of the "discuss list"
concentrates judicial attention on the most debatable cases, and the
ability to file dissents from cert denials further concentrates judicial
attention on key cases and cuts down on casualness in making cert
decisions. The Supreme Court, unlike other courts, is often able to
avail itself of the expert views of the Solicitor General when trouble-
some cases arise. Perhaps most important, all of this happens in the
context of a nine-member decisionmaking body. Given the size of
this body, as well as the incentives and competence of its support
staff, it will be a rare case that, although deserving of certiorari, falls
through the adjudicatory cracks.

Despite these accolades for the current cert system, the Justices
might profitably consider one significant reform. After drafting this
essay, I distributed it to a number of my co-clerks from the October
1979 term. One of these readers, for whose judgment I have the
highest regard, suggested I was too sanguine in my appraisal of
agenda-setting process. Recognizing that current safeguards "prob-
ably, usually work," he nonetheless expressed concern about the

13. Of course, my point here is not that the Court at this stage scrutinizes the merits as
carefully as do lower courts that actually rule on the merits. Rather, my point is that the
Court considers the certworthiness of cases as fairly and fully as lower appellate courts ex-
amine the merits.
diffusion of responsibility that comes from allowing all but one of
the Justices to participate in the pool, particularly when some Just-
tices do not even involve their own clerks in double-checking other
clerks' work. "The glory of the Court," he urged, "always has been
that it does its own work; I think the current 8-Justice cert pool
undermines that glory." He went on "grudgingly" to suggest that a
proper accommodation might support "a structure of three cert
cert pools of three justices each."

This fascinating proposal is one I had not previously consid-
ered, although I would reject it because a three-Justice pool strikes
me as too small to give each memo drafter enough time to deal
degradely with each case. But why not two cert pools of four Jus-
tices each? A two-pool system would directly address the central
problem of putting too much responsibility in any single clerk's
hands. At least sometimes, it would expand appreciably the pre-
cconference "dialogue" over cert petitions by causing different sets of
Justices to look in somewhat different ways at potentially
certworthy cases. A two-pool system would provide an added in-
centive for each memo drafter to do careful work, since each clerk's
work would become subject to direct comparison with the work of
another clerk. Finally, a four-Justice pool would not seem too small
in size to operate successfully. The pool, after all, operated success-
fully for more than half a decade with only five Justices participat-
ing in it.14

Of course, only the Justices, with their own first-hand knowl-
dge of the pool's operation, can judge whether a four-Justice pool
could operate effectively today. The important point is that, if they
believe it could, there are significant structural reasons for preferr-
ing two smaller cert pools to a single large one.

III

Perry's most intriguing commentary concerns the role of so-
called "political behavior" in cert voting. He opens his discussion
of this topic by putting it in proper perspective: "The overwhelm-
ing impression I received from my research is that there is little
bargaining and strategy in the cert. process." At the same time,
Perry concludes, "[t]here is some... and it is more than most of the
clerks, and perhaps some of the justices, acknowledge."

What is this "political behavior" of which Perry speaks? It is
not the swapping of one vote for another, sometimes referred to as
"horse trading" or "logrolling." "Not a single informant men-

14. See Rehnquist, Supreme Court at 263-64 (cited in note 9).
tioned anything resembling horse-trading, and many said explicitly that it never occurred.” Perry wonders why. It is “more understandable,” he opines, that Justices don’t trade votes on the merits because “[t]hat strikes too close to the heart of our norm of ‘justice.’” Because cert decisions say “nothing about the validity of a ruling below,” however, Perry finds “unjustified” the pervasive “normative indignation” at the possibility of vote trading at the certiorari stage.

Here, Perry’s lack of attention to legal process values leads him to take a serious misstep. Although the certiorari decision does not set precedent, it has extraordinary importance for the human beings who are litigants before the Court: it either terminates the appeal process for the petitioner or opens the door for the petitioner to secure total victory on the merits. (In addition, at the least, a grant of certiorari exposes the respondent to all the expense, delay, and inconvenience of full-scale Supreme Court litigation.) For this reason, vote-trading at the certiorari stage, as surely as at the merits stage, would offend the core legal principle that individual cases are to be individually decided based on their individual merits.

This conclusion, however, merely leads to another, more subtle normative inquiry. As Perry explains, all Justices pursue so-called “defensive denials”—that is, they sometimes vote to deny cert out of concern that a grant will produce a bad precedent when the Court rules on the merits. As Perry observes: “It is interesting that every justice denounced and denied any logrolling on cert.; but all admitted that defensive denials occur. Most justices view defensive denials as an acceptable strategy; logrolling is an unacceptable strategy to them all.” The interesting question is why.

Perry theorizes that this difference in attitude has arisen because the Justices “are strongly socialized not to allow outside influence.” Thus “[t]he primary distinction is that logrolling involves two justices whereas a defensive denial involves one.” Although this insight has merit, there is more to the matter than that.

First, as already suggested, the central difficulty with cert-vote logrolling is that it ties together the disposition of two cases in violation of the core principle of case-specific judicial decisionmaking. Defensive denials, which concern a decision on how to vote on one case standing alone, are not afflicted with this vice.15

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15. It might be said in response that the defensively denying Justice violates the norm of case-specific decisionmaking by in effect trading the possibility of reversal in the petitioner’s case for the benefits gained by other future litigants who otherwise will probably feel the effects of an unwanted precedent. Such a tradeoff, however, bears little resemblance to an out-and-out trade under which one Justice swaps her vote in an existing case for another Justice’s changing his vote in another existing and unrelated case. It might even be said that
Second, defensive denials do not raise remotely the same risk of prejudice to the petitioner that a traded vote to grant raises for the respondent. The very reason the Justice makes a “defensive” vote to deny is because the Justice, although sympathetic to the petitioner’s position, believes the petitioner will lose on the merits. To be sure, the defensively denying Justice cannot be sure the petitioner will lose, and the vote to deny, if successful, removes any possibility the petitioner might win. On the other hand, averting a vote on the merits might be in even the petitioner’s own best interest, at least if alternative channels of review (such as federal habeas corpus relief) remain open.

Finally, as Perry himself points out, an acceptance of horse trading of cert votes could start the Court perambulating down the path toward horse trading votes on the merits. Countenancing defensive denials carries no similar danger because the Justices cannot and do not vote “defensively” at the merits stage. In short, a tolerance of vote trading in the cert process would carry a far graver risk to the integrity of merits decisionmaking than does a tolerance of defensive denials.

As Perry emphasizes, the “defensive denial” vote occurs only in the extraordinary case. The criteria applied in the usual case are not “political” in any sense. Sometimes the case is a “clear deny.” So it is, under unwritten rules of practice, if a convicted criminal defendant petitions for cert based on a claim of insufficient evidence of guilt, ineffective assistance of counsel, or a defective Allen charge. The Court also will not review claims that are marked by procedural complexities or are “fact specific” because they involve only application of settled doctrine to a nonrecurring cluster of circumstances.

Perry aptly reminds us that “[w]ithout a doubt, the single most important generalized factor in assessing certworthiness is the existence of a conflict or ‘split’ in the circuits.” Of course, “there are conflicts, and there are conflicts.” In much the manner that youngsters recite the Scout Law, Perry’s panelists tell us that conflicts must be “genuine,” “important,” “ripe,” “square” and “live.” Conflicts should not be “tolerable,” “trivial,” “strained” or “involving some obscure provision of the Internal Revenue Code.” Even if there is a conflict, the Court sometimes will deny cert to permit the defensively denying Justice, in deciding how to vote, is doing nothing more than scanning the future social consequences of the Court’s action in the field of human activity the case concerns. Looking to such consequences is, moreover, something that Justices, with good reason, do all the time. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Court votes to recognize judicial review in part because contrary rule would have the undesirable future consequence of “giving to the legislature a practical and real omnipotence”).
further "percolation" of a legal question in the lower courts or because the petitioned case presents a "bad vehicle" for considering an otherwise certworthy issue.

Notwithstanding the lack of a conflict, the importance of an issue sometimes justifies review. Perry's informants saw illustrations of this principle in the Nixon-tapes, Iranian-assets and draft-registration cases. In some instances a foursome or more will vote to grant cert because of a lower court's "flagrant disregard for precedent" or because "a severe injustice occurred"—particularly, we are told, if the injured party is a child. Finally, some Justices play subject-matter favorites. We learn that the Court's westerners—Justices O'Connor, Rehnquist and White—are "intensely interested" in water rights cases. According to Clerk C16, there is a Justice who feels "that the Court just should never deal with tax cases." There once "was a time when four members simply weren't interested in hearing Securities and Exchange Commission cases." One Justice deems Indian law cases "kind of fascinating." Another thinks "[t]here are a lot of boring administrative agency cases," while "all of the justices seemed to exhibit intense interest in First Amendment issues of all types."

IV

In the end, Perry cannot refrain from advancing a "decision model" that purports to reveal how these many forces interact in the judicial mind. Basically, according to Perry, each Justice in each nonfriviolous case makes a preliminary decision whether he or she "cares strongly about the outcome . . . on the merits." This decision determines whether the Justice moves into "outcome mode"—which focuses on tactical concerns—or "jurisprudential mode"—which focuses on "the types of things that one learns in law school." Emphasizing that each Justice sometimes uses each mode, Perry draws the following picture of how each Justice decides how to vote in each case.
There may be some limited value in this roadmap. In particular, it more accurately depicts how the Justices act than do simplistic assertions that they care only about ultimate outcomes or never care about the merits at all. It also properly suggests the potential for differing philosophies toward the cert process, with some Justices focusing at least sometimes on error correction (particularly in the death-penalty context), while other Justices concentrate solely on resolving recurring doctrinal problems (particularly in light of the limited resources of the Court).  

16. Several persons who commented on this review suggested that I emphasize the importance of the difference between an error-correction orientation and a national-law-harmo-
pect that Perry's model is neither very enlightening nor even true to the data he has assembled.

Consider, for example, the hypothetical Justice Z, who comes across a cert petition that challenges a circuit court's ruling that municipal truck mechanics do "safety sensitive" work and therefore may be subjected to drug-urine tests without a warrant or reasonable suspicion. Justice Z is a strong believer in privacy rights and is outraged by this result. Justice Z also thinks, however, that there is a 60-40 chance a majority of the current Court will affirm the lower court if cert is granted.

According to Perry's model, Justice Z will vote to deny unless he deems it "institutionally irresponsible" to do so. In fact, however, a purely tactical analysis might well lead Justice Z to vote for a grant. Justice Z, for example, might reason that the result below is so intolerable that it is worth fighting the odds to overturn it. Justice Z might be especially inclined to favor immediate review if a "law and order" president has just taken office so that a delay in reaching the issue only threatens to decrease the chances of prevailing as more "conservative" Justices are appointed to the Court.

Even absent such tactical concerns, Justice Z may vote to grant. Justice Z, for example, might say to himself something like this: "This is a close call on whether to take the case just to correct a bad outcome, but the issue will arise often and there is something of a conflict, so I suppose I'll vote to grant." Such a line of reasoning seems to me wholly plausible, and I find nothing in Perry's data that suggests it will never occur. Under Perry's model, however, such reasoning cannot happen, for Justice Z has entered "outcome mode" in which one considers "jurisprudential factors" only to the extent it is "institutionally irresponsible" not to take the case.

This analysis of our hypothetical drug-test case raises at least three basic concerns about Perry's decisional model. It suggests, first, that the certiorari decision process may be too subtle to be captured in a series of simple yes-no answers. (The possibility of a tactical vote to grant, despite a 60-40 chance of losing on the merits, establishes that much.) It suggests also that the particular "yes-no" categories fixed on in Perry's model may be too quirky and nebulous to have much utility. (Why should we say a loss-predicting outcome-mode Justice will grant only to avoid "institutional ir-
responsibility”? What evidence supports that view? And, for that matter, what does it mean to be “institutionally irresponsible”?) Finally, the hypothetical suggests that the psychological wall of separation Perry sees between tactical and nontactical considerations may well not exist. (Otherwise, Justice Z, who was very interested in the merits, would not have considered at all the recurring nature of the issue and the arguable circuit-court conflict in deciding to vote for review.)

More fundamentally, Perry’s model, and to some extent his entire book, overlook or diminish important considerations in the certiorari process. For example, Rule 10 itself says it matters whether a circuit court has “decided a federal question in a way in conflict with a state court of last resort.” Yet Perry’s model does not mention this type of conflict. Perry gives no treatment at all to the important category of “held” cases—i.e., petitions held in abeyance pending disposition of another case on the merits. Perry’s model also lays no weight on whether the case arises by appeal, rather than by petition, despite the admitted (though, in my view, greatly understated) relevance of this consideration. Finally, Perry’s model overlooks a factor he himself identifies as present in the decisional mix: the particular interest or lack of interest of a particular Justice in a particular area of law. (Sometimes Justices just wanna have fun.)

It is true that the questions asked in Perry’s model may be read broadly to take account of some of these considerations. It also is true that Perry appropriately acknowledges the great difficulty of constructing a perfect model of the case-review process. Most important, it surely is true that I know how much easier it is to throw rocks than to build a solid and pleasing edifice.

In the final analysis, Perry has given us such an edifice in his study of Supreme Court agenda setting. I encourage him soon to put on his own agenda a similar examination of Supreme Court decisionmaking on the merits.

19. Of course, this point is of limited practical significance today (as opposed to the time period focused on in Perry’s research), because of Congress’s removal in 1988 of virtually all mandatory Supreme Court appellate jurisdiction. See generally Gerald Gunther, Constitutional Law 52-53 (Foundation, 12th ed. 1991).

Michael Fitts2

Debate over political reform during the last two decades has frequently pursued two different visions of governmental responsibility. On the one hand, many point to the dialogic role of governmental institutions, which in their ideal form can refine citizen goals and preferences into something like a communal vision of "the public interest." Under this view, governmental processes and institutions, and the reform of those institutions, should be evaluated according to the extent to which they further means-end rationality, a reflective analysis of normative goals, and/or a convergence on a communal vision. Civic republicanism, practical reasoning and pragmatism are some of the scholarly literatures that have focused on this value.3 At the same time, another classic approach, perhaps of an older legal vintage, has emphasized democratic accountability, the faithfulness of decisionmaking to the wishes of "the people." Institutions and their reform must come to terms, from this perspective, with (for democrats) the countermajoritarian difficulty or (for law and economic types) principal-agency theory.

As is true with most other areas of scholarship, a synthetic wave of writing specifically looks at institutions and reforms which help reconcile major views, in this case attempting to forge what Cass Sunstein has called a "deliberative democracy."4 Clearly, Sunstein, as well as Bruce Ackerman and others, have made insightful contributions that fall into this tradition, as has James Fishkin in his aptly titled new book, Democracy and Deliberation. Unlike much of this latest scholarship, which tends to be theoretical and court-centered, Fishkin's proposals are highly practical changes aimed at improving the daily mechanics of the political process; specifically, the functioning of the party nominating system. Simply put, Fishkin proposes to create a national jury of randomly selected party members who would meet and discuss issues at length with

1. Darrell K. Royal Regents Chair in Government, Law, and Philosophy at the University of Texas at Austin and also chair of the Department of Government.
2. Professor of Law, University of Pennsylvania.
3. See, e.g., Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L. J. 1539 (1988); Bruce Ackerman, We the People (Belknap Press, 1991); Michael Brint and William Weaver, eds., Pragmatism in Law and Society (Westview Press, 1991) ("Pragmatism").
the candidates of their respective parties during the early primaries. The result, Fishkin hopes, will be a deeper probing of proposed policies by the jury—whose votes on candidate preferences, to be reported in a separate poll, might preempt the daily opinion polls which often capture only the unreflective impressions of the unfocused public during the hectic primary season.

There is much to commend this proposal. Fishkin focuses on a serious problem—the rise of candidate-centered campaigns, the decline of reasoned debate during the nominating process, and the sometimes tyrannical power exercised by the media during the primary season, when the public's impression of individual candidates may be quite limited. While the purpose underlying this proposal is merely to affect the dynamic of primary polls and the public debate about them, it may improve the dynamic of the primary process overall, which most observers, including many winners, agree have serious drawbacks. Fishkin also demonstrates a reluctance to call for sweeping changes, presumably out of fear of the unknown—a humility that the history of past primary reforms may well justify.

Despite these obvious advantages, one is left wondering whether this type of approach should be expanded to other aspects of governmental institutions. As I suggest below, I would be very cautious about extending this model beyond Fishkin's quite limited domain. While this incremental reform would be helpful, it should not divert us from thinking and writing about more systemic reforms.

First, some background. Over the past twenty years, both students and practitioners of politics have come to recognize several drawbacks to the current primary political process. In the old days, primary candidates were chosen largely by the party leadership, with much less popular primary participation or significant public primary debate. The theory behind this system, which now would be put in terms of principal-agency theory, was that democracy—both in a participatory and a dialogic sense—best occurred between the parties, not within them; in other words, party leaders were most likely to be held accountable to the public by the threat of loss at general election day, not by primary fights within the party. Under this reasoning, the threat of an effective opposition in the general election would force parties to focus and develop the most important issues at the time when the general public was paying the

6. This is aptly summarized originally in E.E. Schattschneider, Party Government (Holt, Rinehart and Winston, 1942).
most attention, participation was at its highest and the issues were most clearly framed. Party structures thus allowed for an economy of participation and dialogue.\(^7\)

This ideal of party responsibility, however, only has force to the extent there are two strong, competitive and responsive party structures and the issues coalesce along a clear right/left continuum.\(^8\) By 1968, with divisions in the Democratic Party over the war in Vietnam and race, many rank and file members viewed party leaders as unresponsive. The Democratic primary reforms after 1968, which substantially increased the importance of primaries, opened the process to candidates selected outside the traditional party establishment. With the increasing importance of the media and public funding, as well as the decline of party identification in the public, the nominating process has become a far more open one.

These changes have had several beneficial effects—the parties are more receptive to certain types of new ideas and there is far greater scrutiny of the primary political process than backroom dealmaking allowed. The rigidities of the party bureaucracies have also diminished in many respects. But there are several difficulties with the current system, which should not be overstated but are real.

First, making the parties directly responsive to the party primary electorate may have a tendency to advantage candidates who are at the ideological wings. Since the median voter of each party is likely to be more at either wing than the median voter of the general electorate, and more ideological party members tend to vote in primaries, the group selecting candidates in a primary is unlikely to reflect the goals of the general electorate very well. While primary voters may act strategically with an eye to the general election, they are probably less likely to do so than party professionals.\(^9\) Thus, a primary system may tend to push each party towards candidates at its wing—the left of the Democratic Party, and the right of the Republican Party.\(^10\)

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7. Related to this binary two-party concept of political accountability is a theory of retrospective accountability in government. Since parties "captured" government, they could be held retrospectively accountable for what had been done in government. This mode of accountability was potentially superior to popular directives to the extent the public is considered better at evaluating the past consequences of government action, rather than directing its leaders what to do. See generally Morris P. Fiorina, *Retrospective Voting in American National Elections* (Yale U. Press, 1981); V.O. Key, Jr., *The Responsible Electorate* (Belknap Press, 1966).

8. To the extent political preferences and visions are multi-peaked or stochastic, then majority rule itself may have less meaning, except as a matter of agenda control.


Second, the free-wheeling discussion characteristic of primary politics may lead to open fissures within the party that cannot be repaired for the general election. Theorists of civic republicanism and pragmatism envision public dialogue on the issues as leading toward identification of common ground and respect for difference. Whatever may be the case in other contexts, political parties, in order serve the functions described above at the general election, must properly frame the issues to the public, maximize participation and establish a system for managing debate and conflict. To achieve these goals, parties cannot allow all issues to be placed on the public agenda, but instead must create institutions that will manage the public dialogue. Two political parties—while clearly excluding certain issues—have it in their institutional interest to surface issues that will capture a majority of the electorate and minimize divisions that ultimately are unlikely to sway the mass public. Multiple candidates, in contrast, may not have it in their interest to focus public debate on major systemic issues that will capture the mass electorate. Indeed, the existence of visible and fractious party divisions may be one explanation for the weakness since 1968 of the Democratic Party, whose open primary battles appear to have contributed to its inability to win presidential elections in the fall.

A third potential problem with the primary system is that it may make election campaigns even more candidate-centered, that is, focused on the individual personal qualities of candidates, rather than the broad public issues. While the line between issues of candidate personality and public policy is murky, primaries with a large number of candidates seeking to distinguish themselves from others of similar political persuasion often focus on issues of personality. Not only may little divide individual candidates ideologically from other candidates, but the time needed to mount an effective issues campaign which will affect the electorate is quite limited during a primary. The result is that fewer of the finite political resources of the party may be expended on creating the party political capital on particular issues, and getting out the party message and vote in November.

