SYMPOSIUM

THE FEDERALIST SOCIETY SIXTH ANNUAL
SYMPOSIUM ON LAW AND PUBLIC POLICY:
THE CRISIS IN LEGAL THEORY AND
THE REVIVAL OF CLASSICAL
JURISPRUDENCE

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THE CLASSICAL THEORY OF LAW

Norman Barry†

That there is a "crisis" in law is not denied by contemporary classical liberals (or neo-conservatives). The rise of statute and public law in the twentieth century and the decline of common law and private law has been commented on frequently by, to name just a few individualists, Leoni, Hayek, Mises, and the market economists. Furthermore, the rise of "sovereign" legislatures and the effects of majority-rule democracy have combined to turn law into a means for producing social "end-states" rather than general rules to guide individuals in the pursuit of their chosen purposes. Further, assiduous though legislatures and courts in western democracies have been in protecting civil liberties (although even this is less true of the United Kingdom than the United States), they have been active in the destruction of economic liberty, thus denying that symmetry between personal and economic freedom that is at the foundation of classical liberal social philosophy.

Law is intimately connected with freedom in classical law, not just in the trivial sense that a free society is a rule-governed order which diminishes the coercive power that political authorities have over individuals, but also in the theoretical sense that an explanation of liberty can be given which makes freedom and law consistent. Thus here the objection is to Bentham's observation that "[e]very law is an infraction of liberty." For this implies that each freedom reducing act of law has to be justified on utilitarian or pragmatic grounds, opening up the possibilities of endless interventions with free actions on the ground that they advance some alleged collective good.

In the classical liberal theory of law, however, legal rules only vitiate liberty when the individual is directed to perform some action (as in the phenomena of taxation, conscription, and the direction of labor in a command economy). Most legal rules in classical law are prohibitions, forbidding certain courses of action, or authoritative procedures telling an individual how to do certain things (in Michael Oakeshott's phrase, proper law consists of "adverbial rules"). The

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classical liberal maintains that free societies have been undermined precisely because the ambit of public law (involving the direction of people to specific purposes) has widened vastly, to the diminution of the range of private law. Of course, there are very serious difficulties for the classical lawyer in the question of the content of laws as prohibitions and authoritative procedures, and of the proper limits of public law since (with some exotic exceptions) most individualist jurists accept the necessity for a public realm. Nevertheless, the distinction between public and private is germane to the classical theory of law.

What is the foundation for the classical theory of law as a general system of rules for the guidance of individuals? The first thing to note is that classical law occupies a kind of midway position between what is conventionally known as natural law and positive law. The general anti-rationalist philosophical stance that most classical lawyers take means that they would deny that the human reason is capable of discerning an objective set of moral norms that can be used to validate all claims to law. A proper legal system is identified with traditional rules of conduct which have developed in response to human needs and circumstances, and these rules cannot be derived by the use of an unaided reason. However, classical lawyers cannot accept as “good” any rule or ukase merely because it emanates from a legislature or is consistent with a “rule of recognition” (in the sense defined by H.L.A. Hart). Thus there can be standards of evaluation that derive from the notion of “law” itself rather than from some alleged objective morality. Furthermore, the classical lawyers’ objections to some legislative enactments (and, indeed, court decisions) that are contrary to those natural regularities that economic science reveals show that there is a close connection between classical law and “natural” laws of economy and society. Thus, although many laws, regulations, and judicial decisions may be “legitimate” in a formal or positivist sense, their incongruence with what we know of social processes renders their claim to be law in the broad sense dubious: at the very least they will produce less complex orders.

The main feature of classical law that distinguishes it from almost all forms of positivism is its denial of the assumption that law requires an “author,” some authoritative source that creates a legal order. Positivists in the English tradition of jurisprudence identify authorship with a sovereign while American Realists locate law creation in judicial activity itself, but both are at one in denying that rules to guide conduct can exist independently of the human will. But as Hayek and others have argued, this is an error, for a whole tradition of western legality shows that coherent and predictable
legal orders can develop independently of will, design, and intention. Of course, the common law is the paradigm case of this phenomenon and it is the acceptance of its rules as appropriate guides to conduct that constitutes their legality. As A.W.B. Simpson says: "Common Law rules enjoy whatever status they possess not because of the circumstances of their origin, but because of their continued reception." Thus it is that the principles of the English law of contract have developed entirely without the aid of a single statute.

The attraction of the common law system to liberal individualists should be obvious: it has developed through individuals settling their disputes by reference to its rules, rules that exist independently of will and which themselves embody, contrary to positivism, non-articulated moral notions. To quote Simpson again: "In the Common Law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, fair or just solution."

It is of course true that a liberal individualist order can be conceived of in terms of written enactments, bills of rights, the Rechtsstaat, constitutions, and so on. Indeed, Hayek in The Constitution of Liberty seems to be indifferent between the common law and some fixed code as the most efficient guarantor of a free and predictable legal order. However, in Rules and Order the emphasis is almost entirely on the virtues of spontaneous or unplanned legal orders because of an important philosophical reason concerning the nature of human knowledge. This reason is that the human mind (in this context, the legislative "mind") is constitutionally incapable of constructing a code of rules appropriate for all human circumstances. The complexity of an advanced society means that all legal rules must be necessarily abstract, in contrast, say, to the rules of a primitive society. Many of the rules of an advanced society are not articulated fully in a code yet have a cognitive significance in the rational description of a legal order, and most knowledge in a legal order is "tacit" knowledge.

Hence legal reasoning cannot be mechanistic or deductive, applying fully-articulated principles to particular cases. Hayek, and others in the classical tradition, liken judicial activity to "puzzle-solving" in which a judge tries to find an appropriate rule to fit a particular case. It is not the function of the judge to bring about some desirable state of affairs but to find objectively the right deci-

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4 Id. at 79.
sion within the general system of rules, a system that exists independently of judicial activity itself.

What is important in the classical theory of law is a distinction between "law" and "legislation." Law deals with the actions of private agents and has no purpose beyond providing a predictable framework for individuals to pursue their private ends with the minimum of collision with each other. It might be thought, however, that this predictability is compromised by the fact that the development of law is a matter of judicial decision-making which is essentially subjective and unpredictable. But this is to make too much of "hard" or difficult cases, cases for which no articulated rule seems appropriate. In fact, the bulk of social life is conducted in accordance with rules that are not in dispute. The relevant contrast ought to be between the unpredictability of judicial decision-making and the unpredictability of a complete Benthamite statutory system—which is a function very largely of the caprice of legislators.

Yet classical jurisprudence does not exclude "legislation" or public law, that is, law with a specific purpose. The common law is entirely appropriate for a market society: to enable individuals to exchange for their mutual benefit with reasonable security. But those very same individuals will not generate all that is socially desirable by their mutual exchanges: some public purposes (or public goods) require a framework of legislation or "made" law. Thus, although the usefulness of the common law in the application of new rules to handle "externality" problems without the need for legislative intervention has often been under-estimated, it is undoubtedly the case that in the classical theory of law the rationale for legislation lay in the vexed question of market failure. The major problem in classical jurisprudence has been the restriction of legislation to those areas of social and economic life which have a genuine public dimension. The relative demise of classical law has come about through the intrusion of public law or legislation into what is essentially the private domain: the continued interference with contracts, the close regulation of economic life on behalf of an alleged "public interest," and the taking of property and the construction of welfare schemes on the a priori assumption that private arrangements could not generate such desirable states of affairs.

If the common law or classical law is interpreted as a more or less self-consistent (although necessarily untidy) body of rules, articulated and non-articulated, it has a validity in a natural law sense independent of a constitution, a rule of recognition, a Kelsenian Grundnorm, or a sovereign's command. The validity of particular rules will be a function of their consistency with the whole system and their conformity to certain more or less universally true princi-
ples of human nature first adumbrated by David Hume and Adam Smith. These principles include the recognition of (a not necessarily harmful) self-interest, scarcity (therefore the need for property rules), the propensity to value the present higher than the future (time-preference), and so on.

The most decisive contrast between classical law and modern positive law is in the question of justice. Justice in classical law is the impartial application of universal rules, rules that do not discriminate and which privilege no persons or groups. The point about classical law is that it is “neutral” with regard to the various outcomes that emerge from a rule-governed process; legality is doing justice to individuals and not about the generating of a particular state of affairs. Nevertheless, it should be pointed out in passing that in an indirect utilitarian sense this limited concept of justice has been instrumental in (unintentionally) generating highly complex social orders. Modern positive law, however, looks to legislation to create desirable end-states, justified under the general rubric of “social justice.” These range from straightforward income redistribution through to the creation of “equal” opportunities for named groups, groups that are in no way discriminated by the law itself. Irrespective of the counter-productive nature (in a utilitarian sense) of these measures, they are condemnable from a classical law point of view because of the damage they do to legality.

Why has classical law broken down? The question is of course unanswerable in any uncontroversial sense. Nevertheless, we can point to certain movements of opinion, historical developments, and institutional arrangements which have summed to produce an intellectual and political atmosphere in almost all western democracies which is unfavorable to the traditional notion of liberty under the law.

From the point of view of jurisprudence, particularly damaging was the tendency to validate law by some external criterion, such as a constitution. This may sound odd, but in classical law a constitution was a kind of super structure, a body of rules for the organization of government itself: in other words, law had a self-generated permanence and stability and persisted through, possibly, transient political arrangements. The trouble was that this necessary distinction between law and politics depended upon a tacit acceptance by political rulers that there was, indeed, such a distinction. The problem has been particularly acute in Britain whose unwritten constitution has in the twentieth century permitted the erosion of law by politics. Although not since the seventeenth century has anyone dared to suggest that the common law is the embodiment of “right
reason" and thence superior to statute, nevertheless for a very long
time legislative reticence was preserved. This is no longer so.

The issue here is the sovereignty of parliament, and the organi-
zation of that institution, under modern democratic conditions, on
party lines. For common law is always vulnerable to statute once it
becomes accepted that legal validity is a function of the decisions of
a representative body. In the pre-legislative era of classical law it
might have been true to say, as Hayek does repeatedly, that the
common law principle which holds that a person is permitted to do
whatever is not forbidden by law did embody more "rights" than
those that could be enumerated in some "positive" declaration, but
that claim sounds hollow in late twentieth-century Britain. Yet, curi-
ously enough, and to the chagrin of spontaneous order theorists,
the principle that ultimate legal validity is a function of parliamen-
tary sovereignty was not planned, designed, or even thought of by
anybody: it just happened. Indeed it is a principle of the common
law. It could even be said that it is so because it was said to be so in
a famous textbook on constitutional law written by Dicey.7 There
are, nevertheless, a few English constitutional lawyers who say,
along with George and Ira Gershwin, that "it ain't necessarily so."
Their day may yet come, especially with the impact of EEC law and
international human rights law on the United Kingdom.8

Americans have been more fortunate than the British since
from the very beginning they have had all the paraphernalia of proper
constitutionalism: federalism, the separation of powers, judicial re-
view, and so on. These were designed, especially judicial review,
presumably, to protect classical law and the traditional rights that it
embodies from the intrusion of legislation. This is in contrast to the
British tradition which precludes the courts from adjudicating on the
substance of a statute; there judicial review is limited to ministe-
rial or other action under a necessarily legitimate law. Thus,
although American law is consistent with positive law jurisprudence
in that the validity of purported claims to law is established by "test-
ing" them against some other rule, in contrast to Hayekian quasi-
natural law procedures (which embody the universability criterion),
there is no substantive difference between traditional American con-
stitutionalism and classical law since the protections for individuality
contained in the document can be interpreted as declarations of
general common law principles. These are the kind of protections
British classical lawyers, in the face of the erosion of the common

8 See Bradley, The Sovereignty of Parliament—in Perpetuity, in The Changing Consti-
law in the United Kingdom, are beginning to wish obtained in their country.

The fact that such classical law protections for individuality no longer hold in the United States in the economic sphere is now a matter of great concern to individualist economists and lawyers. Since 1937 a supine Supreme Court has permitted a massive rise of public law, of economic regulation and the promotion of state welfare, most of which flies in the face of those standards of legality proclaimed by classical law. All of this legislation goes beyond the provision of public goods via public law that is permitted by classical law, and all of it is written in defiance of well-established truths of economic theory. From the point of view of classical law jurisprudence the Supreme Court is now in the curious position of refusing to enforce “agreed-on” limitations on the legislature, while at the same time “creating” law (for example, in the areas of enforced integration and affirmative action) in a manner quite inconsistent with the traditional ideal of judicial activity.

Why all this should have occurred is not my concern here. However, certain developments in twentieth century American thought created an atmosphere in which such departures from the classical ideal of law could become intellectually respectable. In jurisprudence America’s major contribution to positivism, realist legal theory, has some quite damaging implications for classical law.

For realism does presuppose that law must have an author. Since America has never had a sovereign legislature, and since the whole idea of judicial review necessitates that the courts play a crucial role in the determination of the content of law, it was almost inevitable that the judges should be seen as the authors of law. Hence the familiar expressions: “law is what the courts say it is” and “rules are only sources of law.” The realist movement made all of its intellectual profit from the fact of its alertness to the simple truth that a mechanical jurisprudence is impossible. Because human language is necessarily imprecise (in Hart’s memorable word, “open-textured”) there can be no uncontroversial application of rules to particular cases; and this means that judges must have considerable discretion. The way that this is exercised will obviously have great significance for the development of law and society. Again, it was almost inevitable, given the nature of the “judicial decision,” that attention should be directed towards all those sociological factors that were said to determine that decision. Thus there was a dramatic shift from a jurisprudence concerned with the meaning of rules to one in which rules have no objective existence at all. Fur-

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9 See B. Siegan, Economic Liberties and the Constitution (1980).
thermore, if judges are the real “authors” of law, then why should they not create a legal order which reflects social conditions and meets social demands? If there are no binding rules to guide conduct then the argument that social policy should replace law becomes almost irresistible.

The implications of this for classical law are serious. For the whole tradition of common law presupposes that an objective body of rules does exist (even though much of it may be incapable of precise articulation). If there were no independent and objective laws, a rule-governed society would be impossible. Although the law will develop spontaneously through interpretation of rules and the adjudication of difficult cases, classical law does not suppose that a judicial decision is therefore completely subjective, a disguised expression of class interest, or is determined by what the judges had for breakfast. The absence of a mechanical jurisprudence does not imply that discretion is entirely unfettered and that individuals cannot be guided by general rules, or judges bound by them, so that attention should be directed towards the prediction of court behavior on the basis of some extra-legal criteria. For this, to follow Hart’s illuminating terminology, is to understand law entirely from the “external” point of view and leads to the elimination of those “internal” features of legality, for example, the obligatory nature of rules as constituting normative standards, which make a predictable legal order possible.\(^{10}\)

In classical law, there is a specific role for the judiciary that depends upon their specialized knowledge. To quote Simpson yet again, law is “a body of practices observed and ideas received by a caste of lawyers.”\(^{11}\) In difficult cases, then, the criteria for adjudication should always be legal criteria rather than political criteria. The contemporary crisis in legal theory has come about largely through the erroneous belief that the courts have no other standards than those set by current social forces and transient coalitions of groups.

From this perspective, the dramatic shifts of opinion that have occurred in the Supreme Court, shifts that have done so much to lend credence to the realists’ case, may not so much validate the claims of sociological determinism but simply illustrate the influence of erroneous ideas. I will mention briefly two: the idea that freedom is divisible and that “freedoms” can be hierarchically ordered; and the notion that legislatures, because they are democratically elected, require no further legal constraint (in America, the latter point applies only to economic legislation, the authors of

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\(^{10}\) H.L.A. Hart, The Concept of Law ch. 7 (1961).

\(^{11}\) Simpson, supra note 3, at 94.
which might just as well be called “sovereigns” despite all the apparatus of constitutionalism).