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13. This problem should not be overstated. In many cases the public, at least in the general election, may be able to sift through the symbolism and rhetoric of the campaigns to
Finally, and implicit in all of the above, primaries can diminish the organizational power of political parties, which can be valuable in stimulating political participation and election turnout within the society, getting things done in government once the primary season is over, and generally holding politicians as a group politically accountable for government action or inaction in a world of multiple actors and unclear collective responsibility. Given the changes in the primary system, and the effect of other political and social changes on the decline of parties more generally, politicians understand that the party leaders and organizational apparatus will be less important in choosing candidates. The media, PAC's and consultants are far more significant than in the past in helping to win nominations. The result may be a political system where individual representatives in government are less beholden to the leadership when legislation is needed or decisions need to be made or implemented.

Of course, many of these problems can be and are overcome. Leaders can and do discuss the issues; the public votes; middle of the road political leaders get nominated and win elections; and parties do have influence. Yet despite its other advantages, the primary system can create a burden, a cost of political organization, which may increase some of the political problems and costs of political mediation, organization and decisionmaking.

Some of these concerns, especially the rise of candidate-centered primaries, animate the proposals outlined in *Democracy and Deliberation*. Criticizing our current focus on sound bites, daily polling data and early primaries, Fishkin calls for the creation of a national party jury randomly selected from the party electorate at the beginning of each primary season. This jury would meet with the candidates early on for an extended period to discuss the issues, and ultimately vote on their favorite. Ideally, the results would be widely reported in the public press, overshadowing the daily and often distorted polling data which has become so prominent in selecting candidates. If politically significant, such jury polls might

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15. The opening up of the party may also have diminished the repeat-player qualities of political relationships when there was a hierarchically organized party structure. As a result, some might argue, there could be more of a potential for suboptimal strategic behavior. See Robert Axelrod, *The Evolution of Cooperation* (Basic Books, 1984).

force the candidates to think about and come to terms with major issues, which may count for more in an extended give and take.

There is much to be said in favor of this change. Fishkin focuses on important issues and their possible alleviation through modest, but (as a result) politically realistic reforms. The fundamental assumption of Fishkin's approach is that our current political institutions suffer from insufficient debate about public issues. The face-to-face sustained discussion of the jury would allow a deeper analysis, and hence perhaps a greater likelihood of the selection of candidates who would better deal with public problems. While legal scholars such as Frank Michelman and Owen Fiss seem to locate the greatest source of civic republican virtue in the courts, these institutions obviously lack sustained democratic legitimacy. Others have pointed to the Congress, or the federal bureaucracy, as other institutional facilitators of dialogue. Fishkin would create a new institution—a national jury, which has the size advantages of the courts yet arguably greater democratic legitimacy, at least in the eyes of social scientists steeped in the theoretical beauty of random samples. More important, this new creature would be incorporated into a part of the political process that is characterized by very little systemic dialogue—the political primaries. While a quite modest change, this may help.

Of course, the mechanics of the proposal may need to be worked out. For one, there is no good opportunity for experts to participate actively in the jury process. Candidate comments on the budget, for example, may be quite meaningless without the opportunity for, or fear of, extended scrutiny by experts in the field. Similarly, interest groups may want their input into the process. While there is much negative that comes from organized interest group influence, individuals clearly have much to gain from their knowledge of and participation in the activities of such groups. As the civic republicans have argued, "[i]nterest groups may be essential [to] civic republicanism . . ., because they consolidate people with common private interests and backgrounds, . . . streamline the input that the government receives, . . . and provide feedback to group members about how the government's ultimate decision addresses their particular concerns."19

19. Seidenfeld, 105 Harv. L. Rev. at 1530-31 (cited in note 18). Indeed, absent that
While these concerns are admittedly minor, especially given the limited use of the poll, there is still something disquieting to a democrat such as myself about this approach, and the direction in thinking it might reflect about political reform if it were to be generalized.\textsuperscript{20} On paper, it is ingenious. If the public is incapable of sustaining a meaningful dialogue on the issues, then perhaps a randomly selected jury of political peers will. The randomness of the selection process will give it some political legitimacy, and its size and length of operation will provide the opportunity for the intellectual depth lacking in mass political institutions.

Unfortunately, Fishkin’s solution to the primary problem—to create meaningful participation for only a representative sample—could run the risk of exacerbating the systemic problem of declining public participation, both practically as well as symbolically.\textsuperscript{21} In a post-industrial state, healthy political institutions ultimately need to facilitate mass participation and dialogue. Yet Fishkin’s approach, if generalized, would not only avoid assimilation of the mass public, but might further diminish the influence of the traditional party structure. To the extent private juries are viewed as crucial in the selection of candidates, the importance of the party organization could be further reduced. This may be important not only on election day, when the organization may not be there to help get out the vote, but also in the running of government, when the relationships forged between the party elite are useful in getting a president’s program adopted in Congress and implemented in the bureaucracy and the states. Simply put, candidates selected by jury meetings with the public may well be less responsive to party structure.

Beyond its affect on overall participation, it is also unclear how much this proposal will ultimately further the selection of institu-

\textsuperscript{20} As suggested above, \textit{Democracy and Deliberation} is very much a part of the newest tradition of scholars attempting to synthesize democratic and dialogic principles in the construction of political institutions. Acknowledging that the current primary system does not create a meaningful public dialogue over the issues, Fishkin then turns to a different form of representative dialogue—a candidate debate judged by a randomly selected political jury.

\textsuperscript{21} The proposal is intended to confront, but does not solve directly, the problem of the massive decline in political participation. While the primaries were originally created to increase political participation in the United States, the evidence is that they have had the opposite effect. Political participation is at the lowest levels in history in the United States, probably skewing the background of the electorate that ultimately makes the decisions and perhaps diminishing the quality of the focus of those who do participate. See Walter Dean Burnham, \textit{Shifting Patterns of Congressional Voting Participation} in Walter Dean Burnham, \textit{The Current Crisis in American Politics} (Oxford U. Press, 1982); Sam Peltzman, \textit{Voters As Fiscal Conservatives}, 107 Q. J. Econ. 327 (1992).
tionally responsible leaders. The assumption of Fishkin's approach seems to be that the problem with our primary system is that it does not select leaders who are aware of and willing to deal with public problems. We suffer from insufficient public debate.

I have some doubts. Given the extensive discussion of public problems in the media, think tanks and talk shows, I am less certain that our problems are a lack of cognition as much as a lack of ultimate political accountability of leaders in government, which indirectly frames the nature of debate before and after elections. With our frequent current state of divided and dispersed political institutions, our leaders and the public know that elected officials do not need to formulate a program dealing with all the issues, balancing off the interests of different groups, and forging a communally responsible plan, for which they will ultimately be held responsible. Symbolic stands and vague promises are successful partly because politicians and the public know that politicians are unlikely to be held personally responsible for the past or future performance of government when they were in Congress or the White House. To the extent this is true, political leaders will be able to talk to the jury in private, as they talk to the rest of us in public, about waste, fraud and abuse, obfuscating ultimate choice and responsibility. Fishkin's plan should improve on the primary system we have now, but we should be circumspect, as I am sure he would be, about extending it elsewhere; it certainly will not lead to a deliberative democracy in this stronger sense. It may simply be a matter of the second best.

Thinking about political reform has ordinarily focused on the extent to which institutions in Congress, the executive branch and in political parties frame issues for political choice, stimulate and organize political participation, and/or implement communal judgments. As entities with an ongoing existence, political institutions generally are thought to perform these roles by overcoming transaction costs, facilitating systemic debate, minimizing collective-action problems and promoting collective responsibility. Political parties in particular may play a special role in overcoming the costs of collective action and responsibility, although we are only vaguely beginning to understand on a formal level how this is accomplished.

Unfortunately, whatever their other values, primaries seem to

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23. For the most part, the political accountability of politicians is retrospective, as politicians are held accountable for their past actions. Dialogue in this systemic sense is not addressed by the Fishkin proposal.
have undermined some of these functions by reducing the significance of political institutions to the political process. They can force individual politicians into constant direct contact with the mass public unmediated by organizations traditionally structured to further the goals outlined above. Moreover, as a practical matter, while Fishkin's proposal may well help ameliorate the decline of collective responsibility accompanying these changes, it represents—paradoxically—a somewhat similar approach. Like the primaries, it minimizes the role of institutions—organizations structured over time to narrow political choice and facilitate mass participation—from the process, both practically and symbolically.

As an incremental change, it should help. The national jury has the advantage of reducing the impact of the ten-second sound bites and weekly polls. Taken as a model of government and expanded to other contexts, however, the national jury could be viewed as undermining those institutions that historically attempted to fulfill that role—in effect, of representative government itself. Fishkin's quite thoughtful book is a valuable contribution to thinking about primaries. I would be wary, as I am sure Fishkin would be as well, about generalizing from his insight.

John V. Orth4

Reviewing a collection of essays is a challenging task; reviewing essays about state constitutions when the reviewer is thoroughly familiar with the text and history of only one state constitution is even more challenging. The fifteen essays in this collection (not counting the editors' introduction) cover a wide array of topics, ranging chronologically over the two centuries of American history. Half the essays treat their chosen topics throughout the several states, while half focus, more or less exclusively, on the experience of a single state; the geographic bias, as always it seems, favors the East: two essays on Virginia, two on New York and two on Connecticut.5 All are well written; individually interesting, they unite to form a provocative whole. The editors, organizers of the conference for which the papers were originally prepared, are to be congratulated. Rather than try to do justice to each of the essays, I propose in this review to comment on several themes which are (or ought to be) central to the subject.


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3. Professor, Albany Law School.


5. The geographical focus of several essays appears in their titles. In two cases the focus appears in the text: H. Jefferson Powell's "case note" concerns a Virginia case, Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20 (1794), and William M. Wiecek concentrates on New York.
State constitutions are now in the limelight. For better or worse, they were dramatically called to center stage by Justice William J. Brennan in a famous article in 1977, published in the *Harvard Law Review*. Disappointed by defeats on the United States Supreme Court under Chief Justice Warren E. Burger, Justice Brennan invoked state constitutions in aid of individual rights. The Chief Justice retorted with a fervent prayer that state courts not mimic what were to him the excesses perpetrated by the Court under his predecessor, Chief Justice Earl Warren. What had been the sleepy preserve of a few state lawyers and eccentric academics soon became a sharply politicized discipline. Sounds of the political clash are occasionally audible in these essays, although in most cases only as "noises off."

The cause of the commotion, as everyone knows, is that state constitutions contain many of the same promising generalities as the federal Constitution. Indeed, the federal Bill of Rights copied many of the provisions in prior state bills of rights or, as they were then more commonly called, "declarations of rights." Although the essayists regularly recognize this fact, they treat it as unproblematic. To a late eighteenth century lawyer, familiar with both the federal Bill of Rights and state declarations of rights, one suggestive difference was, however, immediately noticeable: while the federal Bill of Rights was in the form of an appendix tacked onto the original document, the state declarations of rights preceded the constitutional text. The North Carolina Declaration of Rights, for example, was adopted the day before the Constitution, the latter incorporating the former by reference. Logically as well as chronologically prior, the Declaration of Rights contained, in addition to the prized guarantees of individual liberty, a set of principles to inspire and explain the subsequent details of governmental arrangements. For instance, the Declaration of Rights leads off with the general principle of popular sovereignty, "That all political Power is vested in and derived from the People only," then proceeds to the local application of that general principle, "That the People of this State ought to have the sole and exclusive Right of

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8. The North Carolina Declaration of Rights was adopted on behalf of the people by the Fifth Provincial Congress on December 17, 1776. William L. Saunders, ed., 10 *The Colonial Records of North Carolina* 973 (1890). The North Carolina Constitution was adopted on December 18, 1776. Id. at 974. It provided "That the Declaration of Rights is hereby declared to be Part of the Constitution of this State, and ought never to be violated on any Pretence whatever." N.C. Const. of 1776, § 44.
regulating the internal Government and Police thereof." There follow (among other general principles) declarations in favor of separation of powers and frequent elections. The constitutional text implements these principles by providing for direct annual elections of state senators and representatives and indirect elections of executive officers and judges. After spelling out the principles on which the new governmental machinery should be erected, the Declaration of Rights then proclaims principles of individual liberty (freedom of the press, right of assembly, religious liberty), as well as the now familiar code of criminal procedure. Attention to the structure of early declarations of rights like North Carolina's casts new light on the relationship between self-government and individual rights.

I

To Burt Neuborne, whose essay is written from the perspective of a "civil liberties lawyer," the past is familiar country: the Revolutionary elite was imbued with the values of eighteenth-century philosophy, which "resonate well with the notion of individual rights." To historian Donald S. Lutz, the past is a different country: "Bills of rights . . . were viewed as providing a statement of broad principles rather than a set of legally enforceable rights." Lutz vouches in evidence the frequent usage in the first declarations of rights of "admonitory language" like should and ought, rather than what he calls "legally binding" language like shall and will. Differing with Neuborne, Lutz contends that state courts "did not actively protect these rights in any substantive sense." Apparently conceding Lutz's point, Connecticut Chief Justice Ellen A. Peters tries to find her way back to familiar terrain by relying on traditional common law safeguards of individual rights, while Suzanna Sherry, recognizing the structural divide between declarations of rights and constitutional texts, focuses on the safeguards of individual rights in the former and the purely institutional arrangements in the latter. Sherry observes: "In cases involving individual rights, the natural law component was usually dominant. In cases involving the structure of government, however, the written constitution was often more decisive." These comments, then, imply three dichotomies, familiar today but far less so the century before last: (1) ought as opposed to shall, (2) natural and common law—the two were related—as opposed to written constitutions, and (3) declarations or bills of rights as opposed to other constitutional provisions.

With regard to the first, it may be observed that legal usage in

10. Id. § 2.
the late eighteenth century had not settled down in the matter of *ought* and *shall*. The North Carolina Declaration of Rights, for example, in successive sections declares “That Elections of Members to serve as Representatives in General Assembly *ought* to be free”\(^1\) and “That in all criminal Prosecutions every Man has a Right to be informed of the Accusation against him, and to confront the Accusers and Witnesses with other Testimony, and *shall* not be compelled to give Evidence against himself.”\(^2\) It is hard to believe that the drafters thought they had crossed the line between admonition and command. In this context, it is worth noting that the wording of the North Carolina declaration in favor of free elections closely follows that of the comparable section of the Virginia Declaration of Rights\(^3\) and that both clearly derive from the English Declaration of Rights (1689): “That Elections of Members of Parliament *ought* to be free.”\(^4\) Certain expressions become stereotyped by use, like the bad Latin of the phrase *ex post facto*. In any event, commands to the sovereign may be more politely phrased but are commands nonetheless, just as a hostage with a gun to his head is coerced whether or not the gunman says *please* and *thank you*. (For centuries English subjects initiated suits against the Crown in the polite form of the “petition of right” rather than with the usual process.) After all, what makes the word *shall* a word to conjure with is only that the judges have decided it *shall* be so. In North Carolina the 1776 Declaration of Rights was carried forward verbatim (including *ought* and *shall*) in the 1868 Constitution, where it appeared as Article I. In 1971 it was again brought forward in the state’s third Constitution, although this time *ought* was throughout replaced with *shall*. By the twentieth century it was plain that the change made no difference; indeed, the failure to make it in 1868 had made no difference.

The dichotomy between constitutions and other sources of law, be they common or natural law, is certainly clearer now than it was two centuries ago. When Chief Justice John Marshall in *Marbury v. Madison* struck down the offending sentence in the Judiciary Act of 1789, he roundly declared that “a law repugnant to the constitution

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1. Id. § 6 (emphasis added).
2. Id. § 7 (emphasis added).
3. Va. Const. of 1776, Declaration of Rights, § 6. Although the North Carolina Declaration of Rights is used for exemplary purposes in this review, much that is said of it could also be said of the Virginia, Maryland and (to some degree) Pennsylvania Declarations of Rights. For a tabular comparison of the North Carolina Declaration of Rights with the other three, see John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1797-1802 (1992).
is void,” meaning, of course, a law repugnant to the United States Constitution is void. Yet Marshall was only restating an idea from the celebrated 1610 English case involving Dr. Bonham, in which the supreme law referred to was a medieval amalgam of common and natural law, with popular ideas of fair play mixed in. Judges, like other human beings, necessarily understand the present in terms of the past, and they require at least as much time as anybody else to recognize something decidedly new. Like John Marshall, state judges naturally understood the newfangled declarations of rights in terms familiar to them from prior experience of English common law. (The same “time lag” occurred in the 1870s and 1880s as a generation of United States Supreme Court Justices read the Reconstruction Amendments in light of their pre-Civil War understandings of federalism.)

Just as ought and shall could not be sharply distinguished in the late eighteenth century, and just as the modern positivistic concept of the constitution had barely emerged from the welter of other constitutional sources, so too the declaration or bill of rights was not yet sharply set off from the rest of the Constitution. The drafters were not conscious of a discontinuity when they passed from the declaration of principles of self-government to the declaration of principles of individual rights. The foremost guarantee of liberty was to be representative government itself. Today, especially for those believers in individual liberty who put their faith in elite, insulated, countermajoritarian institutions like the judiciary and who see the people as the major threat to liberty, the original declarations of rights with their mixture of institutional and libertarian features seem a hopeless hodge-podge. The Founders saw it otherwise.

Of course, when one came to ask just how separate the separated powers had to be or how frequent the “frequent elections,” one looked to the specific provisions in the Constitution, not to the general principles in the Declaration of Rights. But then, one did the same thing when one sought specific content for the declaration of religious liberty: the text of the North Carolina Constitution made plain it prohibited an established church but not a religious test for office. And so mutatis mutandis with other rights. “That every Freeman restrained of his Liberty is entitled to a Remedy, to enquire into the Lawfulness thereof, and to remove the same if unlawful, and that such Remedy ought not to be denied or delayed.”

15. 5 U.S. (1 Cranch) 137, 180 (1803).
17. N.C. Const. of 1776, §§ 32, 34.
The obvious reference here was “extratextual”: the Habeas Corpus Act of 1679, received as part of the state’s common law. The Declaration of Rights declared generally “That Perpetuities and Monopolies are contrary to the Genius of a free State, and ought not to be allowed”; the Constitution specifically required “That the future Legislature of this State shall regulate Entails in such a Manner as to prevent Perpetuities.” Finally the General Assembly did its duty and adopted the original of the statute still in force. In cases without constitutional or statutory text, including the right of free speech and the guarantee against double jeopardy, one looked to the glorious grab-bag of the common law. After all, no one ever said the Constitution plus its associated Declaration of Rights created the essential rights of popular sovereignty and individual liberty; they only declared (some of) them and made them operational.

After so promising a start, where did the state declarations of rights go? By and large, they proved more durable than the institutional arrangements and are still operational. In North Carolina, for example, while the Revolutionary Declaration of Rights was carried forward in 1868 (with a few additions made necessary by defeat in the Civil War), the machinery of government was radically redesigned, including among other things the direct election of judges. Part of the problem from the modern libertarian perspective is that state courts pursued their own understandings of civil rights, not those of twentieth century liberals, tolerating racial segregation, for example, and pioneering concepts of substantive due process. This means their set of values was “conservative,” at least by the lights of Burt Neuborne, to whom “conservative means that wealthy people like it and poor people do not”—a candid but crude definition that, by the way, assumes a unity of interest on each side of the economic divide that was usually lacking.

II

Increasingly, after the Civil War, state jurisprudence was eclipsed by federal. And by the turn of the century, powerful homogenizing forces were at work in the legal profession, not least the

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20. N.C. Const. of 1776, Declaration of Rights, § 23.
21. N.C. Const. of 1776, § 43.
new model law school created by Dean C.C. Langdell at Harvard. In his essay, Lawrence M. Friedman recognizes in passing the impact of legal education: "Law schools were generally concerned with 'legal science'; their prestige depended on their national rather than their local status; state constitutional law was irrelevant to their central concerns." Second only to the Supreme Court and the Supremacy Clause, "national" law schools ensured the primacy of federal law and legal institutions. No one should underestimate the extent to which local legal elites were reoriented by their legal education. Discussing a sentence from perhaps North Carolina's most famous constitutional decision, Bayard v. Singleton, an early example of judicial review, the North Carolina Supreme Court in 1982 mistook clear references to the state and its constitution for references to the federal union and Constitution. When Judge Samuel Ashe, one of the drafters of the North Carolina Declaration of Rights and Constitution, wrote in 1786 "the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system of those fundamental principles comprised in the Constitution," he meant, of course, by "country" North Carolina and by "Congress" the Fifth Provincial Congress. The state Supreme Court in the late twentieth century thought he was "obviously referring to our national government," so completely had traditions of localism and "state sovereignty" been effaced, even south of the Mason-Dixon line.

Legal education not only contributed to the decline of state constitutions, it remains a formidable barrier to their future development. State constitutions simply do not fit into the categories of modern law schools. Although logically part of the subject Constitutional Law, they find no room in the course of that name, not only because of its national focus but also because they do not lend themselves to the summary treatment appropriate to their subordinate status. Unlike partnership law, quickly reviewed by way of the Uniform Partnership Act at the beginning of the course on Business Associations, state constitutional law is too unwieldy for similar treatment. Nor do they lend themselves to the common law theme-and-variation approach used in the Property course, although they share the jurisdictional specificity of land law. If only intractable local traditions and vested interests had yielded gracefully to the blandishments of the Model State Constitution, legal

24. 1 N.C. (1 Mart.) 42 (1787).
25. Id. at 43.
III

The search for a "usable past" can make historians queasy. In his essay, William M. Wiecek says flatly that "history cannot be used" and finds its "principal lesson" to be banal: "things did not have to turn out the way they did"—a point with which I must agree, having just said much the same thing myself. Yet H. Jefferson Powell is probably right to observe that "history is to be used" and to insist on its responsible use: "Ransacking the past for isolated 'good quotes' is bad history and bad law (although, of course, at times politically effective)."

Politics, as we know, is what sparked the recent interest in state constitutions. Burt Neuborne, the "ACLU lawyer," is candid about his objective and uncertain only about the proper metaphor, economic or military: he aims "to open up a second market or a second front in the enforcement of individual rights." State constitutions are decidedly second best; federal court enforcement of federal constitutional norms remains the "strategy of first choice." Neuborne waxes nostalgic for the good old days, when he appeared before federal judges whom he found to be "smarter" than their state counterparts and "much more elite." The federal court system offers "the most insulated forum possible," insulated, that is, from the non-elite. This is necessary because Neuborne's causes are unpopular; his norms frankly "countermajoritarian." Elections are the thing to be feared: "an angry populace" turned the enlightened California Supreme Court out of office. Fortunately, state supreme courts are now "less majoritarian than they used to be," thanks to the movement toward appointments or a "formal election process that is not particularly threatening to the judges."

Popular sovereignty, seen from this perspective, is the enemy. Far from being the first right in the Declaration of Rights, it now appears antithetical. Only a person without historical sense can fail to see the ironical similarity between such a viewpoint and that of England's colonial governors: not yet having learned to call themselves countermajoritarians, they styled themselves simply the "better sort." Their ideological heirs in the nineteenth century, as documented in James A. Henretta's essay, called more candidly for a restricted franchise. This is not, of course, to say that judges

ought to be chosen in partisan elections (as they are in North Carolina), nor is it to say that individual rights should be at the mercy of plebiscites. It is simply to observe that even Federalists like Alexander Hamilton, smarter and much more elite than anybody else, realized that they had somehow to square liberty with popular rule: they appealed from the people angry to the people calm. Constitutions are the higher law precisely because they are the majority's considered opinion.

**REFLECTIONS OF AN AFFIRMATIVE ACTION BABY.**

Daniel R. Ortiz

Despite its press, this is not really a book about affirmative action. To be sure, it swipes at the various arguments used to justify affirmative action programs, challenges many orthodoxies and argues for a major overhauling of racial preferences, but its real concern lies elsewhere—in the contemporary politics of African-American identity. Racial preferences may have sparked these reflections, but racial identity remains the focus of their true concern. To understand this, however, discussion must begin with Carter's ostensible subject: affirmative action.

Carter takes on both the "traditional" and "modern" approaches to racial preferences, by which he means the remedial and diversity justifications, respectively. Although both approaches actually have a long history in the debate and can, for example, be found in *Regents of the University of California v. Bakke*, it is true that the diversity rationale, the "modern" approach, has enjoyed increasing prominence with the advent of critical race studies. The more "traditional" approach captures little of Carter's interest and he dispatches it quickly.

Against those who believe that racial preferences are permissible and sometimes even necessary to remedy racial oppression, Carter makes three primary arguments. First, he notes that racial oppression has not harmed all African-Americans the same way.

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1. William Nelson Cromwell Professor of Law, Yale University.
2. Professor of Law and Harrison Foundation Research Professor, University of Virginia.
Some, including himself, have suffered from it but arrived with nearly all their opportunities intact. Others, he admits, have not. But for him the point remains that oppression has not injured every African-American in equally serious ways and that different forms of oppression have injured members of other classes. Thus, simple racial preferences seem a very rough remedy.

Second, Carter argues that racial preferences cannot effectively compensate for any past disadvantage. The belief that they can is simply a “pretense” we should “abandon.” This is true, he argues, because racial preferences help those African-Americans who need help least or, put differently, those who most need compensation are least able to take advantage of the benefits affirmative action programs can bring. In education and the professions, for example, affirmative action is just a form of “racial justice on the cheap” that eases white guilt and benefits middle-class African-Americans while ignoring the misery of the larger number of blacks in the lower class.

In fact, to the extent people believe preferences help remedy inequality they may actually deepen it instead. The more we are lulled into complacency with cheap, cosmetic fixes, the less likely we are to tackle the primary and more intractable obstacles to black advancement, like the “social infrastructure of inner-city communities.” Unlike affirmative action, programs that address these real problems do not come cheaply.

Third, Carter argues that the costs of affirmative action to the black community itself clearly outweigh any benefits such programs might bring. Racial preferences, in his view, inevitably marginalize those they aim to help. They limit the range of African-American ambition and success to that of being not the best, but only the “best black.” Like any double standard, those implied in racial preferences stigmatize the success of those they help. Under the guise of redressing injury, they reintrench the stereotype of black inferiority more deeply—in the eyes of both whites and people of color.

None of these arguments is new. They represent the standard objections to remedial justifications for affirmative action. The only innovation is that Carter, a self-admitted beneficiary of such programs and leading African-American scholar, is now leading the charge. The importance of this part of the book, in other words, lies not in what is said, but in who says it. This is true in two senses. First, Carter’s identity as a beneficiary and a scholar of color may lead people inside and outside the African-American community to take the arguments against such programs more seri-
ously. If people within the community itself speak against preferences, we cannot dismiss the arguments as easily as we might have before. Second, and more important, the hostile reception of Carter’s views within the African-American community leads him to explore his place in that community and the notion of racial identity itself. This part of the book more seriously engages him and holds much more interest for the reader.

Racial identity implicates what Carter calls the modern or diversity rationale for affirmative action, which he unequivocally rejects. Unlike the earlier approach, this view makes difference, not injury, central. It holds that African-Americans, regardless of any injury they have suffered, should be represented in many arenas because of their distinctive cultural perspective. Although Carter admits that “history does make black people different from white people” he argues both that this history does not make blacks different in “some predictable... way” and that blacks’ difference should not be valued any more than anyone else’s. Holding all three of these beliefs together, however, proves difficult.

Carter’s rejection of the diversity rationale represents an oblique attack on critical race theory. Unfortunately, he somewhat misrepresents it. To him, critical race theorists value black difference almost solely because of historical oppression. Only the suffering of African-Americans, he believes, could warrant the privilege diversity theorists would grant the black perspective. This view discomforts him because it creates a “hierarchy of suffering” that “reject[s]... the idea that recognizing difference can be a binding force, a form of love.” “[M]aking the fact of suffering the badge of authority defeats the purpose of valuing diversity,” for it “make[s] a potentially bitter contest of what ought to be a solemn and shared understanding.” The problem with critical race theorists, in other words, is that they divide those who have suffered from each other rather than bringing them together. To avoid this danger, Carter would enforce a parity among marginalized voices, even if the effect is to subordinate them all to majoritarian perspectives.

Critical race theory, however, does not value diversity just because of the suffering that may have defined it. We can privilege a black perspective, if we agree with Carter that one exists, without creating a divisive hierarchy of suffering. In this view, we should recognize difference not because of suffering, though that might make such recognition even more important, but rather because “love,” to use Carter’s term, requires us to recognize what is centrally important to others we respect. We should value African-Americans’ viewpoints and seek to include them in many of the
arenas of culture, in other words, because such perspectives distinctively and centrally characterize a community of importance to us. How can we "love" without granting such respect?

Relational feminism, another diversity perspective Carter discusses, makes this point clear. Unlike Carter's version of critical race theory, relational feminism does not rest its argument for valuing women's "different voice" on women's oppression. Relational feminists argue instead that we should represent this different viewpoint in culture simply because it is different and characterizes many people. The relationship between representation and oppression is, in fact, just the opposite of what Carter portrays with respect to race. To relational feminists, suffering results from failing to acknowledge difference. It is not the case that difference necessarily stems from suffering.

At bottom, then, Carter fails to engage critical race theory's concept of identity. Recognizing diversity does not have to create contests of suffering that divide oppressed peoples from each other but can instead represent "a form of love." Valuing central differences can be the highest form of respect one community can pay another. This does not, of course, solve all the difficulties. We must still determine when a community has a different perspective, how central that perspective is to its identity and whether the community deserves respect. To be sure, these are hard questions. But we cannot ignore them simply because they are hard. Otherwise we put ourselves in the position of having to say that since the Jaycees and African-Americans both have viewpoints over some questions that differ from the rest of society's we have to respect both their perspectives equally—which, in Carter's terms, means not at all.

Carter's ultimate conclusions suggest that he himself distrusts some of his arguments. As he admits, "[g]iven the logic of all that I have said [against affirmative action], I often feel that I should oppose all racial preferences in admission to college and professional school. But I don't." Instead, he advocates a return to affirmative action's "roots." To him, "the proper goal of all racial preferences is opportunity—the chance at advanced training for highly moti-

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6. In fact, the view that women's different voice reflects oppression represents the most powerful radical feminist critique of relational feminism. See Catherine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourses on Life and Law* 32, 39 (Harv. U. Press, 1987) ("Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men.")
vated people of color who, for whatever complex set of reasons, might not otherwise have it.” This sounds innocuous enough, but how can he defend it?

Enhancing opportunity for one group diminishes opportunity for others. Giving opportunity to those who “might not otherwise have it” also presupposes the use of a separate standard for people of color. But, according to Carter’s own reasoning, such double standards lead to invidious racial stereotyping and the “best black” syndrome. How can we justify either breaching meritocratic standards or placing these kinds of costs on people of color? Carter never answers and for good reason. On some level he would have to resort to exactly the types of justifications he has rejected. Carter’s position thus contains a highly charged ambivalence which threatens to undermine his claims.

The root of his ambivalence lies in his notion of black distinctiveness. Although he admits that blacks are different from whites, he argues against any definite sense of difference. Like much bad deconstructive theory, blacks seem to be characterized not so much by particular differences, but by difference itself. Thus, “[racial] solidarity . . . means not, as the diversity movement would have it, embracing some special perspective gained from our history of oppression; . . . it means rather, embracing our people themselves, in all their wild and frustrating variety.”

But can one ground a group identity largely in group members’ differences from one another? I think not. First, it would be impossible to define the group’s outer boundaries. Are other groups, particularly whites, less internally diverse? Second, internal diversity is at bottom inimical to the very concept of a group identity. The more different people within a group are from one another and the more important those differences are to them, the less likely they are to view themselves as a meaningful group. The more numerous and important the differences, in other words, the thinner the shared identity.

Carter wants to have it both ways. On the one hand, he insists that black group identity is thick enough to be constitutive of his and other blacks’ individual identity. Race, he says at one point, defines “all that we are.” On the other hand, however, he insists that there can be no “shibboleths” that define one as a black. His call for “[black] unity, not in the sense of groupthink but in the sense of group love,” suggests that racial solidarity lies primarily in toleration of difference. African-Americans, in this view, are a people with a shared history but no real shared values. They seem more a bunch of classical liberals who happen to be black—just an-
other caucus in the liberal community—than a people with a special
culture.

So deep does Carter's belief in liberalism run, moreover, that he
thinks "identification with an ethnic group" should be "a con-
scious decision." Even community affiliation should reflect autono-

mous choice. Thus, in his fantasies, he muses over the possibility of purely voluntaristic communities: "What I envision is the possibil-
ity that each of us might make a choice about which racial group we
prefer to join." He recognizes, of course, that race is not now a
choice, but it "should ideally be [one], a decision one makes to
claim a people, a culture, a history, as one's own."

I must admit that, as a cranky liberal myself, I have some symp-
athy for this unrealistic position. But I do not think you can have it both ways. Either the community is special, rich, and constitutive of
individual identity or it is not. The problem may be that Carter
finds himself trying to straddle a divide within the African-Ameri-
can community itself. Carter quite honestly describes himself as
different in many respects from most African-Americans. He is "a
middle-class professional living in the suburbs," one of affirmative
action's success stories. His success, however, places him across a
class divide from most of the people he shares a history with, a
divide which, he believes, now more than race determines the life
opportunities of people of color.

At times Carter acknowledges these limits to his experience and
carefully narrows his arguments to the black middle and pro-

fessional classes. Thus, in a footnote, for example, he states that
many of his arguments against affirmative action do not extend to
nonprofessionals. At other times, however, Carter speaks as an "in-
tellectual" whose black experience qualifies him to speak to all parts
of the African-American community. He realizes his own differ-
ence from most of the people he speaks to but still finds it necessary
to be considered part of the group. This causes him to stretch
group identity very thin, thin enough to cover both the middle and
poorer classes.

His own belief that class, more than race, now defines people's
opportunities should lead him to question this strategy. If he is
right, there are several black communities, not just one, and on
some particular issues some of them may identify more with mem-
bers of other groups, including some whites, than with other black
communities. Carter suggests, moreover, that the success of affirm-
avative action may itself be partly responsible for this community di-

vision. Insofar as his own views of preferences represent a classically liberal, middle-class outlook, they reflect the success of those civil
rights programs, including preferences, that enabled him to reach or stay in the middle-class. Thus, affirmative action may in one sense be self-limiting. Its very success may be partially responsible for calls from within some quarters of the black community to limit it.

This is not, however, a simple case either of majoritarian coop-
tion or of some victims pulling up the ladder before others have a
chance to escape. It instead reflects the importance of economic status to self-definition in our culture. As Carter says: “The day is
gone when large numbers of black students see themselves as the
vanguard of a revolution; what students want now, and with reason,
is a piece of the action. So do I.” Perhaps one effect of the civil
rights movement’s success is the development of such class fissures
within the African-American community. Carter’s reflections,
then, are ultimately not about affirmative action, but about what it
means to be both black and traditionally successful in a world that
still limits many blacks’ chances of success. The book’s importance,
in other words, lies not in its arguments, but in its ambivalences.

JOHN MARSHALL HARLAN: GREAT DISSENTER OF
THE WARREN COURT. By Tinsley E. Yarbrough.1 New
$29.95.

Michael E. Parrish2

As Earl Warren and his Court moved aggressively in the late
1950s and early 1960s to eradicate racial segregation and to extend
the Bill of Rights to the states, the first Justice John Marshall
Harlan became a patron saint to Hugo Black, William O. Douglas
and other of its more liberal, activist members. The former slave
owner from Kentucky, mocked by Justice Holmes as “my lion-
hearted friend,” had dissented in The Civil Rights Cases,3 Plessy v.
Ferguson,4 Hurtado v. California,5 and Twining v. New Jersey,6 all of
which established his claim to being the jurisprudential progenitor
of those who battled to expunge racism from the Constitution and
to incorporate the Bill of Rights into the guarantees of the Four-
teenth Amendment.

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1. Professor of Political Science, East Carolina University.
2. Professor of History, University of California, San Diego.
3. 109 U.S. 3 (1883).
4. 163 U.S. 537 (1896).
5. 110 U.S. 516 (1884).
6. 211 U.S. 78 (1908).
The first Harlan’s burgeoning reputation for liberalism did not go unchallenged, however. Holmes’ own progeny, Felix Frankfurter, often on the defensive during the early Warren years, reminded the second Justice John Marshall Harlan that his grandfather had written for a unanimous Court in 1899 when the Justices refused to block a Georgia school board from closing an all-black high school while continuing to operate similar institutions for white students. Whether to test his own doubts about the Brown decision or simply to needle his junior colleague, Frankfurter pursued the issue relentlessly for several weeks. “I submit that any judge who thought that the Constitution, as a legal proposition, is color blind, would at least have been able to reach the lawyer-like result . . . in not leaving colored high school children out in the cold,” he concluded. With good reason, Harlan II remained unpersuaded by Frankfurter’s analysis of Cumming and convinced that his grandfather would have ruled against racially segregated public schools had a later case presented that issue.

For their part, those who placed Harlan I on a liberal pedestal in the 1960s seldom recalled that he wrote for the majority in Adair v. United States,9 where the Justices struck down on “freedom of contract” grounds an act of Congress that had attempted to end the union-busting practice of yellow-dog contracts on the nation’s railroads. How the jurist who dissented in Lochner and wrote a sweeping opinion that affirmed a broad commerce power for Congress10 could have also penned Adair has baffled legal scholars for a long time. Harlan I, it seems, was a man of contradictions.

So, too, was his namesake and grandson, a Rhodes Scholar and a high-priced Wall Street lawyer, who was named to the high court by Eisenhower in 1955 and served until 1971. Often bracketed with Frankfurter and Potter Stewart as one of the Warren Court’s frequent nay-sayers, Harlan II is most frequently remembered for resisting the application of the Bill of Rights to the states, rejecting court-ordered reapportionment, opposing the Miranda warnings,11 and backing the Nixon administration in the Pentagon Papers

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8. Frankfurter conveniently ignored Harlan I’s passionate dissent in Berea College v. Commonwealth of Kentucky, 211 U.S. 45, 67 (1908) where the majority, including Holmes, sustained a state law prohibiting racial integration in private schools. “I am of opinion,” Harlan wrote, “that in its essential parts the statute is an arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile state action and is, therefore, void.”
case.\textsuperscript{12}

But Harlan II has enjoyed a major renaissance of late that should receive yet another boost with the publication of Tinsley Yarbrough's fine biography. This past June, when the Supreme Court largely reaffirmed the right to abortion in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\textsuperscript{13} the five-Justice majority rested its constitutional arguments squarely upon Harlan II's broad conception of the Fourteenth Amendment's Due Process Clause which he set forth first in dissent in \textit{Poe v. Ullman}\textsuperscript{14} and later restated when concurring in \textit{Griswold v. Connecticut}.\textsuperscript{15} How Harlan II would have voted in \textit{Roe v. Wade}\textsuperscript{16} or \textit{Casey} must remain as shrouded in mystery as his grandfather's views on segregated public schools, but it can be argued persuasively that by utilizing his approach to the liberty protected by the Fourteenth Amendment in \textit{Casey}, the majority placed abortion rights on a firmer constitutional foundation than ever before.\textsuperscript{17}

Yarbrough, whose previous books examined the judicial careers of J. Waties Waring, Hugo Black and Frank Johnson, has written a sympathetic yet critical interpretation of the Justice most often associated with the conservative wing of the Warren Court, a spokesman for judicial restraint in an age of activism, a Frankfurter, some wag observed, without the mustard. Such a characterization is probably unfair to Harlan, who certainly lacked the latter's combative personality and acerbic wit, but whose judicial impact may prove to be more durable for those very same reasons.

Utilizing all the extant judicial papers from the period and drawing upon extensive interviews with Harlan's former clerks and associates, Yarbrough's study ranks among the best biographical works covering the Warren years. Avoiding tedious chronology, his wise selection of particular cases highlight Harlan's central values without drowning the reader in a swamp of detail. The Harlan who emerges was a very intelligent, kindly, well-intentioned man, but one who exhibited all the cultural and political limitations of his social class. When he was good, as in \textit{Poe v. Ullman} or \textit{Griswold}, he could be very, very good. But when he was bad, as in \textit{Flemming},\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{12} \textit{New York Times Co. v. United States}, 403 U.S. 713 (1971).
\item \textsuperscript{13} 112 S. Ct. 2791, 2804-08 (1992).
\item \textsuperscript{14} 367 U.S. 497 (1961).
\item \textsuperscript{15} 381 U.S. 479 (1965).
\item \textsuperscript{16} 410 U.S. 113 (1973).
\item \textsuperscript{18} 363 U.S. 603, 617, 638 (1960). Harlan provided the fifth vote and wrote for the majority in upholding the termination of social security benefits to an alien who had been deported from the United States for membership in the Communist Party during the 1930s.
\end{itemize}
he could be horrid.

Frankfurter, the immigrant lad who made good, often gave offense to allies and adversaries alike. Harlan II seldom did. He was the very model of the American patrician—raised in genteel comfort, educated at prep schools, Princeton and Oxford, polite, well mannered, well tailored, in short, a gentleman who appears to have been taught from the cradle that people of his background were destined to rule the nation's politics and legal system.