The role that classical law gives to the judiciary in a complex society must be that of enforcing general standards of legality even against the “democratic will” (as embodied in public law). The rationale for this is that in a complex society, characterized by competing and divergent ends and purposes, there is no such thing as a democratic will which is not also the imposition of some particular end-state or purpose on society at large. Even if there were a genuine majority will, as opposed to the coalition of interests that is a surrogate for the majority in all democratic societies, there is no reason why that should be decisive (least of all in America). Classical law presupposes only that there is a minimum of agreement on rules and practices. This requires judicial “creativity” only in the enforcement of such standards in difficult cases and in their protection against transient majorities in legislatures.

The restoration of the classical idea of law is a difficult task. As Hayek has often pointed out, the legal profession no longer resembles very closely Simpson’s “caste” of experts, adept at puzzle-solving and the exploration of the meanings of rules. One legacy of realism is that lawyers have become obsessively concerned with the “social” aspects of law: less concerned with the adjudication of cases and more with the implementation of what they believe to be socially acceptable values. Again, as many individualists have pointed out, in economic judgments they have revealed themselves to be in the grip of erroneous doctrines.

Classical legal philosophers differ in their recommendations as to how an individualist legal order might be created and the rise of public law checked. There are two possibilities. First, that the courts might reassert the traditional role of review of economic legislation or that some reduction on the power of legislatures be instituted (perhaps a modification of the simply majority rule). Undoubtedly it is the “unreliability” of the courts that has led many individualists, from Hayek to Buchanan, to demand more comprehensive constitutional rearrangements. Such constitutional rearrangements that have been proposed do not involve the creation of new law but rather the resurrection of traditional rules. They also recommend institutional forms which transmit genuine “opinion” more accurately than does conventional majority rule democracy.

In this brief paper I want to address the influence that the classical legal tradition has had upon the development of public law in general, and modern American constitutional law in particular. In so doing, I shall concern myself with this question as it relates to the protection of private property and economic liberties. In some sense it might seem improbable to chart a course from the early Roman and classical writers to the present day. But I do think that the journey can be made, and that it discloses some interesting, if unanticipated insights, along the way.

Very often there are demands for a revival of the classical legal tradition in modern public law. I am skeptical of these demands because I think that they call for the revival of a classical tradition that has never been. In order to show why this is the case, it is necessary to examine both the strengths and weaknesses of the classical law tradition. The central conclusion that emerges from that examination is that the classical law theorists themselves stopped short exactly where the very important questions of political theory—limited government and entrenched individual rights—begin. In making these arguments I shall direct my attention, not primarily to my own normative views on the subject, but to the way in which classical thinkers themselves regarded their own work.

Speaking globally there are two ways to look at the classical law. One is to read the great modern thinkers about classical law, of whom Friedrich Hayek would surely count as one. The other way is to read the original great classical texts themselves in order to learn how the early writers understood the operation of their own system. Here I propose to avoid the first course, with its immediate appeal to grand political theory, and to adhere more closely to the second, that is, to the more mundane views that the classical writers had about their own tradition.

My greatest familiarity is with the Roman law, and so I will concentrate most heavily upon it. With the Romans, and with many
early common and continental lawyers, there seems to be a near boundless confidence in the power to organize the legal doctrines that govern social life. It might be that the origins of these legal rules were customary, so that no one could quite figure out where they came from. But the classical writers possessed an indomitable belief in their ability to domesticate and systematize these rough customary impulses. When one reads, for example, the standard Roman text—and here the only complete text we really have is Gaius’s Institutes—one is struck at the outset with its firm and self-confident architectural structure.

Classification is the key technique for the Roman lawyer. He will divide the world into the law of persons, the law of things, the law of property, the law of obligations, and so forth. Then each of these categories will in turn be divided further, so that the law of obligations becomes the law of delict (or tort) and contract, while the law of contract becomes the law of consensual, real, stipulatory, and literal contracts. The consensual contracts are then broken down into sale, hire, partnership, and mandate. Then, for each contract, the roles of all parties are analyzed among themselves and to the rest of the world.

As a rough generalization, the classical lawyer armed with this methodology will find some appropriate pigeonhole for each and every routine transaction. At first appearance, the system is static, complete, exhaustive, and elegant. It does not project the image of ceaseless evolution and customary change, but rather that of a kind of timeless, Cartesian stability. It stands outside the forces of history and circumstance. Nor is this achievement idle, for many of the Roman classifications (such as those which relate to the law of bailments\(^3\)) do endure down into modern times in the English, and I dare say continental, systems of law. Some of the high opinions that the Romans had about their own legal system and legal abilities were indeed true.

In part the success of the Roman system rested upon the Romans’ concern about its dominant structures. To their credit, Roman lawyers were always looking for the core, and not the penumbra. They spent little time worrying about the classification of marginal cases, so long as they were confident in the basic soundness of their categories. Nonetheless, it is not as though they reasoned to these categories from some more general political or legal theory. Rather they took those categories as indisputable and axiomatic, for they had an unquestioned belief in the power and justice of vested rights. Their great strength was their ability to reason


from accepted premises and established categories in order to show
how complex transactions could be navigated through the system
that they created. Their ability to deduce in a formal way particular
conclusions from accepted principles is really quite inspiring and a
model which modern lawyers could do well to emulate.

On closer look, however, just how good is this architectural
structure and its doctrinal sophistication? The question is trouble-
some indeed if it turns out to be impossible to justify the base on
which the structure must rest. There is a second side to the Roman
classical vision, which is not so optimistic, unified, comprehensive,
serene, or secure as the initial impression may suggest.

First, there are embarrassments within the Roman system of
classification, and often times these are hinted at by the Romans
themselves. For example, when they divide the law of property into
matters human and divine, they come face to face with the critical
question of how to classify city gates and city walls—the standard
form of a public good. They refuse to put them clearly into either
category, and yet they were forced to develop a series of rules which
governs their possession, use, and disposition (of this last, there in
practice could be none). The rules were sensible, for social survival
was at stake. But the doctrinal foundations were very shaky. The
reference to things held as a “corporate body” (“per universitatem”)
were as uninformative and weak in the original Latin as in
its problematic English translation.\footnote{See, e.g., G. Inst. 2.8-2.11.}

The second sign of weakness in the Roman system is revealed
by the use of the word \textit{quasi}, especially as it appears in the Roman
law of obligations. In modern times, we instinctively recoil when we
hear reference made to matters of institutions that are quasi-admin-
istrative or quasi-judicial. Yet we tolerate the use of these terms be-
cause we are somewhat unhappy about the rigid division between
legislative, executive, and judicial power as set out in the first three
articles of our Constitution. The \textit{quasi} gives us a little room to ma-
uever, but at the cost of some needed intellectual precision.

The Romans are no better when it comes to the use of \textit{quasi}, be
it with tort or contract. Nonetheless, what alternative is there when
you are committed to a basic division between contract and tort, and
then have to find a home for the law of restitution, a body of law
which simply does not disappear because its foundations are un-
clear? Any obligation to pay for benefits conferred upon you by an-
other does not rest on contract, because there is no promise; and it
does not rest on tort, because there is no infliction of harm upon a
stranger by the use of force.
Yet this category of obligations, while fluid, is hardly empty. Quite the contrary, quasi-contract covers a wide range of actions done by mistake or through necessity. It can arise whenever someone receives goods by mistake that were meant for another; or whenever one person pays by necessity the public authorities, taxes owed by another; or where one person by mistake makes improvements upon the land of another. Instead of trying to work out the systematic theory of where the obligation of restitution begins and ends, the Romans made marginal adjustments to their accepted categories of contract and tort. But they paid a price. They dissolved their neat classificatory system, and they never did explain why the theory of restitution was needed, what it did, or how it could be justified or extended. Instead, as one pushes harder on the lines, the Roman law tends to converge with the more incremental, less systematic methods of our own common law. As we shall see, this weakness in the theory of restitution has important public law implications.

These classification difficulties are perhaps symptomatic of the greater weaknesses of the Roman methodology. The Romans skirted the problem of finding ways to justify the first principles in which they so strongly believed. Typically when the Roman wants to admit that he has been caught on fundamentals, he does not yell “ouch.” Instead he introduces the word “natura” or “ratio naturalis,” or natural reason, into the discourse. If the Romans want to defend the rule of first possession, how do they do it? Well it is obviously the “natural” mode of occupation or acquisition.\(^5\) If they want to speak about the obligation of a parent to a child or a master to a slave, again the reference is to an obligatio naturalis, natural obligation.\(^6\) If they want to justify self-defense, it is because ratio naturalis comes to the rescue.\(^7\) It turns out that in place after place within the Roman law, the soft underbelly lies in its resort to appeals to natural rights, without any systematic account as to how these rights might be justified or developed. They are just given.