In this respect Harlan II came from a long line of patrician judicial forbearers—Joseph Story, who agonized over the evils of slavery, but sustained the Fugitive Slave Act; Oliver Wendell Holmes, who relished the clash of ideas, but helped put Debs in prison; Charles Evans Hughes, who deplored debt peonage, but fought the economic reforms of the New Deal. The most recent incarnation of this social type appears to have been Lewis Franklin Powell, Jr., the courtly Virginian, who fought segregation and cast crucial votes on abortion and affirmative action, but placed consensual homosexual relations beyond the pale of constitutionally protected liberty and dismissed statistical arguments showing gross racial disparities in the imposition of capital punishment.\(^{19}\)

The patrician as jurist deplores anti-radical witch-hunts led by the hoi polloi that threaten to undermine the efficacy of more genteel forms of repression. He defends privacy, especially when linked to the conventional, heterosexual pleasures of his social class. He seldom votes to disturb the existing distribution of property and political relations. That, in a nutshell, was Harlan II, the Justice who helped inter the Smith Act in *Yates v. United States*,\(^{20}\) but sent Junius Scales to jail a few years later under the same statute.\(^{21}\)

In addition to *Poe v. Ullman* and *Griswold*, Harlan II raised

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Justice Brennan's dissent branded the law and the termination a bill of attainder through which Congress sought to punish "aliens deported for conduct displeasing to the lawmakers." Harlan argued that judicial inquiries into legislative motives were "at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed."


high the banner of privacy in *Roth*, 22 a major obscenity decision of the Warren years, and *Chimel v. California*, 23 which narrowed the limits of warrantless searches incident to an arrest. But he resolutely opposed the reapportionment revolution and was the lone dissenter in *Flast v. Cohen*, 24 where the Justices modified standing requirements and broadened the opportunities for taxpayers to contest government programs. He seldom appears to have met a monopolistic business corporation he didn't like. 25

A lawyer's lawyer, it was appropriate that Harlan filled the seat occupied by Robert Jackson, another first-class advocate, litigator, and process-oriented jurist, whose occasional eloquence on behalf of freedom of speech and liberty was exceeded only by his belief in conspiracies and his passion for order. 26 But from the perspective of 1992 and the present Supreme Court, now packed with political lackeys and intellectual harlots, even Jackson and Harlan have taken on the stature of devoted civil libertarians. One can only hope and pray that the *Casey* five continue to read the Harlan of *Griswold* and not the Harlan of *Flemming*.


*Michael Stokes Paulsen* 2

I

The *Constitution in Conflict* is a disappointingly weak book about a powerful and important idea in constitutional law. The

25. Harlan's principal clients at Root, Clark, Buckner & Howland prior to his judicial appointments had included American Telephone and Telegraph, Western Electric, International Telephone and Telegraph, the Gillette Safety Razor Company, American Optical and DuPont. He represented the latter in their unsuccessful effort to maintain a dominant financial interest in General Motors, and when the Supreme Court finally sustained the government's Clayton Act complaint, he recused himself, but later denounced Justice Brennan's opinion for its "superficial understanding of a really impressive record." The record, of course, had been one he helped to prepare at Root, Clark.
1. Southmayd Professor of Law, Yale University.
2. Associate Professor of Law, University of Minnesota Law School. My thanks to Michael Socarras, Ron Wright and Chip Lupu for their helpful comments.
idea is that, contrary to today's conventional wisdom, the Supreme Court is not the sole or even final interpreter of the Constitution. Rather, the power to interpret the Constitution is a shared power of all three branches of the national government—Congress and the President, as well as the courts—and that these branches are co-equal with one another in the exercise of that power. The power of the idea lies in its claim that ours is not a system of judicial supremacy, with the Supreme Court having the final word on all constitutional issues, but a system of constitutional supremacy accomplished through the structural separation of powers, with each branch exercising independent, coordinate review over the constitutional judgments of the others.

This idea is not new. Indeed, there is a strong argument that this was the original vision of the Framers. This theory has repeatedly emerged at important junctures in our constitutional history as a counterweight to progressively more aggressive assertions of judicial supremacy and power by the federal courts. Historically, the idea that interpretation is a power shared among independent, co-equal branches has been voiced by such prominent figures as Thomas Jefferson, Andrew Jackson, Abraham Lincoln and Franklin Roosevelt. This view was featured prominently in a controversial speech by Attorney General Edwin Meese in 1986 that sparked a new wave of interest in the question of executive branch "nonacquiescence" in Supreme Court precedents, including an issue-length symposium in the *Tulane Law Review*.3

The book jacket reviews of *The Constitution in Conflict* lead the reader to expect a defense of the "shared power" view from an unlikely source—Yale Law School Professor Robert Burt, a noted academic liberal known chiefly for his work in the areas of family law, medicine and psychiatry.4 The inside flap advertises the book as one defending that idea "that the Constitution could be interpreted by any of the three branches of the government" and rehabilitating the idea of "equal interpretive power" as a legitimate, indeed preferred, rival to judicial supremacy. Professor Sanford Levison raves: "*The Constitution in Conflict* presents a well-thought-out attack on the standard notion of judicial supremacy that views the Supreme Court as the 'sole' or even 'ultimate' interpreter of the Constitution."

Such a book might well have been highly interesting. But

BOOK REVIEWS

those who come to this book expecting a thorough and systematic investigation of the idea of coordinate and co-equal interpretive power will be sorely disappointed. In Professor Burt's hands, the idea of shared interpretive authority is a throwaway line that has little to do with Burt's real thesis, which is decidedly less interesting: The Supreme Court, Burt argues, should exercise its authority in a less authoritarian—and, by implication, less authoritative—way, fashioning compromises and intermediate solutions rather than hard-and-fast answers. The Court should be careful not to get too far out in front of public opinion; it must modulate its decisions to take into account public perceptions and the need for its decisions to gain acceptance. It must also help the parties to appreciate the other side's position. The effect of its decisions should be "pacification," not "provocation." The Court should decide cases so that nobody goes away too happy or too unhappy, to the end that nobody goes away and that the contending factions are forced to continue in "dialogue" with each other. Neither party should be able to take a judicial decision and lord it over their litigation opponents, lest the losing party feel too "subjugated" (a too-trendy academic word that Burt hackneys at a rate of once every other page). A typical Burt passage captures the flavor of the entire book: "Though it is obviously preferable that all disputants be equally happy with the outcome and with one another, the equality principle remains viable if everyone is equally unhappy."

This is a tired thesis—warmed over Alexander Bickel but without the grace or sophistication. With Burt, the point is also more social history than law. He labors to develop his view through a long and meandering tour through some of the more interesting events in the Supreme Court's history: Marbury v. Madison and the Marshall Court's early conflicts with Presidents Jefferson and Jackson; slavery and the Civil War; economic substantive due process in the late nineteenth and early twentieth centuries; the New Deal realignment; Brown v. Board of Education, Cooper v. Aaron and the battle over segregation; and today's raging disputes over capital punishment, abortion and affirmative action.

Sometimes Burt becomes so interested in what he is saying about particular cases or epochs in the Court's history that he (and the reader with him) loses track of the main contour of his argument. These lengthy digressions are almost welcome, though, for when Burt seeks to squeeze all the lessons of legal history into his thesis, the book wallows in overwrought sentimentalism:

In all these instances, the Court not only dismissed the possibility that contending parties on their own might reach a peaceable ac-
commodation but, more fundamentally, the Court rejected the
goal of accommodation and agreed with those among the antago-
nists who defined their struggle as necessarily requiring the utter
subjugation of their opponents.

The theme is constantly repeated, with Burt collating previous is-
se-discussions as he goes along. By the time we make it to abor-
tion, for example, Burt writes as follows:

[F]or abortion restrictions, as for race segregation in Brown, for
economic relations in Lochner, for territorial slavery in Dred
Scott, for federal-state relations in McCulloch—a Court may
properly overturn the coercive imposition because of its inherent
inequality, but only to impose an equal status of stalemate on the
adversaries, not to end the conflict, not to seize victory from one
and award it to the other.

But the most unfortunate aspect of The Constitution in Conflict
is not the staleness of the thesis and its presentation, but the fact
that Burt’s approach seems to have no formal role for the legal cor-
rectness of one or the other party’s claims. To be sure, Burt has
views about who has the politically better position and here he
pretty much follows the traditional liberal line. He is pro-New
Deal, anti-segregation, pro-abortion, anti-capital punishment. But
nowhere does the legal (or moral) correctness of a party’s position
play a very important part in Burt’s theory of how the Supreme
Court should resolve disputes. There is nothing remotely approach-
ing traditional legal analysis of the issues Burt addresses, and thus
no serious discussion of the possibility that one or the other position
might be right or wrong as a matter of law. Legal disputes are seen
as simple political or social disputes. Everything is an “issue.” And
when the Supreme Court decides an issue, its goal should be to cre-
ate dialogue and accommodation. There are no absolutes. All
claims not to be subjugated are created equal. Anything and every-
thing can be compromised, even the most important principles of
the Constitution.

Thus, Burt treats the right of white Southerners not to be sub-
jugated by the North on a level of moral equivalence with the right
of blacks not to be subjugated by their Southern white masters in
the institution of slavery. (See p. 198.) The vice of the Dred Scott
case was not its constitutionalization of a property right in slaves
and dehumanization of blacks but in its failure to strike a satisfac-
tory social compromise that preserved dialogue. (See pp. 186-99.)
The beauty of the desegregation cases was not Brown I’s vindica-
tion of the rights of black schoolchildren, but Brown II’s moder-
tion of the remedy, so that desegregation created dialogue with,
rather than subjugation of, the competing claims of white southerners to maintain Jim Crow. (See pp. 271-85, 293.)

This is ridiculously obtuse. If the point on which the North seeks to "subjugate" the South is that the South cannot be permitted to insist on slavery for the whole or secession for itself, then we must choose one "subjugation" over another. If desegregation "subjugates" white racist notions of how society should be organized, tough luck Bubba. Certain claims have a higher legal and moral status than others. Some claims and claimants should be unqualifiedly rejected. Burt's vision of justice and the Supreme Court's role is an intellectually and morally bankrupt one—splitting the difference between all disputants in the vain hope that they will then reconcile with each other, irrespective of the legal and moral merits of the parties' respective claims or the intransigence of their positions. It is not that Burt is completely agnostic about results—he thinks the Court should push the parties in certain directions—but that he is indifferent to legal principles as the means of determining results. He would prefer to have the Court attempt to manage conflict through a two-steps-forward-one-step-back dance that has more to do with psychology and "dialogue" than with decision according to legal rules. In short, for Burt, constitutional adjudication is group therapy, not law.

Burt embraces this view for "all disputes which are so polarized that one party regards the other's victory as destructive of equal status and therefore intolerably oppressive"—that is, in practical terms, all disputes where the parties strongly assert that they are right and the other side is wrong. Apparently, the best litigation strategy for a party with an indefensible legal position is to stake out the most extreme and unreasonable position imaginable. Burt's Supreme Court will then act as a National Mediation Board that strives to split the difference between a correct legal position and an unreasonable one unreasonably maintained.

Can one imagine what would happen if the Court actually were to behave in such a manner?

II

The April 1992 publication date of The Constitution in Conflict preceded by just a few weeks the announcement of the most significant Supreme Court decision in decades, Planned Parenthood v. Casey.5 The three Justices filing what has come to be known as the "joint opinion" in Casey—Justices O'Connor, Kennedy and Sou-

ter—doubtless did not read Professor Burt’s book as they worked on their sixty-page opus on judicial authority and legitimacy. But their *Casey* opinion provides an interesting example, and test, of Burt’s basic themes. For the joint opinion is near pure Burt-ism: In upholding the right to abortion created in *Roe v. Wade* against state laws that “unduly burden” that right, there is only the slightest of nods in the direction of traditional legal analysis. The weight of the discussion concerns the preservation and enhancement of judicial authority, to the end that wise men and women exercising “reasoned judgment”6 might impose some sort of Grand Compromise (or pseudo-compromise)7 that does not resolve an issue of constitutional law but instead purports (to borrow Professor Burt’s words) to “promote institutional interactions among the combatants that might lead them toward future ‘consultation and accommodation.’”

The core of the *Casey* opinion is its reaffirmation of the “central holding” of *Roe v. Wade*—that women have a constitutional right to abortion throughout pregnancy that may be made subject to certain incidental regulations, but that is effectively immune to actual government restriction.8 The majority opinion does not contend that this result is correct as a matter of constitutional first principles, but merely that it should be adhered to as a matter of precedent, “whether or not mistaken.”9 The ground *Casey* defends is not principle, but the Court’s own power: by its own admission, the Court attached unusual importance to the doctrine of *stare decisis* for the sake of preserving its institutional position as chief expositor of the Constitution, accepted by the people as such.10 That

6. Id. at 2806 (“[A]djudication of substantive due process claims may call upon the Court . . . to exercise that same capacity which by tradition courts have always exercised: reasoned judgment.”).

7. Professor Burt correctly recognizes what the Court in *Casey* did not, that its “compromise” over abortion is a lopsided one in favor of the pro-abortion position: “As *Roe v. Wade* was actually decided in 1973, however, the Court awarded total victory to one troop among the combatants.” *Casey* tinkers with, but does not meaningfully alter, the terms of *Roe*. See infra n.8.

8. The majority’s characterization of its ruling as retaining the essentials of *Roe* is undeniably accurate. The aspects of the Pennsylvania statute upheld by the Court do not actually prevent women from obtaining abortions; they present procedural obstacles only. The Court made clear that it would strike down procedural obstacles that meaningfully restrict access to abortion. Actual substantive prohibitions on some abortions plainly would be struck down under the Court’s reasoning. In practical operation, there are only slight differences between the “strict scrutiny” of abortion regulations in *Roe* and the “undue burden” test of *Casey*. Chief Justice Rehnquist’s dissent is surely mistaken in its assertion that *Casey* retains but “the outer shell” of *Roe* but “beats a wholesale retreat from the substance of that case.” 112 S. Ct. at 2855 (Rehnquist, C.J., dissenting). *Casey* maintains the substance and makes slight alterations in the outer shell.

9. 112 S. Ct. at 2810.

10. Id. at 2814 (“Our analysis would not be complete, however, without explaining why
acceptance, the Court said, would be threatened were it to overrule Roe v. Wade, because of the acceptance Roe has obtained (at least in some quarters) and because of the possibility that the Court would be perceived as succumbing to political pressure—"overrul[ing] under fire"—were it to do so.

One may rightly question (as did Justice Scalia's dissent), the accuracy of the majority's realpolitik assessment, and may also question (as did Chief Justice Rehnquist's dissent), whether the Court might not as easily be perceived as succumbing to political pressure in reaffirming Roe rather than overruling it. But the truly extraordinary aspect of the majority's discussion is the suggestion that politics or perceptions should play any role at all in the Court's decisional calculus, with respect to the doctrine of stare decisis or any other matter. The Court's "legitimacy", the majority wrote, is "a product of substance and perception." The success of the Court in maintaining real or perceived legitimacy is determined by the "people's acceptance" of the Court's decisions. Accordingly, the Court "must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them...."

Those claims should, of course, be "principled," or at least "grounded truly in principle." Thus, the majority concludes,

overruling Roe's central holding... would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so, it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself...."
“the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”\textsuperscript{18}

The Court’s discussion is dotted with euphonious references to “the rule of law” and “constitutional principle,” but the boldness of its claim nonetheless comes through plainly: While social and political pressures do not “as such” dictate how the Court decides cases, they nonetheless bear on how the decisions of the Court will be perceived, and the Court must take those perceptions into account in order to maintain its legitimacy. If the Court’s decisions should maintain a principled appearance (under broadly defined criteria), they need not—and cannot—rest on pure principle, especially if that principle suggests a politically controversial outcome. Rather, the outcome must be one that readily can be “accepted by the Nation”; its legal justification need only be “sufficiently plausible to be [so] accepted.” For the \textit{Casey} majority, the Court’s legitimacy depends not on the legal correctness of its decisions, but on some combination of legal plausibility and political acceptability.

\textit{Casey} continues: The Court “would almost certainly fail to receive the benefit of the doubt”\textsuperscript{19} when overruling cases in two circumstances. The first is where the Court overrules too frequently: “There is a limit to the amount of error that can plausibly be imputed to prior courts.”\textsuperscript{20} This proposition is doubtful as an empirical matter; a great deal of error plausibly may be ascribed to earlier decisions. If (as the Court recognizes) courts must be permitted to correct some errors on the theory that “two wrongs do not make a right,” how is it that there can be, in principle, too much error correction—on the theory that “too many rights make a wrong”? What the majority probably means is that there is an increasing cost to overruling in terms of the Court’s prestige—the currency with which the majority is chiefly concerned. So stated, the point seems sound as a logical matter, but it does not reflect well on the Court. This argument is probably posted as a defensive rear guard against criticism of O’Connor, Kennedy and Souter as being inconsistent for having voted to overrule numerous other cases.

The second situation in which the majority feared losing the benefit of the public’s doubt was the overruling of a highly controversial, deeply divisive “watershed” case in which the Court had

\begin{itemize}
  \item \textsuperscript{18} Id. at 2814.
  \item \textsuperscript{19} Id. at 2815.
  \item \textsuperscript{20} Id.
\end{itemize}
earlier “staked its authority”:21

Where . . . the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and in those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.22

In other words, it is precisely because of the controversial, deeply disputed nature of the Roe decision and the rare importance it has assumed in contemporary debate over the legitimacy of the Court that the majority felt it could not now back down, “whether or not mistaken” in the first instance.23 (This aspect of the majority opinion earned Justice Scalia’s particular ire as “czarist arrogance.”24) The Casey opinion treats the abortion issue as one on which “[m]en and women of good conscience can disagree”25 but on which these good people should obligingly put their differences aside once the Court has spoken, and accept the Court’s decree. The Court’s “promise of constancy” must be kept for the sake of keeping faith with those who have been “tested by following” a controversial decision.26 The people must accept the will of the Justices because “the character of a Nation of people who aspire to live according to the rule of law” is inseparable from their acceptance of the decisions of “the Court invested with the authority . . . speak before all others for their constitutional ideals.”27

Putting aside the Court’s pretentious rhetoric, there are at least three fundamental problems with the vision of judicial-political legitimacy reflected in these passages—criticisms equally applicable to Burt’s thesis.

First, it is wrong in principle. The legitimacy of the Supreme Court in our constitutional system rests not on its ability to fashion social and political compromises but on its ability to render deci-

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21. Id. at 2815.
22. Id. at 2815.
23. Id. at 2810. See also id. at 2816 (“We conclude that the basic decision in Roe was based on a constitutional analysis which we cannot now repudiate.”) (emphasis added).
24. Id. at 2884 (Scalia, J., dissenting). See also id. at 2883: “I cannot agree with, indeed I am appalled by, the Court’s suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—against overruling, no less—by the substantial and continuing public opposition the decision has generated.”
25. 112 S. Ct. at 2806. See also id. at 2807 (“As with abortion, reasonable people will have differences of opinion about [contraception].”)
26. Id. at 2815.
27. Id. at 2816.
sions that the public readily can recognize as straightforward interpretations of a constitutional or statutory text. The Court's legitimacy rests on its ability to render non-political legal judgment in accordance with principles of interpretation that stand outside the judges' personal sense of what is expedient, practical or desirable as a policy matter. That is why Roe (and now Casey) strikes so deeply at the heart of the Court's legitimacy: it is perceived, rightly, as pure judicial fiat having no basis in constitutional text or history.28

True, political opposition to Roe flows primarily from its policy result. But unlike other socially explosive decisions (like Brown v. Board of Education), opposition to the abortion decisions cannot be met with the rejoinder that the words of the Constitution require such a result, for they plainly do not. (Defenders of Brown could properly point straight to the words "equal protection of the laws.") In this respect, Casey's legitimacy (or lack thereof) is completely dependent on Roe's. Adherence to precedent may provide the formal trapping of legitimacy, but not its substance. If the precedent decision is fundamentally illegitimate, no amount of discussion of stare decisis can supply the defect; the doctrine of stare decisis becomes an excuse for repeating error. And where stare decisis is defended solely in terms of the need to preserve the perception of legitimacy so that the Court may maintain its institutional power, one may fairly wonder whether the doctrine is empty and circular. Casey reveals just how far the Court has strayed from the grounds on which its legitimacy depends.

Casey's second fundamental problem is the notion that the Court can successfully defuse controversy in general and the abortion controversy in particular by fashioning astute and expedient "compromises" (all the while denying doing so). This is embarrassingly naive. Historically, as Burt notes, the Court has been more of a provocateur than peacemaker, its supposed "compromises" frequently exacerbating social strife—Dred Scott, Lochner and Plessy leap to mind, along with Roe. The problem is not that the Court has done a poor job of peacemaking but that it invariably will perform poorly a task that is not its job and for which it is not particularly well suited. The attempted practice of judicial statesmanship collapses into judicial authoritarianism, as the Court seeks to enforce as law the terms of the "compromise" it has imposed, in the

face of resistance by one or both of the parties. Politically sensitive judging does not avoid the need to hand down an Order of the Court; it merely relocates the decree to a position the Justices perceive (often incorrectly) to be more politically acceptable.

Such a relocation is always away from principle—away from what an unvarnished legal analysis would produce. The idea that the Court will gain more popular respect by searching for the "sufficiently plausible to be accepted," half-principled-half-political solution than by being principled is highly dubious. Even where the result is politically popular, the very act of judicial compromise compromises the judiciary's authority and legitimacy by rendering its decisions that of a transparently political body. The parties and the public are not fooled, and the Court's decisions become less authoritative in the eyes of the People, not more so. One consequence of *Casey* is likely to be—and should be—the de-legitimation of the present Supreme Court.