The weakness of their understanding about their own system had a profound influence on how far they were prepared to push their general conceptions. When the Roman lawyers applied their rules, they usually addressed small number situations similar to those which common law judges typically faced. The typical hard problem might involve a contest between the original owner of property and the good faith purchaser who acquired that property from a thief. They made no effort to deal with complex large num-

\(^5\) See, e.g., G. Inst. 2.66.


\(^7\) Dig. 9.2.4.
bered situations, such as taxation or comprehensive social regulation. To the extent that Romans achieved clarity it was because they were able by judicious selection to identify a narrow tractable subject matter for analysis. It is no accident that their analysis of bailments is probably as serviceable today as it was in Roman times, for that is not the kind of issue in which one expects enormous transformations upon the rise of the welfare state. The law of bailments is not targeted for revision by any conscientious social planner.

The key question for public and constitutional law is this: were the Romans willing to make trumps out of their private law rules? In thinking about their private law system, especially the law of property, did they view it as a break upon the power of government, or just as a set of default provisions that continued to apply until the emperor or legislature decided to do something more drastic? The Romans clearly took the cautious and restrained view. Private law was not a barrier against state action. To see the point, look at a passage which talks about the status of "dominium," that is the most powerful form of Roman ownership, by W.W. Buckland—no critical legal studies exponent he—but the leading exponent of Roman law in the English tradition in the years between, say, 1890 and his death in 1946:

We have now to consider what is meant by *dominium*, ... Moderns describe ownership as *ius utendi fruendi abutendi*. But whether the right concerned is *dominium* or one of the inferior modes it is practically never so unrestricted as this. All civilizations lay down restrictions on what a man may do with his own. An owner might not cruelly treat his slaves. The law might forbid him to build above a certain height, or within a certain distance of his boundary. He might not, for purpose of profit, pull down his house. Thus the principle is subject to such restrictions as the State may impose. And the owner can restrict his right by conferring rights on others, e.g. a right of way, without ceasing to be owner.\(^8\)

I think that some of you who have looked at either the early police power cases\(^9\) or various California land use restrictions\(^10\) would see something familiar here. In particular, any statement that the principle "is subject to such restrictions as the state may impose" means that the classical lawyers regarded their legal constructs as nothing more than default rules in a world dominated by legislation. It is hardly a principle that speaks to the need to pre-

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\(^8\) W. Buckland, *supra* note 6, at 187.


serve private property against the depredations of the state. In essence the early brand of constitutionalism implicit in this world view is captured by the maxim, *Quod principi placuit legis vigorem habet*—that which is pleasing onto the prince hath the force of law. The private law could be wiped out by the imperial edict or any form of legislation.

This view was not held uniquely by the Romans. John Locke in his second treatise on government offers a powerful defense of property, and of legislative supremacy, but he does not so much as consider the institution of judicial review. In his *Treatise of Human Nature*, David Hume takes a similar view. He develops at great length the rules of justice that have stood mankind in good stead over the ages. These rules number three. There is first the rule of first possession; there is second a rule which allows the transfer of property by voluntary exchange; and there is third the rule which requires individuals to keep their promises. There is no theory of restitution in Hume, and no part of his message explains what set of social institutions could be developed to insure that these rules of conduct will be respected by all citizens, or by the state. His failure to address that question stems from the same problem that bedeviled the Romans. He did not see any tight connection between the rules of property and right conduct, on the one hand, and the principles of public law that govern the formation and operation of the state on the other. More specifically, because he, like the Romans, did not adequately understand the law of restitution, Hume could not see how any system of forced exchanges, including those resting upon a "just compensation" principle, could be used to account for the state and to limit its powers. His was the basic weakness of all social contract theory: too great a reliance upon the private ideal of voluntary contracts coupled with an insufficient understanding of forced exchanges.

The transformation to modern constitutionalism could not be more stark. Our view of the subject is that certain rights are trumps over legislative will. It is no longer possible to say, blandly, that all forms of taxation and regulation, or modifications in systems of liability rules, are subject to the legislative decision. In fact the common law conception of private property is captured in the constitutional command of the fifth amendment that says that "private property shall not be taken for public use, without just compensation." On its face this provision appears to ask the courts to

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discharge exactly the same task the classical lawyers were unwilling to undertake, by using a set of principles—those of restitution—which they were least able to develop. The constitutional text asks judges to determine which portion of the system of private property survives at a constitutional level. Yet it is on this very question that the classical lawyers were willing to say nothing at all.

It is not surprising therefore that many of our greatest lawyers could be steeped in the classical tradition of private law and still take a very narrow view of the scope of protection that the constitution gives to common law rights of property and contract. That surely was the position of Justice Holmes, a master of the common and Roman law tradition, who yet emerged in his dissent in *Lochner v. New York*\(^*\) as the leading constitutional skeptic on matters of private property and freedom of contact.

There is, I think, a surprising, negative linkage between classical private law and modern constitutional law. The classical lawyer dealt with small numbered situations and default rules. He was most comfortable in imposing obligations where the defendant had acted, whether by making a promise or committing a tort. Restitution, which involved forced exchanges not based upon personal wrongdoing or promises, was at the margins of his system.

Constitutional and public law come into play where classical law was weakest. It deals with entrenched individual rights, not default provisions. It requires a sophisticated treatment of large numbered situations, such as those involved with taxes and regulation. Finally, it requires that special attention be devoted to the most difficult extensions of the law of restitution, for once private property can be taken upon payment of just compensation, then there is a complex network of forced exchanges on whose validity the courts must pass.

In the end therefore I think that the radical separation of constitutional and private law championed, or at least accepted, by the classical lawyers cannot be maintained. Still a good deal of work must be done before the connections between the two bodies of law can be forged. Thus it is necessary to rebuild the system of natural law from the ground up on far firmer foundations. It is also necessary to make explicit the very linkages between public and private law that the classical lawyers did not understand, or could not explain. These tasks are daunting because there is enormous skepticism about any natural law reasoning, and there is a great willingness to accept public intervention in all areas of economic life. Although I cannot attempt the demonstration here, I think that the new accounts of property and contract, at bottom, will have to

\(^*\) 1905 U.S. 45, 74 (1905).
be functional and utilitarian. They will have to explain why violence is a social evil and competition is a social good. They will have to consider the role of bargaining breakdown and high transaction costs. I believe that this work can be done, but it will require far more sophistication, and a much more powerful arsenal of tools than have been bequeathed to us by the classical private lawyers. But once that task of reconstruction is done, it should become clear that the classical lawyers built better than they knew.

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14 For a short account, see Epstein, Self-Interest and the Constitution, 37 J. LEGAL EDUC. 154 (1987).
I should say at the outset that I expected to be arguing about some of the fundamental substantive issues separating the Right and the Left in contemporary legal thought. In particular, I thought that Professor Epstein would defend the notion of a sharp distinction between individual economic liberty and public regulatory power suggested by his recent *Takings* book and by tonight’s theme of “Classical Law.”

If I correctly understand his talk, however, he has abandoned the attempt to portray market-oriented legal ideology as something implied in the very idea of liberty or freedom or the rule of law; I agree with him that the image of a classical common law that is (or was) neutral, objective, and determinate is, quite simply, analytically incoherent. The notion of a return to such a regime is a fantasy because such a regime never existed.

The loss of faith in the ability to present the “free market” as the model for legal decisionmaking is a significant event in our political and intellectual history; it is also a particular challenge to conservative, market-oriented legal theory. Legal theorists on the Right have traditionally presented the hierarchies of our social lives as infused with a transcendant logic or necessity, as if the existing distribution of wealth, power, and prestige either directly reflected an underlying meritocracy of equal opportunity and just desserts, or indirectly would achieve a kind of utilitarian justice in the long run. Either way, the notion has always been that there was something qualitatively different between economic liberty and social regulation, between private freedom and public power.

What we have been calling “classical law” played a foundational role in this idea that something called a “private market” was, or could be, a neutral, impersonal mediator of social relations. In the classical law imagery, as described by Professor Barry, the common law rules of tort, contract, and property were supposed to provide the neutral, objective framework within which individuals could pursue their own, self-defined ends free from social coercion. So long

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† Professor of Law, University of Virginia Law School. B.A. 1977, Emory University; J.D. 1980, Harvard University.

as the classical law image was plausible, right-wing legal theorists like Hayek could present their program as embodied in the impartial dictates of freedom. Thus, in the rhetoric of, say, Hayek, free market capitalism is implied in the very idea of the rule of law; economic regulation is not simply bad policy—it is downright inconsistent with having a society ruled by law at all. That is why, I guess, there is a resurgence of interest in classical law among today’s conservative legal scholars; the framework of classical law theory promises advocates of right-wing social policy a way to present their programs as the result of a commitment to rational, neutral law as opposed to ideology and politics. But, as Professor Epstein suggested, the return to classical law is a dead-end.

I want to focus tonight on two issues. First, I want to explore with you why the traditional notion of a sharp distinction between the public and private realms as the basis for distinguishing law and politics, or law and legislation, is no longer considered respectable in American intellectual life; this analysis simply reviews the critique of market ideology that the legal realists taught us.

Second, it seems to me insufficient merely to point out the analytic flaws of the classical law approach. The more important task is to understand how people could in fact believe that the classical world-view was neutral and self-evident. To get at this aspect of classical law, we need to consider how classical legal thought worked in the world as a social ideology—that is, how the classical world-view represented the world through particular images and metaphors for perceiving and talking about society. This grid of interpretation was not simply a “theory” in the sense of an intellectual project; it was also a justification for and an ideology of power through which actual, real-world relationships of economic and social domination between workers and owners, landlords and tenants, men and women, were translated, not as the exercise of social power, but instead as free and consensual individual choices.

First, the analytic critique. Here I will take the Lochner era as roughly representative of the classical law tradition. Now, in the modern legal context, Lochner is routinely criticized because the Court is supposed to have imposed its own values in its reading of the Constitution. But this reaction to Lochner presupposes the decline in the belief in the neutrality of classical common law doctrine. That is, it is possible to say that the Court was imposing its own biases in its protection of the “liberty of contract” between employer and employee precisely because it is no longer plausible to believe that the market organized through the common law was neutral and value-free, and therefore the Court’s protection of that
realm from legislative intervention also could not be neutral and value-free.

To mainstream lawyers of the Lochner era, however, the Court's protection of the liberty of contract was not necessarily a value question at all; instead, Lochner could be seen as the constitutional manifestation of a broader, integrated view of law very closely resembling Professor Barry's description of the classical theory of law. From this perspective, the judiciary was merely performing at the constitutional level the same tasks that it carried out at the common law level—the protection of private, individual choice, or, more generally, the protection of the private realm from public interference. Accordingly, the judiciary at common law enforced contracts that were the freely-willed result of bargaining between competent parties; it refused to enforce contracts that were the product of duress or fraud, because in such circumstances the private choices of individuals were tainted by external interference. When this imagery of what law was about was transferred to the constitutional level, it meant that, just as the judiciary would protect the free choice of parties through the rules on duress and fraud at the common law level, so at the constitutional level the judiciary would protect the free choice of individuals from interference by others more generally, these others represented by the State.

There was this deep metaphoric connection between the common law and constitutional law, a grand integration of public and private law within which legislative interference with the liberty of contract very closely resembled interference with the free choice of a contracting party through the infliction of duress or fraud; just as the judiciary refused to enforce a contract that was the result of duress or fraud because in such circumstances the basis for enforcement, the free choice of an individual, was absent, so also the judiciary would refuse to enforce legislation that invaded this private realm of free choice. And accordingly, in breathtaking symmetry, the logic of the common law also governed the logic of constitutional law—the permissible range of legislative regulation roughly corresponded to the realm in which the common law itself recognized an absence of free choice. Hence, the legislature could regulate and forbid bargaining practices that the common law would recognize as fraud or duress; the legislature could not go beyond those limits in regulation because, by definition, if the common law would enforce a particular transaction, it was the result of free choice and therefore simultaneously immune from legislative interference.

This is how the classical law theory can end up with the fairly odd-sounding institutional premises that Professor Barry advocated.
In this vision, the legislature threatens liberty because it represents the possibility of collective power, rather than individual choice, determining social relations. The judiciary, on the other hand, does not threaten liberty because it simply facilitates the achievement of individual desire. Public law is legitimate in this scheme only when it is truly neutral to private individuals; public law is illegitimate when it is overtaken by interest-groups pursuing rent-seeking legislation because then the government would be taking sides in the private market and thus acting in a regulatory rather than facilitative fashion. Of course, public law is necessary to achieve the “public goods” that the market is structurally unable to produce, but it must be restricted to this fairly narrow role lest the public realm invade the private realm, replacing freedom with coercion. Similarly, in the mainstream political economy of the eighteenth and nineteenth centuries, the relationship between the private and public spheres was also conceived on the contractual model—free, private individuals come together and out of the necessity to get public goods create the public realm in a broad social contract, but that contract limits the State to the public realm; legislative interference with liberty of contract, the core of the private realm, is illegitimate because it is not grounded in the free choice of individuals; it amounts to a breach of this original, imaginary social contract.

We can see the enormous weight put on the notion of individual free choice in the classical law approach. Both the common law and constitutional law referred back to an initial, foundational image that in a contract between competent parties, individuals freely determined their own fates and therefore the classical common law rules and the corresponding limits on legislation were legitimate because they were implied in the very idea of freedom under law. Both the contours of the private realm and the contours of the public realm were legitimated by reference to the free choice of individuals determining their particular social relations in contracts and agreeing to a broad social contract in public law. Thus, public power was legitimate to the extent that it was taken as derivative of private consent. On this world-view, the inequality of bargaining power between contracting parties could not impugn the consent grounding contract because inequality of bargaining power itself, as the Coppage\(^2\) Court asserted, was a result of freedom to contract as one saw fit.

Now it is possible to object to this approach on external grounds—that is, through a basic disagreement with the individualist model on which the classical approach rests. One might initially

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\(^2\) Coppage v. Kansas, 236 U.S. 1 (1914).
disagree with the founding ontology governing the reigning distinction between the public and private realms. Rather than imagining that we begin in the world as private beings, as discreet, atomistic individuals with particular desires and talents that are part of us as individuals, exogenous to the social world in which we find ourselves, and that group life is threatening and coercive to our personal identity, we could begin with the competing ontology of community, that is, the idea that we are not in any meaningful sense discreet, unconnected individuals, but are interdependent and inevitably connected to one another, that we need and desire fulfillment outside ourselves, with others in group life, and that even our personal identity and meaning depend on our connections as members of a community. The possibility of this alternative ontology for imagining the relationship between individuals and groups impugns the first premises of the classical world-view because it calls into question the self-evident character of the main problematic of the classical approach—the premise that there is a fundamental and qualitative distinction between the individual and the group, the private and the public, and that the job of law is to mediate the conflict between the two realms.

I have called this objection to the classical approach “external” because it challenges the first premise of classical law as itself a controversial value choice; it amounts to saying that one can understand the coherence of market ideology, but disagree that individualist as opposed to communal premises should govern social life. Or that other values, such as security, must necessarily compete with the classical value of freedom and, indeed, even within the classical structure, the recognition of duties to others reflected in the competency, fraud, and duress rules of contract, and in torts generally. This objection to the starting-point of classical law is important because it refutes the classical pretensions to neutrality by finding a controversial value choice at the core of the whole classical approach. I will return to the issue of the classical image of the relationship between individuals and groups later; now I want to move on to what I consider the more telling objections to the classical approach made by the legal realists.