The third problem has to do with the nature of *Roe* as being a "watershed" decision. The idea that the more extraordinary the precedent—the more remote its connection to constitutional text, the more severe its departure from tradition and the more wrenching its social and moral consequences—the less it should be subject to reconsideration, is strange indeed. It is the Big Lie theory applied to judicial decisionmaking: the bigger and more outrageous the lie, the more likely it is to be believed. If the Court is going to depart from text, history and precedent, it should make a really colossal departure and proclaim it with gusto. (That's what makes it a "watershed," after all.) Future Courts will then feel obliged to "remain steadfast" to the watershed for the sake of preserving the appearance that the judiciary is governed by the rule of law. The logic of the "watershed" argument would suggest that economic substantive due process and the lawfulness of segregation—the *Lochner* and *Plessy* watersheds—should have been preserved.

One would think that the Court's legitimacy might have been enhanced by overruling *Roe*, as it was by overruling *Plessy*. Indeed, before *Casey* was handed down, it might have been guessed that there could be as many as seven votes to overrule *Roe*—O'Connor, Kennedy and Souter joining the four dissenters. An opinion written by O'Connor, the first woman Justice and one who had publicly anguished over *Roe*, for a solid majority of seven, and adopting the same high-church tone as *Casey*, might well have been "perceived" as more legitimate than the deeply and bitterly divided *Casey* decision. Moreover, if the result proved contrary to public opinion, that

29. 112 S. Ct. at 2815.
outcome would be susceptible to popular revision, since overruling *Roe* would merely have returned the issue to the democratic process. The Supreme Court would not have been the focus of continued controversy.

Why did not O'Connor, Kennedy and Souter choose this course, which would seem equally as politically astute? There are three possible explanations, none of which is very flattering to those three Justices. The first possibility is that these three now support a broad right to abortion as a matter of substantive constitutional law—a switch of positions by Kennedy and O'Connor—and that their rhetoric about the Court's legitimacy merely provides political and intellectual cover for their present positions. The second possible explanation is more disturbing—that these Justices genuinely view the craft of judging as one of divining that which will prove a balance "accepted by the Nation" and then seeking a "sufficiently plausible" legal justification for that outcome. Professor Burt could not have said it half as well.30 If this is the explanation, *Casey* is a jurisprudential watershed in its own right, proclaiming an era of Burt-like social-psychological-political constitutional judging.

The third possible explanation is perhaps the most disturbing of all, and probably the most likely. O'Connor, Kennedy and Souter were concerned first and foremost not to be seen as paying off the pro-life political movement for their nominations as Justices, even if they were persuaded that *Roe* was bad law and otherwise would be inclined to overrule it. In an atmosphere poisoned by bitter confirmation disputes centering on the issue of abortion, by

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30. Professor Burt's own position on abortion is incoherent: He believes the Court was wrong to impose an answer to the abortion controversy in *Roe*, but only because such intervention was not necessary to insure that the issue would remain "avidly controverted." Nonetheless, the "subjugative impositions" of the abortion controversy (Burt means state regulation of women's rights to abort their unborn children; he does not appear to consider the possible "subjugative imposition" on the child) mean that some sort of substantial abortion right must be protected. The right he would create is plenary but patchwork: states would be free to regulate and prohibit abortions, but only if enough states adopt "free-choice statutes" and women residing in the other states live within reasonable travel distance of those states. Residency restrictions would be unconstitutional and states would be required (apparently as a matter of constitutional law) to provide financial assistance to overcome the financial burdens on women travelling from other states to obtain abortions. (It is not at all clear that Burt's "compromise" is any less abortion-on-demand than *Roe* or *Casey*. It certainly has no firmer basis in the Constitution.)

On the issue of *stare decisis*, however, Burt comes down remarkably close to *Casey*: Even if the Court was wrong in the first instance, it "would [not] be justified in simply overruling *Roe*" twenty years later. "The Court drew the lines of polarized confrontation and cannot now walk away from this subjugative conflict that it, more than any other institution, was instrumental in defining as such." However, Burt held little hope that the Court "might work to redefine the abortion controversy away from this subjugative ethos and toward the equality ideal," predicting instead that *Roe* would soon be reversed "and in its place, so far as this Court is concerned, force will rule."
protestors on both sides besieging the Court's grounds and by hysterical media attention, O'Connor, Kennedy and Souter were concerned that no one have the impression that they had been "bought"—that they had given secret commitments on abortion as the price for a seat on the Supreme Court. They were not so much concerned with the Court's legitimacy but with perceptions of their own individual legitimacy. Whatever views they might have had on abortion and *Roe* were subordinated to this primary, personal concern. There is evidence for this explanation in the opinion itself: the first paragraph's reference to the executive branch's repeated requests over the past decade that the Court reconsider *Roe*;31 the exalted tone; the extended discussion of *stare decisis* and the Court's legitimacy; yet the unwillingness to embrace *Roe* as correct in principle (and occasional hints that at least some thought it wrong in principle).32

The third explanation combines the worst aspects of the other two. Not only is the *Casey* rhetoric a cover for a switch in positions, it is a cover for a switch the Justices do not even believe in themselves. And even if *Casey* was a case-specific personal declaration of independence, the Justices making it will feel the need to adhere to the Burt-like jurisprudential principles stated there. It would be sadly ironic if what Professor Burt has urged out of a naive and misguided sense of judicial statesmanship has become law out of the basest and most personal of motives—the concern of individual Justices for their own prestige, power and public image.

It is doubtful that even those who are cheered by the result in *Casey* respect the Court's reasoning. The concern for image and for the politically expedient, and the lack of concern for principled legal analysis, should be deeply troubling to everyone, regardless of their political views on abortion. The same is true of Burt's thesis. In its acutely self-conscious (and self-important) conception of the judicial role, in its arrogance about its own wisdom and in its naiveté and presumptuousness in purporting permanently to "settle" a divisive political and moral issue by constituting itself as a national abortion-law mediation panel, the Court's *Casey* decision illustrates (far better than Burt's book) the hazards of Professor Burt's method in practical operation. *Casey* shows that the Justices will tend to use that method to fashion Grand Compromises not for lofty purposes of public peace, but for baser motives of seeking to preserve positive public perceptions of the Justices themselves.

31. 112 S. Ct. at 2803.
32. Id. at 2810, 2816.
There is no necessary connection between Burt's actual theme of judicial mediation and the book's advertised theme of a challenge to the idea of judicial supremacy in constitutional interpretation. One might favor a mediator's role as the appropriate manner in which "supreme" interpretive power should be exercised. But one might also favor such a role out of the perceived need to accommodate other branches that share interpretive power on an equal basis. Burt seems to shade toward the latter view, but his discussion waffles foggily between the two, never clearly coming to rest on either of them.

One wonders what would have been the result had the book seriously and systematically explored the thesis that the Supreme Court is not the supreme, or even final, interpreter of the Constitution, but must share that power with other actors in our constitutional system—the President, the Congress, the states. How might such a reading affect our understanding of the Supreme Court's role in our constitutional system? How might it affect our understanding of the power of the Court to "say what the law is" in relation to the other branches? In short, one wonders what might have been the result had Burt written the book advertised by the dust cover.

The raw materials for such a study are present in the same legal history that makes up Burt's discussion in *The Constitution in Conflict*: John Marshall's argument for judicial review in *Marbury v. Madison*; Andrew Jackson's presidential dissent to the Marshall Court's holding in the Bank controversy; Abraham Lincoln's resistance to the Taney Court's ruling in *Dred Scott*; the Court's landmark decision in *Brown v. Board of Education* and state government resistance to the post-*Brown* desegregation decrees, exemplified in the Little Rock situation and culminating in *Cooper v. Aaron*; the Nixon Tapes case; the ongoing dispute over abortion.

Burt begins by noting, accurately, that John Marshall's justification for judicial review in *Marbury* "carefully avoided any claim for judicial supremacy." But the discussion quickly degenerates into the sentimental and speculative as Burt makes the historically unsupportable claim that Marshall was simply trying to engage Jefferson in a constructive dialogue.\(^{33}\) He never returns to any system-

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33. According to Burt, John Marshall was claiming that judges "were an appropriate instrumentality for this protective, conflict-transcending, and therefore unifying purpose for the law" and was "in effect asking Jefferson to transcend the divisive politics of 'the contest of opinion through which we have passed' and to give content to the unifying terms of his inaugural address, that the defeated 'minority possess their equal rights, which equal law must protect.'" It is hard to imagine that anyone familiar with the historical circumstances of the *Marbury* case and the Republican-Federalist acrimony of the era could take seriously
Suppose, however, that Marbury is read—as it fairly can be read—as embracing only a co-equal, coordinate power of judicial interpretation, founded on the ideas of separation-of-powers and the independence of the judge’s oath, and not as proclaiming judicial preeminence in legal interpretation. Marbury’s separation-of-powers argument is, in a nutshell, that the structure of the Constitution, and the political theory of written constitutions generally, requires that the judges be free to interpret the law independently of the views of Congress. To hold that one branch’s (the court’s) interpretation is controlled by another’s (Congress’s) is to bestow a “practical and real omnipotence” on the controlling branch. But this argument suggests not that the judicial branch is the supreme interpreter, but that each branch has a power of legal review over the determinations of the others. Similarly, Marbury’s argument from the oath requirement of Article VI—that judges would violate their oaths if they were forced to acquiesce in a violation of the Constitution by deferring to the views of another branch—with equal ease can be turned into an argument against judicial supremacy. The President, members of Congress and even the executive, legislative and judicial officers of the states, swear an oath to uphold the Constitution.

Taken seriously, this reading of Marbury has rather sweeping and startling implications. Do Congress and the President therefore have the prerogative to disregard (to “overrule”?) Supreme Court decisions with which they disagree when considering legislation? Does the President have the power to refuse to enforce Supreme Court judgments that he believes are legally improper? Is a state governor bound by his oath to resist by every means possible judicial decrees that he conscientiously believes are based on unfaithful interpretations of the Constitution?

Each of these questions corresponds to an actual historical event. Jackson’s veto of the Bank bill was premised on the idea that “[e]ach public officer who takes an oath to support the Constitution


34. 5 U.S. (1 Cranch) 137, 178 (1803).


36. The Court characterizes such a requirement of deference, against one’s own conscientious judgment as to what the Constitution requires, as “immoral,” “worse than solemn mockery” and even “a crime.” 5 U.S. (1 Cranch) at 180.
swears that he will support it as he understands it, and not as it is understood by others." Thus, the "opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." As a Senate candidate in 1858, Lincoln declared his opposition to Dred Scott and his refusal to be bound by it as a legislator; the decision was not binding "as a political rule" preventing Congress or the President from "resisting it" by passing legislation inconsistent with it. As President, Lincoln defied Chief Justice Taney's order declaring unconstitutional Lincoln's suspension of the writ of habeas corpus at the outbreak of civil insurrection in Baltimore in April 1861. Lincoln directed subordinate executive officers to ignore Taney's order in Ex Parte Merryman, either because Lincoln believed that Taney was wrong on the merits of the precise constitutional issue presented or because Lincoln interpreted the Constitution to justify otherwise unconstitutional actions when necessary to suppress insurrection threatening the maintenance of the constitutional union.38

Modern constitutional conflicts raise many of the same issues. Richard Nixon complied with the Court's decision in United States v. Nixon, but he had made noises about refusing to do so. Had he been convinced of the legal correctness of his claim of executive privilege, should he not have refused to produce the tapes? Would Arkansas Governor Faubus have been within his constitutional prerogative (if still morally and legally wrong) in resisting desegregation in Little Rock if he conscientiously believed that the Brown decision was unlawful? Could an anti-abortion President legitimately announce that Roe v. Wade and Planned Parenthood v. Casey were wrongly decided, and that the executive branch would take no action to enforce any injunction issued by a federal court against state abortion legislation?

Are there principled distinctions among these various situations, or must we choose between judicial supremacy and radical decentralization? If so, is it so clear which alternative is to be preferred? Which one is more consistent with the original understanding and design of the Constitution? Burt asks none of these

37. Veto Message, July 10, 1832 3 Messages and Papers of the Presidents 1139, 1145 (Bureau of Nat'l Literature, 1897).
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questions, the discussion of which would have made a far more inter-
ingesting book—and one better suited to its title—than The Consti-
tution in Conflict turned out to be. Asking these questions might also have shed light on the question with which Burt is most con-
cerned: how is the judiciary's interpretive power to be exercised? The shared power view offers at least two limited insights on this question.

First, if the power of constitutional interpretation is viewed as shared, rather than the Court's exclusive prerogative, there would seem less warrant for the Court taking itself and perceptions of its institutional integrity quite so seriously, (as it did in Casey, for ex-
ample). If those in other branches are not, in fact, required to ac-
quiesce in the Court's constitutional judgments, then there is no need to adhere to precedents out of an overwrought sense of obliga-
tion—a "promise of constancy," a commitment "to remain steadfast, lest in the end a price be paid for nothing" to those in other branches who will be "tested by following" the Court. Nor must precedents be followed on the ground that the Nation's "very ability to see itself through its constitutional ideals" is bound up in devotion to a Court "invested with the authority to . . . speak before all others for their constitutional ideals." Perhaps the legitimacy of the Court depends on a fairly high doctrine of judicial inerrancy if the underlying premise is one of judicial supremacy. But if the premise is one of co-equal authority and interpretive tension among the branches with the political branches regarded as playing an equal role, the legitimacy of the system is not dependent on whether the Nation accepts as indisputably correct the views of any one in-
stitution within that system.43

Second, at the same time that a shared power model might sug-
gest that the Court take itself less seriously, it might suggest that the Court not act so politically. That role—the tempering of principle with pragmatism—can be expected to be performed all too aggres-
sively by the political branches. It does not follow from the premise of shared power that the Court should modulate its decisions to take into account political realities, either to effect compromise or

39. 112 S. Ct. at 2815.
40. Id.
41. Id.
42. Id. at 2816. See also id. at 2814 ("The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court.").
43. Again, contrast the (inconsistent) words of Casey: "[T]he justification claimed must be beyond dispute. . . . [T]he Court's legitimacy depends on making legally principled decisions . . . sufficiently plausible to be accepted by the Nation." 112 S. Ct. at 2814 (empha-
sis added).
to avoid rendering decisions that will likely bring the Court into conflict with the President, the Congress, the states or the people. On the contrary, to do so would be to compromise away in advance the one contribution it can best make to government: the integrity of its judgments. The actual "final" constitutional resolution of an issue will be determined by the extent to which the executive, the Congress, the states and the people agree or disagree with the Court's interpretation and translate that constitutional judgment into limitations on or refinements of the Court's ruling. But that resolution is a matter properly out of the Court's control and, strictly speaking, should be none of its concern. The Justices should—indeed, because of their oaths, must—state what they believe is a proper interpretation of the law, irrespective of political consequences, public perceptions or concern for their own power.

The Constitution in Conflict implicitly rejects such a view of the Court's role in favor of a more self-consciously political role. That Professor Burt has taken this position is not of enormous moment. That the Supreme Court has made considerations of power and politics the centerpiece of its new jurisprudence of "reasoned judgment" is of far greater cause for concern.


Carol M. Rose

In this small volume James Ely puts forth a careful, wide-ranging and blessedly terse survey of the constitutional treatment of property rights over the course of American history. This is not a book of constitutional theory, nor is it a book on the theory of property rights; and although the author makes a number of interesting and informed judgments about the legal events he describes, he does not give the reader many explicit clues about the theoretical stance from which these comments emerge. Extrapolating from the text itself, Ely seems to be working from the perspective of ordinary language or ordinary understanding. That is, he appears to be asking what most people mean by "property," and then describing the
ways that our various governmental institutions treat the relevant subjects.

This common-sense procedure results in a book that challenges some conventional presentations of constitutional property law. For example, Ely is interested not only in the federal courts, but in the whole range of governmental decisionmaking, including state judicial decisions and legislation, along with congressional acts and regulatory policies. He also moves beyond the conventional focus on land as the quintessence of property, and takes up a variety of other subjects affecting economic entitlements—taxation, intellectual property, property in slaves (from a time happily now past), the regulation of utilities and railroads, the effects of social policies concerning labor relations and discrimination, among others.

A book so brief necessarily slights some aspects of American property history. Readers interested in environmental history may look in vain for many issues relating to the management of public resources—notably the Federal public lands, so very important in the settlement of the West—or the property impacts of various subsidy programs, such as water reclamation projects, agricultural price supports, or the highway programs. Similarly, family law enthusiasts will not find much about the changing (and sometimes not-so-changing)\(^3\) organization of entitlements within the family. Moreover, brevity appears to have dictated that Ely lapse into a more conventional presentation in the later pages of the book, where the issues often appear as the usual pingpong game between the United States Supreme Court and the various governmental actors that have attempted to regulate property.

All the same, the book is a very useful survey of past and present property rights, and of the political and doctrinal lenses through which American law has envisioned property. Those lenses have changed over time, and in Ely's book, one sees the gradual restings of constitutional property foci: the odd mix of republicanism and mercantilism in the colonial period; the preoccupation with the "obligation of contracts" clause in the early republic; the shift to the commerce clause with all its ambiguities; the laissez-faire and substantive due process approach of the later nineteenth and early twentieth centuries; the switch to permissiveness about economic regulation in the New Deal and following decades; and the current obsession with the "takings" clause, perhaps as a redress to the double standard ushered in by the famous footnote 4 in Carolene

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3. For an argument that the widow's share has survived all kinds of changes in estate law, see Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers"*, 10 J.L. & Ineq. 137 (1991).
Products—a double standard that has treated property rights as lower in status than other constitutional rights.

Ely dispatches this huge history with admirable calm, only infrequently taking sides in the great debates represented by these massive doctrinal moves. On the most current of these debates—whether property rights should be restored to a rank of equal status with other rights—Ely once again seems to take a kind of ordinary language approach. That is, if people call property a “right,” he seems to find no obvious reason to distinguish this right from others, or to treat property rights as particularly subject to regulatory whim. Ely thinks that the Constitution’s Framers saw property as equal in status with other rights, and although he thinks there might be modern reasons for greater property regulation than once was the case, he still appears to think that a right is a right is a right—even if it is a property right.

What is perhaps more intriguing is the much more radical viewpoint implied in the title of Ely’s book, and explicitly stated by Arthur Lee of Virginia in 1775: that property is “the guardian of every other right.” This view implies that the Carolene Products footnote got the matter exactly backwards: that property is not just equal in status with other rights, but takes precedence over all others. This is not a view that Ely explores at great length, evidently taking the more moderate position of parity over preferment. Nevertheless, it is a view that Arthur Lee’s contemporaries appeared to share, and one that has cropped up in various guises throughout our jurisprudential history.

So, is property the guardian of all the others, and of liberty more generally? Why might anyone think so? Here, in no particular order, are some answers, all of which have a newer version as well as a perhaps more provocative older version.

Answer 1. Property protects all other rights, because property enables citizens to be independent and hence capable of self-government.

In its older form, this view could be encapsulated under the rubric of “republican property”: property, and especially agricultural property, gives the citizen a safe haven, and this in turn enables him to form independent judgments and to debate and defend his views with courage and vigor in the political forum. The republican property owner is his own man, dependent on no one, and hence fit to exercise the franchise and generally take part in the polity—and if you are not such a property owner, you should be excluded from politics, since you might turn into a potentially dan-
gerous sycophant. I say “own man” advisedly, because it was quite consistent with republican property that women, being excluded in large part from property ownership, were also excluded from the franchise.

The modern form of this argument is quite different, and Ely’s book touches on it: Property, it is said, does indeed form an essential basis for the projection of one’s own “personhood.” But what follows is not exclusion of the propertyless from politics, but rather the view that all citizens should be furnished the necessary modicum of property, so that they too can be sturdy, self-governing citizens.

A few observations may be in order here. For one thing, the modern version does not unambiguously protect property rights, since the citizenship-enhancing property that gets distributed to the poor will necessarily come from the taxes (and hence assets) of those who are better off. For a second thing, the older republican property was also not unambiguously pro-property: republican property had a certain tolerance of redistribution, since vast disparities of wealth were thought to disrupt the republican polity, and since commercial property (which entailed dependence on other trading folk) was never thought to be so significant for independence anyway, and hence was thought to be more regulable. For a third thing, property has no exclusive lock on political independence. It has often been rather nervously opined, for example, that destitution might make people even more strong-minded and “independent,” since the destitute have no reason for giving a damn. One might even think that their unpropertied willingness to revolt takes the place of property: it is the guardian of all their other rights.

All the same, no one should think that the “independence” argument about property is simply a tired antiquity. One might observe its resurgence in the presidential candidacy of Ross Perot, where a number of people seemed to think that the man’s great wealth made him more sturdy and courageous than other politicians. The idea was that he could speak his mind fearlessly, precisely because his property made him independent—and hence an

4. For a description of this position, see Carol M. Rose, Property as Wealth, Property as Propriety, 33 Nomos 223, 235-37 (1991) and authorities cited therein.
7. See Rose, Property as Wealth, Property as Propriety, 33 Nomos 223 (cited in note 4).
appropriate man for political office. This is the idea of republican property rejuvenated.