The legal realist analytic is an “internal” critique of classical law to the extent that the realists demonstrated that, even if one were to accept the individualist premises of the classical approach, there was no neutral, coherent basis for implementing the program in legal doctrine. Instead, the realists demonstrated that the issue was not, and cannot be, the choice between a free market and public regulation, or between the competing values of freedom and security, because the very concept of a neutral common law regime of private
law is analytically flawed. There is, simply, no such thing as a free market at all. The classical image of a realm of private free choice was false because, as soon as a legal regime was in place, there could be no such thing as a private sphere of civil society separate from public, social power. The classical distinction between the private common law and public legislation was, in a word, incoherent.

Now, there were various levels in which this critique was worked out, and if you are interested in seeing it explicated fairly fully, the best contemporary piece I know of on this is Duncan Kennedy’s and Frank Michelman’s article, *Are Contract and Property Efficient?* Let me now just trace the outlines of the critique and draw out the significance for the theory of classical law.

One angle pursued by the realists was to demonstrate that the distinction between free will and duress upon which legitimacy of the classical approach rested was itself a political decision, a social construct. For example (I am thinking of Robert Hale’s work here) in the paradigm private law field of contract, the so-called consent to a contract was actually conditioned on something external to the contracting parties, the bargaining power created by the legal protection of property rights. If an employee wants to eat, and the property rules have been structured so that all the available food in the community is owned by someone, and all the available means of production are privately owned, then the employee is coerced into agreeing to some employer’s contractual terms. And this coercion is rooted in the legal decisions about what interests to protect as property and what interests not to protect. In the classical imagery, the employment contract should be enforced because it is the result of a private, unregulated decision between two competent parties. The realists showed that the consent to the contract was the result of social power embodied in the property rules, and there was no neutral way to justify the property rules themselves as pre-social or natural. When the common law judges thought they were simply ratifying individual free will in private law, they were really ratifying the exercise of will in the broader context of social power, the existing matrix for the distribution of privileges and entitlements, including property rights and entitlements to be free from harm or privileges to inflict harm. As Holfeld taught us, any distribution of entitlements creates power in some people and loss of power in other people. There is nothing particularly natural or self-evident about any particular scheme for making this kind of distribution of legally protected interests; it could be structured completely differently, so that others would be benefited and burdened.

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The classical argument that inequality of bargaining power could not justify regulation of the employment relationship because such inequality was the result of free choice, the result of a free market, could then be turned completely inside out—since inequality of bargaining power necessarily influenced consent, and bargaining power is the result of the law's distribution of entitlements, there could be no private realm of consent free from the influence of social power, and therefore nothing outside the legal categories themselves determined what would be called public or private, free or coerced, an entitlement to security or a privilege to harm.

Conceptually, the realists demonstrated, the classicals had it wrong—private individual free will did not precede social power; rather, social power, reflected in the property rules by which some were wealthy and some impoverished, preceded and determined, contractual consent. The public precedes the private; there is no way to use private contractual consent to legitimate as neutral and "legal" the common law of contracts because consent is itself derivative of a prior public power reflected in the decisions of what interests to protect as property and what interests to refuse to protect. In the fundamental contradiction referred to by Professor Epstein, there is no natural, pre-social way to distinguish and apply the free market principles favoring the protection of private property and the principles favoring open competition since competition by definition causes harm and insecurity to existing property. The upshot of this strand of realist argument was that it is a political decision what to call free will and what to call coercion, what to protect as property and what to privilege as freedom. The classical common law could not be justified as a protection of the free market because what was called freedom as opposed to coercion was itself a function of the legal rules.

A similar point applies to the fraud rules. It is conceptually possible to conceive of either broad or narrow disclosure duties; narrow disclosure rules would burden some and benefit others; broad disclosure duties would benefit different groups and burden other groups. But nothing in the concept of contract or a free market can tell you which to choose. Rather than simply reflecting and facilitating pre-existing private decisions, the constituent common law market rules actually constituted and regulated what would count as legitimate and illegitimate market power. The classical private realm was, in short, the construct of the public power reflected in the choice of whether to recognize broad or narrow duress rules, or broad or narrow fraud rules. Most importantly, the distribution of wealth was not a result of the private free market, but the result of social power reflected in decisions as to what to protect as property,
what to define as free will or duress, and what range of other-regarding duties to recognize in contract, tort, and property law. The issue could not be a principled distinction between the free market and the social welfare state because the free market was transcendental nonsense; the distinction between a private, unregulated market and public intervention was false, because the particular structure of the private common law was itself, necessarily, a form of public regulation. If what scares classical liberals about the government is the idea that the State represents the threat of social power, the realists showed that there is no escape from social power.

If you are with me this far, the next question is why did not the classical law proponents see the analytic flaws of their justificatory theories? Now here is where the realists stopped short in their challenge to the old order. The realists tended to treat the classical world-view as a mere intellectual error, as a mistake in a train of reasoning, rather than as playing a critical role in the construction of social life, rather than as an ideology that spiritualized the status quo power relations by translating them as a meritocracy of freedom and liberty under law. The realists neglected to talk about the way that the classical ideology worked in the social world, to tell workers in the sweatshops that they had consented to their working conditions and to their own exploitation, to tell the wealthy that their economic power was earned, deserved, and legitimate. Instead, the realist explanation was "formalism"—the classical theorists mistakenly thought that they could move from the abstract ideas of liberty, of contract, and of property, to concrete doctrinal manifestations, such that contract would mean, for example, the particular rules of offer and acceptance, consideration, the distinctions between free will and duress, the limitations on principles of fraud and misrepresentation, and the contours of expectation damages, as if the idea of having a contract regime answered all these subsidiary doctrinal questions for you. The formalist mistake was to assume that you could move from the abstract idea to the particular concrete context without the intervention of social power, of policy or the whim of the judge or the apparent social consensus or something like that.

Without that moment of formalism, that old kind of Aristotelian classificatory belief that the categories of public discourse could somehow magically match up with the categories of independent, pre-public material life, without that kind of intellectual error to explain themselves, the classical system appears simply as an ideology of power rationalizing the apartheid of class and wealth, the exploitation of workers in the factories of turn of the century America, by the propagation of the myth of economic meritocracy in the free market.
Let me be clearer. I am not talking here about classical law as an abstract theory concerned with the source of law, or with whether law has an author or not. I am talking about law as social ideology, as a matrix for translating social experience, and specifically how the classical approach translates actual people's lives on assembly lines, in bread lines, on street corners, in interviews, in families, and across the "private" realm as free and consensual, as devoid of public power. The image that when we are in the private realm, as defined by classical law, we are free is a false image; it was false when it presented the economic relations of the early twentieth century as free, and it is false today when it presents women's roles in the "private" realm of homelife, workplace, families, and sexuality as a result of private, free choice. It is a lie that represses all the ways that our "private" relations are socially constructed, through the ideology of gender roles, of sexuality, and through the material distribution of power and privilege.

The point here is that there is more to the flaws of the classical approach than some intellectual error. The problem with the classical approach is not that there is some mistake in the chain of reasoning that could be corrected by the substitution, as Professor Epstein suggests, of utilitarian for natural law premises; rather, the representation of the world according to the classical imagery is an ideology which plays a social role in legitimating as natural or necessary the rank caste structure of our social life.

The problem with classical law is not formalism, because the mistakes of the classical approach are not epistemological mistakes in the theory of knowledge, mistaking mental categories for categories of material existence. They are rather pieces of social mythology and ideology that play particular social roles in relations between people. In other words, the problem of the public/private distinction is not simply that it is indefensible after taking seriously the work of realists like Pound and Hale and Felix Cohen; the problem is that it is a false and inauthentic representation of our lives as sharply divided by on the one hand a private realm where we are truly ourselves, somewhere, at home, or in total isolation from others and their influence, and on the other hand, another realm where we are not ourselves, where we have to play publicly-imposed roles, where we are somehow coerced, putting on masks and playing out roles that appear to have no social agency. This classical categorization of the social world seems to me simultaneously to be the very definition of social alienation—the sense that it is normal to believe that we do not collectively create both ourselves as individuals and our social roles, that we are either alone and free from social influence or with others but robbed of our subjective identify.
The myth structure of classical law ideology plays a particular political role, by translating as free and normal the social alienation and powerlessness people feel at work and in their public lives generally. If we believe this mythology, that the social roles we play as teachers and students, as managers and workers, and as men and women, are either public and therefore coercive but necessary, or private, and therefore simply the result of individual free choice, then we do not see them as open to social change, by us working together imagining new, more fulfilling ways to be together. In short, the classical ideology is the message that we are powerless to change the world together, to recover the sense in social life that we can create and recreate the world in which we live.
DISCUSSION: THE CLASSICAL THEORY OF LAW

QUESTIONER 1: I have a question that I will direct to Professor Peller. I think Professor Barry might have been making an empirical argument or he might have been making a phenomenological argument. I am not sure, but, given that he was talking in terms of tradition, where is the formalism in his argument, where is the abstract idea, the idea that one would make from some sort of innate idea or some abstract idea?

PELLER: I may have misinterpreted Professor Barry; if I did I apologize. As I heard his presentation, he presented an image of laws prior to legislation, of the common law and private law as the realm of liberty. And as I understood his presentation, liberty is threatened through the social welfare intervention of legislation. What I was suggesting was that the most important teaching of the realists, what one as a matter of intellectual integrity must confront if one is to hold on to this particular classical image, is the argument that the social welfare legislation of the New Deal is not qualitatively different than the common law because the common law itself is regulatory. And the only way I suggested to avoid that realist point is the notion that the common law is not regulative because there is an absolute, determinate way to move from the abstract idea of freedom, equality, contract, and property, to the particular doctrinal manifestations and concrete cases.

BARRY: I will just make one point for clarification. I was making a kind of epistemological argument about knowledge: it was an anti-formalist argument to the effect that the human mind is incapable of encapsulating in a formal body of rules this public/private distinction. And the liberal argument also is that individuals are not ontological entities apart from society who merely contract and set rules for their ontological separate selves. They do exist as members of units which are more than atomized connections between themselves. The point is that through their ignorance they will grope towards a better system of arrangements than if indeed they could somehow formalize this system. So it is a skeptical argument. It is saying that if we look around, we find that human needs and arrangements are better organized through a spontaneous method by individuals who are already social beings, than if some other person could design a different set of arrangements. So it was indeed, as the speaker said, a kind of skeptical, epistemological argument.

EPSTEIN: I have a comment upon Professor Peller’s presenta-
tion. I agree with him in part, but I want to set his worst fears aside. I do not agree with him in respect to everything that he said, particularly about my own position. I think the point that he made is clearly correct. The failure of natural law theory today is that, to the extent that one wants to get into a debate about the choice of desirable legal rules and social institutions, he cannot do so on the grounds that we are blessed with the safety of having necessary truths that will work on our side. It is a mistake to use the word "formal" to refer to essentially deductive conclusions which come from unassailable as self-evident premises. And I think, in effect, a lot of people thought they could demonstrate that level of certainty for the rules that they had. The legal scholarship of the realists and others was fairly powerful in devastating that defense of the old order.

The question, however, is, is it possible to make reconstruction of the traditional conceptions by trying to invoke some other more functional criteria and justifications. It is a subject I did not talk about today, but which, for example, I do talk about in the Takings book. The first thing you have to do is to be aware of the problem of the straw man. For example, Peller said that people have the idea that common law rules are not regulatory. I do not think anybody really believes that, as the paradigmatic common law rule shifts from contract to torts, we are obviously talking about a whole variety of restraints, some which operate ex post by way of damages, some which operate ex ante by way of injunctions. The real question is not whether we think the common law is or is not regulatory—of course, it is regulatory. The real question is, does it contemplate a form of regulation which is superior to some alternative that might be devised?

The second point goes back to the characterization of what laissez-faire or what the Lochner movement meant. Professor Peller mentioned, for example, that when you were talking about classical theory, you were talking about "the absence of coercion" that creates liberty in a system with no government intervention. I do not think any of the classical liberals believed that, and certainly Peckham did not. To give you but one historical example, Peckham was a reasonably strong champion of the anti-trust laws, insofar as they were dealing with horizontal restraints, and he wrote opinions that supported that particular conclusion. In addition, one of his great problems in Lochner was that he went a little too far in favor of state power. The errors in the opinion are contrary to those for

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which he is usually castigated. He thought mistakenly that all matters of health essentially were subjects of such great paramount public importance that state regulation could always displace freedom of contract. What one has to do, therefore, is to ask how to deal with the principle of freedom of contract with some sort of functional justification. Let me give a one minute summary of why I think the principle had such a great allure, even though from time to time, it has been misunderstood by those that sought to invoke it.

First, I think it is just wrong to talk about the system and factory as one of oppression. In fact, in the period he talks about, real economic income in the United States was consistently rising, something by about 30-40% in the period between 1870 and 1914—and this in the face of enormous immigration of low-priced labor which could displace higher-priced domestic service. Of course, it was the unions who wanted to keep my forefathers from coming to these shores, not the businessmen. One, therefore, must understand that coercion is not necessarily hierarchical, but often times responds to the greater weight of the greater number.

Analytically, moreover, wage contracts should not be struck down whether at common law or by statute because of an alleged inequality of bargaining power. This concept seems to me to be incoherent. So why worry as long as somebody can sense, no matter what his original wealth, that he is going to be better off after the agreement than he was before? Otherwise if he is going to starve then he might as well starve in style and go out with a stock equal to W rather than W-X. So it seems to me that the principle of mutual benefit within a bargain is something that is perfectly consistent with a rational social justification of a principle of free contract. It is not consistent with the welfare state which says that we know better for what people can do than they can know for themselves.

The second half of the argument is about externalities. The common lawyers did not talk in these terms but they certainly understood the problem. They were always uneasy about contracts in restraint of trade, and the reason was that they had some intuition about the social losses associated with the move from competition to monopoly. They were also certainly exceedingly hostile to those contracts which were designed to inflict mayhem, rape, or murder upon third parties. Those were flatly illegal. There was no principle of common law which said freedom of contract governed wholly without regard to the external effects. But what one can say pretty confidently is that if you are looking at an agreement in which there is only a transfer of goods and services and money between two parties, both of whom will be left better off than before, then to the extent to which you increase the wealth of stock of the two parties to
the transaction, the anticipated external effects are going to be positive when taken in the aggregate. There is now more wealth to go around, and thus the velocity of voluntary transactions can increase. Once one understands these points the regime of freedom of contract becomes pretty powerful on a social welfare ground, modernistically understood. We know that there are gains between parties, and that there are gains with respect to strangers, so it is very hard to figure out the losers under this general regime.

Even with respect to the feminist jurisprudence, it is striking when one looks at the particular catalogue of grievances. Virtually each and every one of them turn out to be legal restrictions against entry into certain markets. It would be a terrible thing for the law to say that women must stay at home, but if some women choose to stay at home when they are free legally to go out somewhere else, it seems to me that we have learned something about their behavior in the absence of barriers to entry. What our principle ought to be is that of the classical liberal idea: keep those barriers down, and the problem of people sorting themselves into occupations and roles based upon tastes and upbringing will more or less take care of itself.

If my analysis of contract is correct, we can make the appropriate reconstruction of private markets and their legal foundations. Indeed, as a constitutional matter, huge portions of the Constitution basically have adopted this program, even though I am quite confident that many of the framers only glimpsed at the justification for their scheme, and could not have given the far more systematic defense of it that I have tried to introduce here. So, I disagree with Professor Peller very sharply when he says that because the natural rights theorist fails in proving his beliefs as necessary truths, there are not sufficient social regularities to justify, empirically, protecting common law rights at a constitutional level.

BARRY: Just a very important point. Almost all of the classical liberal legal theorists were anti-natural rights philosophers, partly because of their skepticism and, I think, partly because they recognized that it is impossible to persuade people of the nature of these natural rights. But it is possible to persuade people of the advantages that come through mutual exchange and spontaneous order. Rules emerge as conventions that meet people's needs. They are accepted, on reflection, for this reason, not because they are intrinsically right. So I think I agree entirely with Professor Epstein on that point.

PELLER: Professor Epstein opposed the argument I presented, and I think I was not too clear. I was not, of course, saying that Justice Peckham was an anarchist. I was saying that Jus-
Practice Peckham has a particular view of the relationship between the private and the public spheres and a particular notion of what the content of the private and public spheres were. Of course, Justice Peckham believed in some kind of liberal state which would take care of the grossest externalities, such as monopoly, and his opinions in monopoly cases confirm that.