Answer 2. Property protects all other rights, because property diffuses political power.

This argument is heard rather often. Ely cites William Van Alstyne on the matter, but he might just as well have quoted Milton Friedman8 or Friedrich Hayek.9 The basic idea, putting it very crudely, is that property is a source of power, and if everyone can acquire and hold property, no single institution or set of institutional leaders can gather all the power to itself. Hence private property is not only economically decentralizing; it is politically decentralizing as well, and prevents the monopolization of power in the hands of some central Leviathan.

The older version of this argument is in a way more interesting, since it emerged against a now almost-forgotten set of background beliefs, according to which hierarchical control was assumed to be necessary for both economic and political life. This was because human beings were thought to be so unruly as to require the subordination of the (many) worse to the (few) better. The eighteenth century property theorists challenged this set of beliefs, describing the market as a self-regulating natural mechanism that effectively dispensed with the need for an imposed political discipline.10 Indeed, if “the market” could adjust the unregulated participation of huge numbers of human transactions, why did human beings need authoritarian ordering at all, economic or political? Hence private property, and the interactions of the market, gave the original model to the decentralization of political authority.

Again a caution is in order: Joyce Appleby, an historian whose work has thoroughly explored the eighteenth-century political hopes for capitalist private property, evidently believes that the time for this hope has come and gone.11 Moreover, one has to wonder how thoroughly property can diffuse political power when a property regime itself depends on a set of political choices; we might want to recall, for example, that many of the early capitalist efforts were most actively promoted by monarchs.12 On the other hand, recent political events have once again shown the power of this set

11. Id. at 105.
of ideas; as Ely points out, the move to a free market in the former Soviet-dominated world is not just an economic matter, but also at least in part a political move, aimed at diffusing power.

Answer 3. *Property protects all other rights, because property makes politics boring and unimportant.*

Ely has at least one modern quotation relating to this version of property's primacy: it is from Judge Alex Kozinski, who remarked that rational people, if forced to the choice, might well forego the right to wear obscene slogans on their clothing, in favor of the right to build buildings or operate railways.\(^{13}\) Given Judge Kozinski's prominence on the libertarian lecture circuit, one might expect that he himself has rather more sophisticated choices on matters of political liberty; but his observation does give the flavor of another political argument for property. That argument is that property is much more interesting than politics, and hence property can entice people away from endless rounds of political battles. Why bother to repress other people's liberties, when one can spend one's time so much more engagingly in business?

Here too there is an older version. According to Martin Diamond, this capitalistic distraction from politics is one of the things that *The Federalist* had in mind. An extended commercial republic would make property available to all, and that prospect would disarm factions, channelling their efforts away from the usual pursuits of murdering each other over honor and religion and the like.\(^{14}\) Thus free speech and freedom of worship would be protected by a profound indifference to what anyone says about anything—an indifference induced by the frenetic pleasures of property-seeking. Indeed, a few decades later, Tocqueville rather bemusedly reported that the idea was working: Americans lusted after commerce so mightily that they cared for little else, and, incidentally, hardly could speak about religion or ideas at all, except in the most vapid and extreme generalizations.\(^{15}\)

There are several caveats here, too. One comes from modern public choice theorists, who tell us that the quest for goodies is indeed quite likely to invade the logrolling democratic political pro-

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cess—perhaps even more likely than in hierarchic orders. Indeed, the political quest for goodies (or "rent-seeking") seems rather easier than making an honest buck in business, and hence, on this cheerless account, political rent-seeking tends to displace productive business activities. Another caveat comes again from the news of our day in Eastern Europe, where the lifting of centralized economic regimes seems for the moment to be absorbing some citizens not in the amiable pursuits of money making, but in the much deadlier and destructive fixation on settling old ethnic scores. Property may distract people from politics, but politics can distract people from property, too.

**Answer 4.** Property protects all other rights, because property symbolizes all other rights.

This argument may have animated some of the Founders' interest in property, and certainly seems to lurk in Madison's well-known and almost lyrical description of a great string of rights as his "property"—that is, in a "larger and juster meaning" he had "property" in his religious beliefs, his opinions, and so on. The idea here is that property is the symbolic form that human beings use to represent all forms of entitlement: you can't think about or describe rights of any kind except in metaphors of property, à la Madison.

Is there a modern version of this idea? Jennifer Nedelsky, who has studied the Federalist conception of property, thinks that the notion of property-as-symbol may have some merit, although she warns that property is a rather complicated and imperfect stand-in for other kinds of rights. And in a very practical way, perhaps property's symbolic force animates the incredible touchiness that is still set off by the regulation of landed property—particularly physical invasions of land—even though, as Ely points out, land is considerably less important in modern economic life than once was the case.

Assuming for the moment that property does act as the quin-

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tessential symbol for all rights and liberties, it would follow, I suppose, that a weakening of the concept of property in turn would weaken the sense of rights altogether. So what? One response might be, so much the better: that is, we Americans are too rights-conscious for our own good, and our entitlement-crazed desire to sue everybody can only clog the machinery of economic growth. Another response might be that even if property is an important symbol of all other rights, why is land the dominating symbol for property itself? Suppose, for example, that the leading metaphor in our symbolism of rights were not property in land, but property in water, in which people do in fact have important entitlements. Would our symbolism of rights then lead us to think about rights in a figuratively more “fluid” way—making us think that rights bring us into contact with other people, and that rights require us to work out joint solutions?

In short, then, maybe property can act as a symbolic stand-in for all kinds of rights, but this symbolic role raises questions, too: What’s so hot about rights-consciousness? And do we need rights-consciousness in the sense of fixed boundaries?

All these propositions, then, and no doubt some others as well, may lead us to a somewhat muted cheer for property as the “guardian of every other right.” To be sure, some of these notions stray rather far afield from Ely’s down-to-earth book. They relate, however, not only to the question whether property is a preeminent right, but also to a question that Ely does talk about more extensively: whether property enjoys even an equal status with other rights.

Here is the way the preeminence issue raises the parity issue: Property may have once been important as the guardian of other rights, but if those other rights have come to have more direct constitutional protections, do we really need property rights so much? That is, if current interpretations of the Bill of Rights and the great Civil War amendments now protect our political and expressive rights directly, might property as an indirect protector now safely recede to a second rank, somewhat in the way that *Carolene Products* suggested?

This question once again goes to the significance of property as a political institution rather than as an economic one. Clearly there are independent and powerful economic arguments for property, since property rights are widely believed to enhance and encourage wealth-producing activity. But if property is only about economic well-being, and if property is no longer needed as the political guardian of other rights as well, then the regulation of property
would seem to involve only issues of the levels and distribution of total wealth, without implicating fundamental issues of political self-rule.

The foregoing comments assume a few things, of course. For example, they assume that the protections of other rights only ratchet up, and not down; if our courts can change their mood about protecting speech and religion and so on, then property once again might become more important as the “guardian of every other right.” Another and more fundamental thing that these comments assume is equally problematic: that one can sort out the political from the economic aspects of property. This is a tricky business, as Ely notes: one only need contemplate, for example, the property interest in a newspaper business, a radio station, or even a sound-truck.

The distinction between property rights and other rights is also a tricky business if one thinks that a society’s overall economic well-being (or lack thereof) might affect people’s willingness to forgo liberties. If that is the case, then the status of property, sheerly as a utilitarian “economic” institution, might affect the overall social commitment to political rights. This is an observation that has often been made about Weimar Germany, for example; that is, that economic fears put political liberties on the auction block.²¹ More recently, it sets the background for the worry that economic distress might cause the re-emergence of a new authoritarian regime in the former Soviet Union.

Ultimately, then, property’s economic role might be thought another reason why property could be the “guardian of every other right”: Property rights make societies wealthy, and wealthy societies can enjoy the luxury of liberty.

So, where do we put our bets? On property as an indirect protector of all the other rights? Or on the judges as the direct protectors or those rights? Or do we hedge our bets and go with redundancy—direct protections plus the indirect protections of property rights? Ely of course does not dither much with these questions in this useful book, but his comments do bring them to the surface, and in so doing suggest that property rights still raise vital concerns in our constitutional polity.

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Norman L. Rosenberg

Taking no prisoners, this aggressively revisionist history immediately targets Harry Kalven, Jr. "Contemporary libertarian arguments," Transforming Free Speech begins, "are neither traditional nor worthy." Portrayed as the primary influence on contemporary First Amendment discourse, Zechariah Chafee, Jr., receives sustained censure, especially for repudiating the "conservative libertarianism" of late nineteenth-century jurists such as Thomas Cooley, Christopher Tiedeman and John W. Burgess.

Conservative libertarians, according to Mark Graber, created a forward-looking, comprehensive view of speech issues. They espoused defamation rules, for example, that anticipated New York Times v. Sullivan. They opposed overseas expansion in the 1890s, foreseeing that divisions over foreign policy could fuel calls for curtailing speech rights at home. More important for his primary theme, Graber argues that conservative libertarians linked speech and economic issues in a coherent conception of individually based, judicially protected rights. They recognized "a sphere of private mental conduct that was as inviolate as their cherished sphere of private commercial conduct."

During and after World War I, however, scholars and jurists such as Chafee, Oliver Wendell Holmes, Jr., and Louis D. Brandeis helped to "transform" conservative libertarianism into the "civil libertarian" approach to speech issues. Criticizing functionalist histories, which see Chafee's generation simply responding to wartime censorship and gaps in existing free-speech doctrine, Graber denies that civil libertarianism represented "a necessary response" to repression. The older libertarianism, in fact, actually would have "afforded better protection" than the civil libertarianism invented during World War I and the 1920s. For example, in contrast to Chafee, who accepted the legitimacy of some controls, John W. Burgess (the only prominent conservative libertarian alive in 1917-

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denounced all the speech regulations established by Congress and Woodrow Wilson's administration as unconstitutional.

Why did civil libertarians go wrong? Invoking political theorist Quentin Skinner and legal scholar James Boyd White, Graber concentrates upon the "intellectual environment," the "modes of rhetorical justification" that shaped and constrained civil libertarianism. This approach leads him to the general ideology of progressivism and the specific tenets of sociological jurisprudence. Adapting political progressivism to law, scholars such as Chafee and Roscoe Pound stressed the social dimensions of legal decision-making. In place of the individualistic, natural rights, anti-statist tilt of conservative libertarianism, civil libertarians emphasized the social context of all rights claims and the reformist potential of state-sponsored social legislation. This approach ultimately transformed free-speech doctrines.

In speech cases, civil libertarians' commitment to the intellectual assumptions of sociological jurisprudence produced a "central dilemma." While insisting that democratic societies protect dissenting expression in order to encourage diversity and invigorate public dialogue, they also considered a society "democratic only if elected representatives determined what social interests would be protected and promoted." "For reasons unrelated to expression rights, though clearly related to property rights," progressives jettisoned the conservative-libertarian conviction that courts jealously guard all individual liberties against socio-economic legislation. Inverting Cooley's calculus, progressives accorded freedom of speech "no higher constitutional status than freedom of contract." Their anti-Lochner convictions, in this sense, worked against strong judicial protection for freedom of speech.

From this perspective, the First Amendment writings of both Holmes and Brandeis are found wanting. In a judgment that, ironically, parallels Harry Kalven's, Graber concludes that Holmes was never really interested in the problem of protecting speech. Although Brandeis "sharpened" Holmes's musings about protected expression, he contributed no comprehensive free-speech theory of his own. Those Brandeis-inspired opinions of the 1920s and early 1930s that did uphold speech claims simply adopted an expedient pragmatism. "As long as conservative justices struck down laws that abridged the freedom of contract, liberal jurists unashamedly used those precedents to strike laws that abridged the freedom of speech."

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4. See, e.g., id. at 133-36.
5. For two different views, see the appreciative, and carefully argued account of the
Zechariah Chafee's voluminous writings bequeathed the most flawed legacy. By emphasizing social rather than individual interests and by limiting the judiciary's protective role, Chafee ignored conservative libertarianism's crucial insight: that doctrines about protected speech must confront economic relationships within public life. Steadfastly rejecting any general judicial power to strike down "reasonable" legislation in the name of individual liberties, Chafee justified protection of speech on instrumentalist grounds that squared with his anti-Lochnerism. Judicial scrutiny of free-speech claims, according to Chafee, should primarily look toward the broader process by which popular opinion took shape rather than the specific rights of individual speakers. A process-oriented approach to speech issues would, he hoped, encourage wise social and economic legislation—which the judiciary should not casually strike down—that rested upon fully informed public discussion.

Unfortunately, this circuitous strategy for legitimating "some form of judicial activism" on First Amendment issues "implicitly pretend[ed] that the distribution of economic resources did not affect the system of freedom of expression." Focused on governmental restraints, Chafee ignored broader economies of power and knowledge. Any remedies for "private restraints on fair discussion" must come from "an aroused public opinion and the enterprise of individuals and the community, with the possibility of affirmative governmental action in the background," he wrote in 1941.

Graber thus scolds Chafee for creating a free-speech tradition that remained "structurally insensitive" to the economic concentration that was already stifling dissenting speech. Later theorists such as Thomas I. Emerson and Vincent Blasi, though recognizing that "material inequalities threaten the democratic process," continued "to place the relationship between private property and free speech at the periphery" of First Amendment discussions. With mainstream scholarship still focused on the venerable free-speech versus illegal conduct debate—largely an issue of the past, according to Graber's analysis—"virtually all recent" discussions either ignore, slight, or fail to "resolve" the relationship between speech and property.

Intending to build upon Michael Walzer's work on political and property rights, Graber promises a subsequent study that will develop a "political libertarian approach to free-speech problems."

Briefly outlining such a project, he first suggests that “only speech uttered for the purpose of causing criminal conduct is beyond the pale of the First Amendment.” If this principle were applied retroactively to Supreme Court cases, only Benjamin Gitlow would have overstepped the protected sphere for dissenting speech.6

On problems of speech and property, Graber suggests that the threshold question should be “When is money speech? rather than Is money speech? Individuals have the constitutional right to convert their material resources into political expression [only] as long as the average member of the community can afford to invest similarly in politics.” Apparently offered as an updating of the individualistic approach of Cooley’s day, political libertarianism would deny special speech rights to corporations and labor unions; uphold the type of regulations on corporate contributions struck down in Bellotti;7 accept the campaign spending limits invalidated in Buckley v. Valeo;8 and, more generally, authorize legislation aimed at preventing wealthy persons from “convert[ing] material advantages into political expression.”

Transforming Free Speech is an ambitious, valuable and provocative book. It effectively argues that contemporary scholarship might draw from more than a single “worthy tradition”; that histories of free expression cannot “stand apart from American political and intellectual developments”; and that any free-speech theory—including Graber’s own—is historically contingent, “a product of its times.” But as an attempt to re-imagine the past as a prologue to clearing theoretical space for the present, the book invites dissent on a variety of specific issues.

Although skeptical of various parts of Transforming Free Speech, including the claim that Chafee’s framework still confines First Amendment discussions, I will note only two issues here: the book’s narrow reading of “intellectual” history during the crucial “transformation” period, and a similarly constricted approach to what might be called the “cultural politics of speech.” In terms of both these issues, the book’s call for considering First Amendment issues against a broad historical backdrop seems only partially realized.

First, when exploring conservative and civil libertarian thought, Transforming Free Speech follows a rather narrow path. At points it pursues “the not-so-great-person” mode of legal history: Had only previous theorist X solved earlier dilemma Y more

effectively, we would have been spared today’s doctrinal crisis Z. Thus, Zechariah Chafee “obscured earlier libertarian arguments,” imagined a “mythical tradition” for his own views, and “stunted the development” of “more protective” principles. This formulation places too much weight upon legal thought in general and individual thinkers in particular; in addition, it appears to fly in the face of the book’s own, better-conceived arguments about the historical contingency of legal discourse.

Yet even Transforming Free Speech’s best moments, some historians may find, too often fall back upon a reductionist, binary framework—conservative vs. civil libertarianism—that limits its view of free-speech debates. Fifty years separated Thomas Cooley’s and Zechariah Chafee’s initial writings on free expression, and (perhaps inevitably) Transforming Free Speech cannot adequately represent a half-century’s intellectual history. To link the demise of Cooley’s libertarianism to the rise of progressivism and sociological jurisprudence—and then to characterize the resultant civil libertarianism as a step backward in free-speech theory—simply ignores too much about these complex discourses and, more importantly, about other historical discussions of speech issues.

Articulated in its own historically contingent texts, conservative libertarianism, for instance, may have actually been “transformed” prior to the emergence of sociological jurisprudence. Thomas Cooley’s earliest ideas about libel law, which always represented a minority position, underwent important transformations during the 1880s. And well before Chafee (or other civil libertarians) had begun to write, the dominant legal approach to libel and many other speech issues had, arguably, already assumed the “neo-Blackstonian” form that Justice Holmes endorsed in Patterson v. Colorado. The late nineteenth and early twentieth centuries, in other words, may have seen transformations within as well as of conservative libertarianism that do not fit into a binary approach.

Similarly, attempts to locate the historical contexts of specific legal texts may require more precise mapping than Graber’s framework allows. For example, the works of John W. Burgess, cited as examples of the continuing vitality of conservative libertarianism during World War I, might also be read in light of Burgess’s rabid pro-German sympathies. His final books, contemporaries in the historical profession argued, seemed more pro-German—and anti-
Wilsonian—than libertarian.  

Moreover, conservative libertarian texts, drawn from whatever point in time, seem to fit awkwardly into any tradition critical of the impact of wealth upon speech. As Graber concedes, the primary link between conservative libertarianism and his political libertarianism is that both seek to join, though in obviously different ways, speech and economic issues. Yet if one seeks historical antecedents for the approach Graber sketches, texts by the opponents of conservative jurisprudence—anarchists, women’s rights crusaders, labor organizers and agrarian populists, for instance—would seem more appropriate sources than those of Cooley, Burgess and company.

Second, and more broadly, Transforming Free Speech, with its focus on the “intellectual environment,” simply cannot examine the larger cultural politics that helped to shape debates about legally protected speech. To take only a single example, the book ignores a monumental change that interacted with both the conservative and civil libertarian discourses about speech: the rise of mass commercial culture. During the late nineteenth century, for instance, the legal writings of both Cooley and Brandeis were intertwined with changing modes of mass communication, especially those offered in celebrity-oriented journalism. And during the first decades of this century, the free-speech debates that most engaged so-called progressives addressed new forms of commercial expression, especially motion pictures, advertising, popular theater and muckraking journalism.

In this political-cultural context, Transforming Free Speech, which is implicitly shaped by the question “How can speech be given the broadest possible legal protection?,” may give too little


12. See, e.g., David Kairys, Freedom of Speech, in David Kairys, ed., The Politics of Law: A Progressive Critique 237 (Pantheon Books, rev. ed. 1990). Transforming Free Speech itself also discusses two important, often neglected figures who fit into neither the conservative libertarian nor the civil libertarian molds: Theodore Schroeder, a philosophical anarchist associated with Emma Goldman and with the Free Speech League; and Ernst Freund, the author of the classic treatise The Police Power: Public Policy and Constitutional Rights (Callaghan, 1904). Their writings, Graber notes, point to a “path not taken” by civil libertarians such as Chafee, but his important discussion of Schroeder and Freund remains limited within his overall, binary frame. See Transforming Free Speech at 54-65.


historical attention to another query, "Why is 'speech' deserving of special legal protection?" As mass commercial culture enveloped the very fabric of everyday life, variants of the "Why is speech special?" question were asked repeatedly during the period in which conservative libertarianism allegedly gave way to civil libertarianism. What emerged by the 1920s was not simply a new set of legal doctrines, but much broader discourses about "free" speech which were rooted in complex economic, political, academic, as well as legal cultures.

After 1900, discussions about the film making industry, again to note only one example, produced fierce debates about what kind of legal protection Hollywood's products deserved. During these discussions, people from legal and other professional (and nonprofessional) communities consistently linked speech and economic issues; equally important, their overlapping discourses helped to construct the complex relationship between "law," including Hollywood's own Production Code, and cinematic expression in the United States. Indeed, Hollywood itself came to offer powerful cinematic representations, including ones highlighting the economic dimensions of speech controversies, that intersected with other cultural discourses about protected expression.

Although Transforming Free Speech offers a very suggestive and valuable analysis of elite legal thought, its narrowly conceived intellectual approach tends to limit its view of an important period in the history of debates about legally protected expression. Histories of the First Amendment, especially those that seek to transform understandings about protected expression, might well look to a wider variety of cultural discourses in order to untangle the complex chains of signification that have helped to give meaning to one of the most powerful of all phrases in the twentieth-century lexicon, "freedom of speech."


Frank J. Sorauf2

The search for order, even meaning, in American political history is first of all the search for significant periods within the 205-year span of government under the Constitution of 1787. Presidential terms serve that purpose about as well as a list of the kings and queens of English history—milestones along the route of history that tell the distance but little more. Scholars find far greater analytical power in periods of party ascendancy—periods in which voters adhere with some stability to the two major parties and in which, perforce, one of them, the “majority party,” governs and puts its stamp on public policy. Even more useful analytically is the study of the great upheavals, the realignments, in party support brought about by shifts in the electorate.

It would be hard to exaggerate the avidity with which historians and political scientists have seized on alignments and realignments as the basic units of historical measurement in the last forty years or so. It was the maturing of sample surveys (i.e., polls) that sparked the explosion, since they provided for the first time reliable data on the party preferences of individual voters. The bibliography in Gates’s book runs to more than fourteen pages, substantial indeed even though some of the entries deal with the courts per se rather than realignment. Harold Bass’s bibliography in another recent book on realignment more generally runs to a staggering thirty-one pages and more than 700 entries.3 Realignment is indeed a flourishing industry among scholars of American politics.

Not surprisingly within so large a scholarly domain, there are sub-domains and tribes of specialists, each with a particular agenda of questions to debate. What fundamentally is the nature of the attachment (loyalty? identification?) of individuals to political parties in a nation with no tradition of formal membership in them—and how does one measure it? Are realignments caused by the conversion of voters from one party to another or by the sudden influ-

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sion of new voters overwhelmingly into one of the parties? Do all realignments have the same dynamic and major characteristics—is there just one kind of realignment, fairly uniform regardless of time and context? And, indeed, will realignments go on "forever?" Or do we now see the end of realignments as party loyalties attenuate and as we linger in a dealignment that doesn't seem to want to progress to the next realignment?

And then there are the questions about the relationship of realignments to policymaking (and policies made) in the Congress and the Supreme Court. Gates's book obviously falls into the latter category. The relationship of realignments to policymaking, however, is in fact two questions. Do the policies made in Congress and the Court before the realignment help to define its critical issues and thus to bring the realignment about? And after the realignment, does the Court, reflecting the majority views of the old alignment, inevitably find itself at odds with the Congress that is the electoral product of the new one? Gates tackles both questions.

In fact, the Gates study is the most systematic and comprehensive one on the realignment-Court nexus in a literature graced by the work, inter alia, of Robert Dahl, Richard Funston, Jonathan Casper and David Adamany. Certainly his data base is wider—all instances of Supreme Court invalidation of both state and federal policies in the periods both before and after the major realignments. For good measure Gates even treats the somewhat inconclusive dealignment (and, a few would argue, partial realignment) beginning with the elections of 1960 and 1964. It is a net wide enough to catch 743 cases. To repeat, it is the inclusion of both national and state policies and the before and after impacts of the Court in the realignment that marks the broadened scope of this book.

Gates's examination of the Supreme Court's involvement with the cycles of alignment and realignment in American history is systematic, rigorous and monographic. There are precious few personalities or anecdotes here. It is serious, empirical social science, although one should hasten to add that the use of numbers is restrained and the statistical apparatus relatively simple. Each chapter—one realignment per chapter—has the same architecture, the same progression of topics; the reader always knows the neighborhood, even if at the price of predictability. There are also many, perhaps even a few too many, previews and summaries to sustain the thread of analysis. In short, the book is intended for the serious reader, and while the prose is certainly not a "quick read," it is lucid and it requires no translation into colloquial English.

Gates's conclusions are equivocal. In the author's words: "The
evidence . . . does not consistently support either the policy conflict role following critical elections or the agenda-setting role before critical elections.” (The “role” apparatus runs through the book and can, if the reader wishes, be safely ignored.) The Court’s contributions to realignment agendas differed in the four instances under study, and the Court’s conflict with the elected branches after realignment is clear only after the realignment of 1932. It appears, in other words, that we have hypothesized too great a judicial involvement in the politics of realignment, a result, I suspect, of inferring too much from the decisions of a conservative Supreme Court between the two wars and the epic battle centering on the Court in the 1930s.

With hindsight sharpened by work such as Gates’s, it now seems that we have ignored a good deal we know about the Court and its decisionmaking in positing the Court-realignment nexus. (For their part, scholars of the parties have paid insufficient attention to the nonparty context within which party realignments take place.) Not all of the issues over which the Court has constitutional differences with the states and Congress become realigning issues; realignment has never involved all of our policy politics and differences. Moreover, the issues salient to the appointment politics of Justices may not be the critical issues of realignment either. And Justices do change their positions even on possible realigning issues; the shift of Justices O’Connor, Kennedy and Souter to constitutional middle ground on the abortion issue reminds us of that.

As for conflict with Congress and the President post-realign-ment, the hypothesis of the nexus underestimates the capacity of the Court for change and adaptation. Have we so soon forgotten the 1937 “switch in time” that saved nine? In such conflict within the separation of powers, the elected branches are not without their weapons, and the Justices, too, are in varying degrees sensitive to their anomalous position as life-long mandarins in a mass democracy and, thus, variously sensitive to broad popular opinion. Nor are the Justices incapable of changes in their own worldviews. In the metered prose of one of the great sentences in American jurisprudence—Benjamin Cardozo’s famous dictum in The Nature of the Judicial Process—“[t]he great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.”

Any exploration of the relationship between basic political shifts in the mass American electorate and the decisions of the Supreme Court inevitably raises the most fundamental issues: the

nature and origin of conflict between the Court and the elected branches, the impact of mass and specialized opinion on the Court and indeed the extent of "political" decisionmaking on the Court. A careful reading of the Gates book will stimulate many meditations on these and similar themes. To take only one example, Gates presents a convincing case that the partisan affiliations and auspices of the individual Justices are only marginally related to their voting on the Court. So, the addition of new data to the debate—on the roots of judicial decision in this case—shows us once again that reality is more complex than we would prefer.

Specialists on realignment and its various manifestations will find additional, more technical grist for their mills in the Gates book. First, on method, Gates is persuasive in arguing that the Court’s constitutional relations with the states must be included in assessing the Court-realignment nexus. Changes in the policy agenda may be sparked and given new salience in the states as well as in Washington. More broadly, the more we explore realignments and the more we learn of their roots and dynamic, the more varied and complicated they seem. Realignments seemed at one time to combine explanatory power with a seductive parsimony. The seduction has been very real, but the parsimony was probably always illusory.

And where does Gates leave scholarship on the nexus? Certainly he has shifted the presumption from one of validity to one of doubt; the final weight of the evidence and the carefully drawn conclusions simply can’t be avoided. For the proponents of the nexus three options occur to me. First, they can admit defeat and give up. Second, they might try to recast the argument by broadening judicial influence (or “role”) to include patterns of policy interpretation as well as invalidation. But such a new conceptualization of judicial muscle raises the most formidable problems of measurement. (Talk about the loss of parsimony!) Third, they can pitch in to reconstruct a new and more complex set of hypotheses, a set that would specify different judicial contributions or impacts in different realignment contexts or dynamics. If we concede that not all realignments are alike, that is to say that the work of the industry has really only begun. Stay tuned.

Cynthia Ward

The so-called republican revival has established the historical bona fides of communitarian thought in the United States, affirmed its contributions to the construction of the American Constitution and offered scholars a new standpoint from which to criticize the premises of liberalism as they have been applied in the fields of history, political theory and jurisprudence. Most recently the literature has moved away from the standard polarization of liberal individualism and republican communitarianism as the northern and southern extremities of political theory. The old mutually exclusive paradigms have given way to the concept of "liberal republicanism," an appellation that accurately implies a scholarly effort to demonstrate both historically peaceful coexistence between the two visions of human nature and society, and substantial conceptual overlap between them. The move toward synthesis comes from both the liberal and communitarian camps; Professor Joyce Appleby's collection of essays fuels it with historical evidence.

If the work of Bernard Bailyn, Gordon Wood and J.G.A. Pocock has demonstrated that liberal theory did not hold an unchallenged position of philosophical dominance at the time of the

1. Professor of History, University of California, Los Angeles.
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3. From the republican revivalist end of the spectrum, well-known efforts in this direction include Frank I. Michelman, Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought, 77 Va. L. Rev. 1261 (1991); Frank I. Michelman, Conceptions of Democracy in American Constitutional Argument: Voting Rights, 41 Fla. L. Rev. 443 (1989); Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988). From the liberal end, they include William A. Galston, Liberal Purposes: Goods, Virtues and Diversity in the Liberal State (Cambridge U. Press, 1991) ("worried liberal" disputes both liberal philosophers and communitarian critiques of liberalism and argues that the modern liberal state is committed to distinctive, unified conception of public good). I have expressed skepticism about the move toward synthesis, in particular the assertion made by Michelman and Sunstein that a "liberal pluralism" which allows government reinforcement of race- and/or gender-based separatism is consistent with the republican vision of community, in Ward, The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix, 91 Colum. L. Rev. 581 (1991).
Founding, Joyce Appleby contests what she sees as an effort to replace liberal with republican theory as the unchallenged "winner" of the political debate in eighteenth-century America. While much scholarship has focused on the possible applications of a contemporary synthesis between the liberal and republican visions, Appleby attempts to build a case for the existence of "liberal republicanism" at the time of the Founding and among eighteenth-century thinkers—especially Thomas Jefferson and his followers—whom historians have long depicted as classical republicans. Appleby's argument is not flawless, but she disinters important historical truths that are directly relevant to contemporary theoretical debates over equality, individuality and justice for the disadvantaged.

Professor Appleby acknowledges the valuable contributions of the republican revivalists in bringing forth from our collective unconscious the historical reality that the Founders were not an undifferentiated group of stick-figure liberals, obsessed by a vision of mankind as composed entirely of autonomous rational individuals making self-interested choices. Appleby does not argue with evidence of a competing, republican paradigm, based on civic virtue and a common-minded citizenry willing to consider and implement a unified vision of the public good. But, at least with respect to Pocock, Appleby charges that disinterested scholarship has become advocacy, leading to the same sin committed by generations of liberal-minded predecessors to the "new republicans"—that of enclosing the colonial mind entirely within the confines of one political paradigm and dismissing the importance of facts which establish the simultaneous influence of another.

Appleby maintains that this puts the civic republicans in violation not only of the evidence of history but of their own methodological principles. In Chapter Four she connects the methods used by Pocock and others to study liberalism and republicanism with their substantive results. Such a discussion is vital, since the choice of a methodology necessarily answers questions that are prior to substantive historical ones, defining what constitutes an historical problem and what counts as evidence of its existence or solution. Thus, Appleby must steer her argument through a methodological maze to be sure that she and Pocock are really addressing one another. She proceeds both by challenging the revivalists' announced method of analyzing political history and by concluding that, even using their own accepted methods, the republican historians have failed adequately to support their claim that civic humanism domi-

7. See, e.g., Michelman, 77 Va. L. Rev. 1261 (cited in note 3); Michelman, 41 Fla. L. Rev. 443 (cited in note 3); Sunstein, 97 Yale L.J. 1539 (cited in note 3).
nated political thought at the time of the founding of the American republic.

Rejecting existing methodologies for the study of political thought, Pocock and a small group of other scholars "urged instead the adoption of a methodology springing from social linguistics. Under their collective prompting both intellectual history and the history of ideas have given place to the study of ideology conceived of as a structure of meaning expressed through a historically specific system of communication." Pocock drew on the work of Thomas Kuhn8 to characterize such "systems of communication" as mutually exclusive paradigms which determined the thought and political prescriptions of the American Founders. Appleby challenges the revisionists' assumption that "one language of social analysis precludes the coexistence of others." She charges that an important part of the language and conceptions of human action in the seventeenth and eighteenth centuries was the birth of liberal theory arising from the imaginative attempt to explain the expansion and success of the market as a regulator of human affairs. The first few essays in the book develop an historical case for this contention, and Appleby then criticizes the republican revisionists for failing to recognize it:

"A complex plural society will speak a complex plural language," Pocock has written. . . . One of the strands in the "complex plural language" in seventeenth-century England came from writings about the nature of the market. While not strictly speaking political, the frequently made assertions that trade possessed its own natural laws and hence was not susceptible to regulation carried profound implications about government's authority. Indeed, one might say that if, as Pocock has insisted, the supremacy of civic humanist values forestalled the appearance of a bourgeois ideology with the entrepreneur as citizen, so the study of economics disclosed a way for making that paragon of civic humanism—the disinterested citizen—an irrelevant figure.

Appleby argues that Pocock's partisan attempt to achieve "the dethronement of the paradigm of liberalism, and of the Lockean paradigm associated with it" gives a soundly conservative cast to his revisionist story. She repeatedly cites the Pocockian methodological premise, "men cannot do what they have no means of saying they have done; and what they do must in part be what they can say and conceive that it is," pointing out that this principle has

“tended to strengthen the case which has been made for the historical-mindedness of seventeenth-century Englishmen,” especially their conviction that human history was doomed to move in cycles, that new departures from it were impossible and that dramatic changes in society were more threatening than exciting. But Appleby points out that this view leaves no room for human imagination to reach out for new language to explain events which do not fit into existing historical or philosophical boxes. Such creativity, contends Appleby, led to the delineation of the liberal theory of human nature in response to observed human behavior in the market for which there was no classical explanation. Available to political theorists at the time was not merely one linguistic paradigm—the classical vision of civic republicanism—through which men could voice their concerns and reactions to events, but the competing, imaginative liberal paradigm, upon which men could and did draw in both economic and political argument:

There were other languages available and used. As important as the financial and glorious revolutions were in the [republican] history of ideology the commercial revolution was even more important. Here a paradigm like Kuhn’s scientific ones had to be invented. The worries about the Bank of England and the national debt in no way precluded men from responding to the abounding evidence of economic change in politically explosive ways. Indeed, many writers managed to think in both languages, pointing out the dangers of political corruptions from extended patronage while analyzing the new market economy with a totally different vocabulary.

So far, Professor Appleby’s argument is strong; in particular, she does a great service in these deterministic days by rescuing a well-documented role in political thought for human creativity. But Appleby seeks to do more than demonstrate the mere coexistence of the liberal and classical paradigms; she attempts to show the presence in the Founders’ political lexicon of the synthetic concept of “liberal republicanism.”

Here, Appleby builds her argument around the thought of Thomas Jefferson, generally considered to be the most prominent devotee of classical republicanism among the Founders. Appleby contends that this view of Jefferson and his followers is wrong, and that exposure of Jefferson’s real views reveals a concept of “liberal republicanism” which belies Pocock’s claims that Locke and other English liberal thinkers had minimal influence on the founding of the American republic. Her attempt is to use Jefferson’s writings and those of thinkers he admired to demonstrate Jefferson’s opposi-
tion to the most important tenets of civic humanism. For example, she makes a convincing case that Jefferson's vision of the American experiment was aspirational and forward-looking—that he had a strong sense of the newness of the Founders' Constitutional experiment, and believed in its possibilities—as contrasted with the pessimistic, reactionary feeling of classical republicans, who believed that change was either threatening or impossible.

Of course, Jefferson's progressive view of human nature might not have divorced him from the substance of classical republican thought, which emphasized altruism, the cultivation in citizens of civic virtue, the primacy of the "public good" over individual autonomy, and a profound mistrust of capitalism as a corrupting influence on the attainment of these social goals. But Appleby opposes Jeffersonian thought to that of classical republicans on every one of these points. She contends first that Jefferson believed in the sanctity of the individual and in the beneficial results of encouraging capitalistic enterprise:

What was distinctive about the Jeffersonian economic policy was not an anticommercial bias, but a commitment to growth through the unimpeded exertions of individuals whose access to economic opportunity was both protected and facilitated by government. . . . What had given a sacred underpinning to Locke's contract theory was his assumption that men living under God's law were enjoined to protect the life, liberty, and property of others as well as their own. Jefferson perceived that Locke's identity of interests among the propertied could be universalized in America and thereby acquire a moral base in natural design.

Second, Appleby opposes Jefferson's respect for the primacy of private interests to classical republican advocacy of sacrifice for the community:

Again he [Jefferson] reversed the priorities implicit in the classical tradition. The private came first. Instead of regarding the public arena as the locus of human fulfillment where men rose above their self-interest to serve the common good, Jefferson wanted government to offer protection to the personal realm where men might freely exercise their faculties. Appleby concludes that, by presenting classical republican thought "as encapsulating Americans within a closed ideology" at the time of the Founding, "the republican revisionists have gone beyond their evidence."

But Appleby's attempt to prove that the presence of liberal themes in Jefferson's writings did not simply represent the coexistence of two, competing paradigms, but rather the formation of a
third one which synthesized them, is ultimately unsuccessful. She raises this problem, but makes only a weak attempt to solve it:

> It is of course possible that Jefferson and his followers were simultaneously liberal and classical, as Banning has argued. However, when we find a man as methodologically reflective as Jefferson repeatedly stating that his party distinguished itself by its commitment to scientific advances in the knowledge of government, by its faith in the self-governing capacities of ordinary men, and by its liberation from reverence for the past, it makes good sense to believe him. Not to do so is to interpret his triumph as a defeat and to construe the emergence of liberalism as a disappointing capitulation to the overpowering force of economic development.

In one way this conclusion simply misses the point; if in fact our goal is to discover the truth and not necessarily to represent Jeffersonian thought (or, for that matter, American liberalism) as a triumph, it is necessary to consider the possibility that American liberalism was in fact a “disappointing capitulation” to the emergence of market capitalism. But Appleby’s main point seems to be that the evidence does not support that conclusion. Historically, she leaves us in doubt on that point; because she spends little time discussing Jefferson’s communitarian views or explaining how she thinks they worked together with his more liberal statements, readers are left wondering if Jefferson was not merely a mislabelled liberal, or whether he simply held conflicting views on these matters.

However—and perhaps most important—Appleby’s attempt does bring out historical facts that have direct (perhaps unintended?) relevance to political debate today. As she notes herself, scholarly critiques of liberalism have proven so successful in academic circles that they have opened a wide conceptual divide between the American intelligentsia and much of the rest of world, particularly in the wake of the liberal revolutions in Eastern Europe and the Soviet Union. Appleby comments on “the irony that the perdurability of liberalism and its supportive systems of capitalism and democracy have been demonstrated for much of the world at the very time that in its homelands doubts about the virtues of liberalism are widespread.” Her book offers a possible key to understanding the initial excitement of the nations of Eastern Europe over their chance to achieve liberal democracy at a time when many intellectuals in the Western democracies themselves seem bent on disparaging it. Appleby does this by disinterring historical truths about liberalism and communitarianism that appear to have dropped out of the Western academic zeitgeist.
First, liberal capitalism was revolutionary. In Appleby's language:

[T]he American Revolution developed its revolutionary character not by redeeming the rights of Englishmen, but by denying English sovereignty and the conceptual order which tied liberty to the English constitution. Deliverance from the strictures of classical republicanism came from the ideology of liberalism, from a belief in a natural harmony of benignly striving individuals saved from chaos by the stability worked into nature's own design.

Liberals opposed their revolutionary belief in individual autonomy and equal rights to the reactionary, pessimistic forces of classical republicans. Liberalism was a response of visionary outrage by revolutionaries to the constraints on human possibilities assumed by republican communitarianism.

Second, this liberalism was egalitarian. Opposing the belief of civic humanists that hierarchies among people would always exist and that a stable government should reflect and reinforce them, liberals constructed a view of human beings as fundamentally rational and politically equal, making possible both political democracy and the limitation of State intervention in the lives of citizens—that is, the creation of the public/private dichotomy:

The appeal of a market society for Americans [was] its capacity to enlist the voluntary efforts of men and thereby permit the dismantling of the customary institutions of control. This possibility gave to liberalism that utopian quality which infected men of all ranks. . . .

Where politics achieved stability by imposing its structure of power, the economy appeared to elicit voluntary participation as it wove ever more extensive networks of free exchange. It also discovered a rationality in the humblest person whose capacity to take care of himself could be used as an argument for freedom. . . .

Appleby cites the crucial liberating role played by another target of liberalism's critics—abstraction:

It would be hard to exaggerate the subversive role abstract reasoning played in this retreat from [civic humanist emphasis on] politics. Science became the lodestar for those who thought they were at the dawn of a new age; modern scientists, not ancient philosophers, guided them into the future; the inquiring mind presented itself as the inexhaustible resource for endless improvement. The importance of the free market to this development cannot be reduced to economics.
Attempts at such reductionism, contends Appleby, reflect ideological imports from subsequent generations of historical theorists:

Liberalism and capitalism have undeniable historical links, but the concept of capitalism that we use today only obscures their connection in the eighteenth century. . . . For us the end of capitalism is the accumulation of capital, the means to that end the capitalist’s organization of hired labor, and the social consequence a permanent division between dependent laborers and independent employers. Attached to the notion of a bourgeois ethic, the culture produced by this capitalism appears in an altogether different light from the Jeffersonian vision. Constricting rather than generous, manipulative rather than emancipating, its values never rise above the interests of its beneficiaries.

In contrast, liberals in the eighteenth century saw market-enabled individualism as both egalitarian and virtuous. Liberals, contends Appleby, didn’t drop the notion of virtue from the political lexicon—they redefined virtue to embrace egalitarian individualism. The notion of the self-generated, industrious human being, acting without the yoke of political coercion from community norms enforced by the state, was utopian rather than evil.

Appleby’s evidence also contradicts reductionist depictions of liberalism that have become routine among its communitarian critics. Liberalism, on her view, was a partial reaction to certain perceived faults in the pre-market economic and political order. It neither denied all benefits of community deliberation nor set itself up as a complete replacement for the values of citizenship or altruism. It merely added to those values the possibility of making individual freedom a reality, on an equal basis, for all people.

Appleby balances her discussion of the positive historical role played by liberal theory with enumeration of liberalism’s faults as they have been delineated by scholars in this century. She cites some flaws that would surely be acknowledged by most readers—e.g., the assumption of early liberal theorists that market-based capitalism was based on natural law rather than human imagination; and some that are much more debatable—e.g., the identification of liberalism as having a “masculine personality,” a choice of phrase which seems to move beyond the merely descriptive claim that liberal capitalism (and all other political systems) have historically been dominated by men to the as-yet unproven assertion made by radical feminists that liberalism is somehow necessarily male.9

Ultimately, Appleby’s book adds substantially to the debate

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over possible syntheses between liberal and communitarian theories, where the most important political question is: If communitarianism and liberalism can be shed of the "historical imagination"—that is, communitarianism purged of its historical love for hierarchy and exclusion, and liberalism viewed without its negative Marxist gloss and thereby revealed as having the potential to achieve human equality and freedom—at what point are the two philosophies in fundamental conflict? Can the idea of "liberal community" Appleby attempts to locate in the thought of the Founding Fathers rest on the common aspiration of both philosophies, at least in their contemporary forms, for equality, inclusion and freedom for all human beings? Appleby, an historian, does not even attempt to answer this question, but her evidence contributes significantly to the synthetic project by making clear that the vision of liberalism held up by post-Marxist historians excludes crucial elements which may explain its appeal not only to eighteenth-century Americans but to the twentieth-century revolutionaries of Eastern Europe and the Soviet Union. Indeed, the question of synthesis may have special significance for politicians and scholars in those countries, where the attempt to construct stable democratic institutions presents political leaders with the inescapable necessity of finding a permanent way to balance strong communitarian socialization with liberal yearnings for equality, unassailable individual rights and freedom from domination by the state.


*Michael P. Zuckert*

Earl Maltz mostly has the right idea about the Fourteenth Amendment. That is no small matter in a field so fertile with scholarly squabbling as this one is. Text, history and current significance all conspire to make the Amendment one of the most pock-marked battle fields of our legal wars of the words. The language of the Amendment, it is often said, presents hardly more determinative meaning than an ink blot: large terms, full of sound and ominous boding, but signifying nothing very specific. Historical investigation has not produced much more decisive evidence about the origi-
nal meaning of the Amendment either. Those who drafted and defended the Amendment spoke in the same large and vague terms as they wrote; moreover, most of the decisive discussion of the language of the Amendment occurred in a committee for which we lack the potentially most revealing records. Private papers help very little. Finally, so much is at stake in the Fourteenth Amendment that scholars and judges face every temptation, provocation and incentive to make of the spotty textual and historical record what they will. The history of the interpretation of the Amendment stands as a powerful comment on the wisdom of the Lord's Prayer: "Lead us not into temptation."

Maltz explicitly locates his study relative to the prevailing debate over the intended effect of the Fourteenth Amendment, and implicitly in relation to ongoing debates about originalist interpretation. On the latter subject he has written extensively and intelligently in the journals, and one can only wish that he had been more explicit in this book on its connections to these debates. Maltz has been at once one of the more outspoken and more sensible defenders of an originalist approach. He has cogently questioned what has now become a near orthodoxy in the pages of scholars like Ronald Dworkin and jurists like William Brennan, that establishment of original intent is impossible. His Fourteenth Amendment book stands as an effort at a case study showing the greatly overstated character of the Dworkin-Brennan claims. Maltz approaches his task in a fully sophisticated manner, aware of the various pitfalls critics of originalism declaim. He is especially attuned to problems of collective intention. Maltz shows that patient, thorough and imaginative analysis can indeed recapture the meanings of the historical actors in this particular set of events. In part, Maltz is the beneficiary of a long-term scholarly siege on the materials surrounding the Amendment. He is able to take advantage of the kind of process of discovery his predecessors engaged in and the sorting out of facts, concepts and interpretations that has come before.

His own contribution is not negligible, however. He attempts to pin down a meaning for the Amendment by triangulating in on it from a variety of different locations, defining thereby the space in which the discourse of framing became possible. He draws heavily on considerations of the general political context, alternative general theories about federalism, rights, and other relevant legal and political matters, extra-congressional comment on Reconstruction issues, and the much-studied congressional debates themselves. Through his method of triangulation he builds a persuasive case for almost every aspect of his substantive interpretation, and for the
general proposition that discovering the intent behind a legal enactment is not more mysterious than, say, discovering the relation between pi-mesons, quarks, and bosons in the composition of the universe.

Maltz does not force his materials into a false pattern or find more uniformity and order than were patently present. He is able to concede what many other scholars have emphasized, that there was a good deal of disagreement among the drafters, there were indeed cases where some (at least) were confused about what they were doing, and where political considerations may have suggested open-ended vagueness as preferable to determinate clarity. Nonetheless, he argues these factors interfere far less with the interpretative effort than they are frequently taken to do. He finds the disagreement and confusion to have existed in a far more structured manner than the Dworkins of the world care to admit. There were not nearly as many understandings of the Reconstruction enactments as there were participants in the process; only a few relatively well-defined positions emerged, and those tended to persist over a number of different issues and over a long period of time.

Although his methodology is complex, the two main ideas of it can be stated rather briefly. There may have been differences among sponsors of the Reconstruction legislation, but we must be careful to find the position which could win a consensus, or enough of a consensus to gain the required majority. Thus he rejects Jacobus ten Broek’s approach of relying heavily on Democratic opposition exaggeration of what the various laws would accomplish. He also rejects the approach of Hyman and Wiecek, who tend to accept uncritically the point of view of the most “advanced” advocates of the measures as definitive. Instead, he notices a dynamic whereby the moderate Republicans held the balance of power. He shows in case after case that although some wanted more (Stevens, Sumner, et al.) and others wanted less (the Democrats), the outcome was almost always defined by the position taken on an issue by the Moderates. A majority, especially a two-thirds majority, could be assembled only when the moderates went along.

The majorities that enacted the Reconstruction measures were, therefore, coalitions composed of elements not in perfect agreement on everything. But Maltz does not infer from this fact Chief Justice Warren’s lame “inconclusive” assessment. The coalition members might well have sought different things in a world they controlled, but the agreement they reached was not a chaotic amalgam of disparate aims, but the position the moderates were willing to go along with. That radicals wanted more was irrelevant. In order to estab-
lish the character of the different groups and of the coalition agree-
ments, Maltz pays sensitive attention to the different proposals
under debate and develops various devices for identifying coalition
and sub-group positions, including extensive use of roll-call
analyses.

He supplements his more internal analyses by setting the whole
in a broader political context. Far from finding the politics a source
of unintelligibility, he tries to show how the politics help fix one or
another interpretation as more likely. With regard to the Four-
teenth Amendment itself, he is quite persuasive in showing how the
political role the Amendment was to play in the congressional elec-
tions of 1866 rendered certain competing interpretations of the
Amendment quite implausible. He shows, moreover, that by 1870
and 1871 the context had shifted so that positions earlier seen as
political liabilities (e.g., extensive congressional authority to reach
into the states), came to be seen as more attractive; he shows further
how, by the time of the Fifteenth Amendment, yet further shifts
had made black suffrage, theretofore a political liability, into a
promising political stance.

Substantively Maltz stakes out ground between the two chief
approaches to the Amendment. He is most hostile to the interpreta-
tion emanating from scholars like ten Broek, Hyman and Wieck,
and Kaczorowski to the effect that the Reconstruction Amend-
ments worked an entire transformation in the antebellum constitu-
tional system, traditional federalism giving way to full-scale
nationalism, accompanied by a new and open-ended protection of
rights, capacious enough to incorporate all and more that the War-
ren Court attempted to do with the amendments. He speaks as
though he is much more friendly to the narrower view of what the
Amendment accomplished, associated with earlier scholars like
Charles Fairman and more recent ones like Raoul Berger. In fact
he differs substantially from the latter group also.

He agrees, for example, with the broader interpreters that the
Amendment’s privileges and immunities clause does incorporate the
Bill of Rights, and while he does not present such a comprehensive
statement on this as Michael Curtis recently did, he adds some per-
suasive arguments to the brief Curtis drew up. Maltz argues that
the equal protection clause is about protection of the laws, and not
about equality; more formally, he argues the Amendment sought to
establish a doctrine of “limited absolute equality,” i.e., to establish
absolute protection for a certain class of rights (natural rights,
rights to governmental protection directly related to natural rights).
He contrasts this to current approaches which emphasize the issue
of classification and see the Amendment as directed at prohibiting all racial classifications or see it affirming a set of germinative rights possessing the mysterious power to grow ever larger and more numerous. In other words, he rejects equally the approaches to the Amendment of the first Justice Harlan, Justice Brennan and Michael J. Perry.

Above all, he argues, the framers of the amendments, or the core group of moderate Republicans retained sufficient attachment to the principles of the federal system to restrain them from all ventures of the sort the more far-reaching interpreters attribute to them. Thus, he insists, the Amendment does embody the state action doctrine, just as the court said in *the Civil Rights Cases*, and contrary to the claim of some important Republican drafters in 1870-71. It does not, in other words, empower Congress to reach private action, much less do so of its own accord.

Had I written this book, I would surely have cast much of it in different terms, and gone about it in different ways in many places, but as should be clear I would endorse most of Maltz's conclusions. One exception to that general concurrence would be the aforementioned argument regarding the power of Congress under the Amendment. As a gesture toward "truth in reviewing" I must confess to having argued in the pages of this very journal some years ago (1986) in favor of the idea that the Amendment authorized what I called the state failure doctrine: if the states demonstrably fail to supply the protection they are obliged to supply under the equal protection clause, then Congress has the right to step in and supply it. This is neither the doctrine of state action Maltz and other narrow interpreters endorse, nor the more or less plenary power doctrine broad interpreters defend. It is a doctrine consistent with the Framers' commitment to the traditional federal system, as the plenary power doctrine is not, and with the commitment to constitutionally guarantee certain rights previously not guaranteed, as the state action doctrine is not.

Maltz rejects the state failure doctrine, or as he calls it, the "supplemental protection theory," for a number of reasons I propose to review here, for they not only give a more corporeal instance of his mode of analysis, but also point to certain limits to his method. The most important piece of evidence Maltz brings forward is the congressional rejection in February 1866 of an earlier draft of the Amendment, a draft couched in language of congressional empowerment rather than prohibitions against the states as in the adopted Amendment. Maltz believes that the rejection of the
earlier draft proves the centrist Republican refusal to accept anything more than a state action Amendment.

Republican opposition to the original proposal was based broadly on the fear it would be seen as embodying a supplemental protection theory. If they had believed that the ultimate wording of section one reflected a similar theory, conservative moderates would have been unlikely to embrace it without protest. Yet no moderate assailed section one of the Fourteenth Amendment.

Maltz's style of argument here reflects one of his chief methodological principles: "the significance of language not chosen cannot be overestimated."

Maltz's point here, however, is founded on at least one false factual premise: so far as Republicans opposed the earlier draft, and so far as they did so on federalism-related grounds, their concern was not with the state-failure approach, but with the plenary power approach some of them feared was authorized by that draft of the amendment. In his own restatement of the debate over the earlier draft, Maltz described as "the basic theme... in all of the denunciations of Bingham's proposal" the fear "that it would create a revolution in federalism by granting the federal government plenary authority to perform the most basic functions of government... the protection of life, liberty, and property." (Emphasis supplied.) Or, as Maltz summarized the debate: "The discussion of the Bingham amendment revealed that a substantial portion of the party—the more conservative moderates—would not accept an open-ended expansion of the authority of the federal government." (Emphasis supplied.)

Maltz concedes that many of the Republican drafters adopted a state failure interpretation of the Amendment during debates on civil rights legislation in 1870 and 1871. Maltz wonders how reliable the later debates are, however: they could well be "law office history." He finds the 1871 defenses of a state failure approach to be inconsistent with what was said in 1866 by, among others, Bingham. "Bingham consistently denied any intention of granting Congress any authority to define substantive rights of life, liberty, and property." That may be so, but the state failure doctrine does not conflict with that position. At most it gives Congress the power to supply protection to those persons a state is failing to protect at a level equal to the protection the state is supplying to others. It does not involve fresh or independent definition of rights.

More generally, some of the limits to Maltz's approach to the Amendment come to light here. He is surely correct to suggest that
the state failure doctrine was not explicitly discussed during the de-
bates on the Amendment itself in 1866. Perhaps he is correct that
had it been discussed, it would have been rejected, although this is
highly speculative, and I can imagine a good argument to the con-
trary. The state failure theory was not discussed, not because the
drafters were planting a Trojan horse in the Amendment, but be-
cause the situation posed by the Black Codes and the response
taken in the 1866 Civil Rights Act filled their minds and few, per-
haps, consciously thought of, much less consciously signed off on
the state failure doctrine. Yet, a legal text, like many human utter-
ances, means more than the conglomery of specific instances a person
has in mind when making the utterance.

For example, a person giving a definition of a triangle as a
three-sided enclosed plane figure may not picture to herself an obtu-
se triangle, and may be surprised when confronted with one.
Nonetheless, she surely can rightly be said to have intended obtuse
triangles in her definition, whether she knew it at the time or not.
The language of the Amendment does the same. There is a logic to
the conceptual structure which is present whether the drafters were
fully conscious of all its implications or not. Indeed, this is one of
the most commonplace of our experiences of the law; much of the
judicial function turns precisely on courts having to decide how law
applies in instances not obviously and consciously intended by the
drafters, and yet somehow intended. Maltz does not give sufficient
weight to phenomena of this sort in his treatment of the history of
the Reconstruction legislation, nor in his theoretical approach to
the problem of originalism. This relates, perhaps, to another char-
acteristic of his approach. He tends not to pay sufficient attention
to text, preferring to go behind text to intention as revealed in all
the imaginative and helpful ways he illustrates in this book. Nonethe-
less, we must remember it is the text that is part of the Constitu-
tion and not the sum of all that was said about it in and out of
Congress.

These comments are not, I think, mere quibbles, but yet they
must not be allowed to derogate from an extremely valuable and
mostly very sound book. Earl Maltz mostly does have the right
idea about the Fourteenth Amendment, and that is no small matter.
Graham Walker attempts the *prima facie* odd—if not bizarre—enterprise of attempting to convince the constitutional theory world that St. Augustine—yes, St. Augustine—holds the keys, if not to the kingdom, then to the puzzles and dilemmas that beset the field. He must be judged to have succeeded only partially at best. I doubt we are about to see the *City of God* join *Morality, Politics and Law* or *Law's Empire* in the elite set of texts widely consulted on central issues of American constitutional theory.

Walker thinks Augustine is our man because he thinks that the “normative impasses” constitutional theory has reached can be resolved by recourse to Augustine. Walker finds the good bishop’s theory of politics to possess certain formal qualities needed to speak to our current situation. That situation, to simplify Walker’s account a bit, is as follows: constitutional theory is by its nature a normative enterprise, prescribing how judges ought to approach their interpretive task, or how we, the onlookers, ought to judge what judges do. Broadly speaking, contemporary constitutional theorists can be divided into two camps, moral realists and moral conventionalists. The latter believe, according to Walker, that morality is “merely a matter of socially fabricated conventions” or that morality is “ultimately groundless.” The conventionalist position amounts to the more sinister sounding “nihilist skepticism,” however, because “nihilism is the actuating premise of conventionalism.” Moral realists, on the other hand, “regard the good, whatever it may be, as a reality whose existence is independent of human artifice.” As he sometimes says, the realists see morality as “really real”; realists also hold to “the possibility of the human mind’s actually attaining some real if incomplete glimpse at the nature of goodness.”

The distinction between moral realism and moral conventionalism is, according to Walker, far more fundamental than the more common ways of classifying constitutional theories—liberal-conservative; activist-restraintist; originalist-non-originalist—that one

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finds in the literature. For one thing, the realist-conventionalist di-
chotomy cuts across the other classificatory schemes. Robert Bork
and William Rehnquist, conservative, restraintist, originalists share
moral conventionalism with Lawrence Tribe, Michael Perry and
John Hart Ely, who are one and all liberal, activist and non-
originalists. The realist-conventionalist distinction not only makes
for strange bedfellows, but, Walker argues, it brings out better the
impasses into which the various forms of constitutional theory have
fallen. Probably the strongest analysis in the book is Walker's de-
monstration of the untenability of constitutional theory built on skep-
tical nihilism. “This conventionalism fails its constitutional
adherents.” The problem derives from the “inescapably normative
and prescriptive” aim of constitutional theory, an aim which cannot
be satisfied if one begins with the premises of conventionalism. Ni-
hil ex nihil. This problem equally besets the conventionalists of left
and right, the activists and the restraintists.

Walker clearly prefers the moral realist position, at least for
the reason that it alone can satisfy the logical requirements of a
normative theory, although also because he is convinced that moral
realism is otherwise better as well. Nonetheless, it is significant that
Walker's argument on behalf of moral realism hardly extends be-
yond drawing it out as a necessary presupposition of the enterprise
of constitutional theory.

Moral realists, like Michael Moore or Sotiros Barber or per-
haps Ronald Dworkin, also share in the normative impasse of the
field, however. The chief problems seem to be two: the realist affir-
mation of moral reality appears to encourage a degree of confidence
in our access to moral reality that goes beyond what the uncertain-
ties and ambiguities of moral issues as we experience them would
justify; and secondly, “the mind-set of moral realism instinctively
collapses politics and law into morality,” and thus loses the special
character of law as law.

Walker sees the impasse of constitutional theory, then, very
much in Goldilocks's terms: the conventionalists are too pessimis-
tic regarding access to moral reality and the realists too optimistic
for either side to sustain the enterprise of constitutional theory. Au-
gustine provides the answer that is “just right.” He affirms a moral
realist position that secures some kind of stable access to moral
truth, and yet, through his doctrine of the fall, saves himself from
falling into the “too much” of our contemporary realists. The fall
has produced a vitiated nature and a vitiated humanity; we see
moral truth, but “only through a glass darkly.” The sphere of poli-
tics and law, according to Augustine and Walker, cannot be a
sphere of ultimate moral concern—the central drama of human existence, a drama of salvation—goes on elsewhere. The ends of public life are thus lower and more limited than a full-blown realist like Moore, Dworkin, or Cicero might affirm. Walker's Augustinianism culminates in a doctrine of restraint, then, in practice perhaps not that different from the restraint of Bork or Rehnquist but grounded very differently.

Just how restrained in practice, or how much or little Walker's position would differ from Bork's, is difficult to say because for a book in constitutional theory it is remarkably silent about the Constitution. Walker proceeds at a very "high level" throughout, i.e., at a level that hardly gets to specifics of constitutional issues at all. This must be judged a serious flaw in a work that claims to give a field defining guidelines. At the very least Walker needs to develop his "Augustinian perspectives" in a far more fine-grained manner before many will be prepared to join him in his enthusiasm.

Nonetheless, Walker's effort surely must be judged an interesting one, surely not a run-of-the-mill one. Strange as his chief proposal seems at first, on second thought it seems less out of the way, or at least no more out of the way than such matters as Dworkin's theory of judicial interpretation as a chain novel or Michael Perry's idea that judges should behave like Biblical prophets. For reasons that Walker partly elucidates, constitutional theory has been driven toward an explicit search for a philosophic grounding, and only mere modernist prejudice could rule out of court in advance thinkers of the depth of Augustine. Is there anything worse about taking Augustine seriously than building a theory of the Constitution on John Rawls, as, for example, David Richards has done, or on Robert Nozick as somebody or other must have done by now?

Nonetheless, certain deficiencies in Walker's performance must be noted, which together add up to a failure to make a sufficient case for Augustine. It is not enough to say that if true, Augustine fits the formal requirements of a "just right" constitutional theory. We require far more than Walker gives by way of reasons as to why we should accept or take seriously Augustine's theory of politics and law in general, much less why it ought to be considered applicable to the American Constitution in particular. Walker, in other words, needs not merely to restate Augustine's doctrine, but to give us reasons to believe that it is true.

Walker hurts his own case by leaving Augustine’s doctrine in the heavily Biblical and theological language in which it was originally put. Only occasionally does Walker make slight suggestions as to how this doctrine might be commended to more modern, more
secular thinking. I found it surprising that Walker did not make more use of Reinhold Niebuhr, who succeeded admirably where Walker has failed—in supplying an interpretation of politics roughly Augustinian in inspiration and character, but restated as a philosophical anthropology, and thus available outside the circle of faith in which Walker's Augustine remains more or less trapped. Niebuhr has shown that it can be done, although he paid no particular attention to issues of judicial role and constitutional interpretation. Walker would have done well to have followed his path.