The second point that Professor Epstein makes is that there is a functional as opposed to natural law justification for the *laissez-faire* free contract regime. Professor Epstein, again, and I will try to pin him to this point, simply avoids the issue. Is there a natural way to distinguish between freedom and coercion, free will and duress, those concepts as they are actualized in concrete cases, or is there not? If there is not, then the very distinction between what is called free will or a free contract and what is called un-free contract, the distinction between a contract that expresses “preferences” and a contract that expresses someone else’s will, is incoherent, or is itself a function of social power.

Professor Epstein wants to offer a very thin justification, a utilitarian justification for the free contract regime he envisions by using the notion that people are moving to preferred positions. The problem with that notion is that you have to start out with a free contract concept. Professor Epstein accepts my argument that you cannot do it through mere formalism, through the notion that the distinction between free will and coercion is a natural distinction that we can all simply apply as some kind of vision of natural law. So he moves to utilitarianism, but utilitarianism, once you open up the possibility of externalities, gets you nowhere.

If you are going to justify the free contract regime and include the possibility of externalities, which any utilitarian calculus must, there is simply no determinate way to account for externalities for two reasons. The first reason is that any criteria for evaluating two states of affairs, one in which people have moved to an aggregate preferred position, and the other where there is a sub-optimal state of affairs, any compensation criteria is either totally abstract, merely filled up by the empty concept of “utils,” or it is more concrete and more descriptive, that is, more empirical, and as soon as it gets more empirical it gets more controversial. Do we include in the notion of aggregate utils people’s preferences as to distributional states? No, of course, we could not because that would unwind the whole free contract distribution regime. Do we include, in terms of what counts as utils to figure in the aggregate social welfare function, people’s aversion to alienation or preferences for social solidarity? How would we count them? These are not goods that are currently produced in the current market structure. Is the utilitarian function
simply a replication of status quo commodities or is it wide enough to include the possibility of the creation of new commodities that people might prefer more than the existing market structure. If it does not include the possibility of new structures, then the claim cannot be made that the preferences are in any meaningful sense, exogenous.

The second major problem is the problem of third party preferences. Once we are willing to do an aggregate social welfare function analysis, what about third parties who are really bummed out by people working in sweatshops for sixteen hours a day. The fact that we might not grant these parties a legal entitlement to interfere in the relationship between the employer and employee does not mean that once we use a utilitarian justification for free contract regime, there is any basis for ignoring those preferences. They are preferences. To ignore them is a political, controversial, not a simply theoretical, question.

QUESTIONER 2: I was wondering if Professor Peller could describe a non-utopian situation in which the decision to stay home with the kids would in fact be a free choice, and if he cannot describe a choice like that which would be created, what is the point of critiquing the current choice as not being free?

PELLER: I have tried to argue that the notion of individual free choice as opposed to social coercion, that that way of filtering our experience of social life, sets up categories that are incoherent. No decision is totally divorced from social life and social influence. In that sense if you believe in free choice as this pure kind of individual preference, I cannot define that kind of utopia. But I can define, I am suggesting, a kind of quality of life where people are fulfilled—where people feel that they are able to develop according to their wishes with due concern for the interest of others. With respect to the specific gender example, in current social life, the economic sphere and the public sphere generally are constructed to close-out women, so that it would be very difficult to say in any instance that a particular women’s decision was “free” since the range of options is so limited vis-a-vis others—males’—options.

QUESTIONER 3: I get the impression that Professor Epstein likes the order that is embodied in the American Constitution because it is remarkably close to a sort of Benthamite utilitarian conception of the sort of interactions among individuals that would produce the best world from the utilitarian point of view. But when one reads the Constitution, or probably more appropriately looks at historical documents that describe the sorts of human virtues that the framers valued, one gets the impression that they, at least, had all kinds of values that would be rather difficult to capture in the
utilitarian calculus technique which at its best, I think, suffers from certain technical defects. Now on the other hand, Barry, who has given a wonderful summary of Hayek, suggests that the problem with theoretical rationalistic approaches to politics is that they tend simply not to capture certain, admittedly sometimes aesthetic, sometimes spiritual, sometimes hard to categorize goods of human knowledge about society, and the ways society should be organized are not easily captured by any particular theory. So I guess my question is, what is it that is so great about the utilitarian approach, what is it that is so persuasive about it, that we should only save that much of the constitutional order that is consistent with it and abandon or leave critiqued, as I take it your approach was to the Roman law, those portions of it which are not easily justifiable in functional terms but may embody hard to articulate traditional knowledge, those forms of Hayekian knowledge which simply cannot be captured in utilitarian terms?

EPSTEIN: I think there is a real difficulty in understanding what a utilitarian conception of governance entails. On the one hand, one can endow at the outset legislators and governors with perfect knowledge of what is going to happen. If people had that degree of knowledge and we are all well behaved, then in effect we would want comprehensive social regulations in order to control and domesticate all those elusive externalities that Professor Peller talked about. But my sense about utilitarianism is very much Hayekian. While abstract theorists may identify certain directions, tendencies, and so forth, there are both imperfections in knowledge and corruptions in politics with people co-opting, or abusing public trust for private ends. We should give up on trying to be able to bring every utilitarian virtue into public life. One of the key utilitarian virtues, oddly enough, is self-destructive. It says, do not adopt those kinds of rules which in their own form are explicitly utilitarian; do not count costs and benefits, because once you do that you will get results that somebody standing back from the fray will see to be profoundly anti-utilitarian. The balancing tests of an overtly utilitarian nature fuels much of the law of product liability, public liability, and medical malpractice. So too in constitutional adjudication, these people were trying to be utilitarians. But the difference between an analyst outside the system and a practitioner within it is critical. We can know about problems that we cannot solve.

Let me give you one sense of what some of these difficulties are. Professor Peller noted for example that the utilitarian calculus has to take into account that there are some people who are “bummed out” by virtue of the fact that other people are working in sweatshops. But, of course, the buming out phenomenon runs the
other way around. There are lots of people, many of whom sit in this room, who are bummed out if somebody else comes along and says, "Gee, I know what’s best for these fellows. I’m going to keep them out of the borders so they can starve to death in Mexico." And he gets bummed-out by a series of restrictive social legislation. To what extent is any government official going to be able to figure out which set of bummed-outedness is going to dominate the other? There is also a moral hazard problem. If you know that freaking out is the way to get legislation your way, then get yourself some uppers, put the other guy on downers, and do war dances in the street.

So these elusive externalities run in both directions. It is not a simply a one-directional phenomenon as he implied by that example. They are bi-directional. In the long run you will get a better assessment of the total utility if you systematically and vigorously ignore those psychological concerns running in both directions than if you try to measure them case by case. Take into account the imperfections of measurement, and a lot of the things that a pure moral utilitarian might regard as relevant should be made essentially irrelevant for the legal order.

Does that mean that people who are bummed out by sweatshops are absolutely helpless in my world? Not if there are all sorts of voluntary aid societies. Indeed, a classical utilitarian or libertarian like myself accepts the distinction between legal obligations backed by force, and moral obligations. (Force is "your time or your life," not a hard bargain of your money for my property.) There are lots of people who have money, and there is nothing which says they have to be egoistic in the way they spend it. If they wish to give it to help people laboring in sweatshops, they can. Is this a trivial concern? Of course not. There are billions of dollars, even today, that are spent exactly that way by people with just those sentiments. People who are upset with the status quo can spend their money in order to try to bring about a better social order. To understand the full liberal construct, it is a mistake to concentrate excessively on the legal side of it. This very powerful set of informal social and religious obligations is essential to a free society. While there are some obligations which you cannot define with sufficient precision and clarity to bring the power of the state to bear, still it does not mean that social sanctions should be introduced. If you take the two-tier perspective, it seems to me that both of his points vanish. We can define a distinction between coercion and non-coercion, because we have a system of property rights which gives us the legal baseline, while preserving a place for non-unanimous voluntary conduct to alleviate suffering and to bring about perfectly coherent redistributions of wealth from rich to poor.
QUESTIONER 3: I guess my question is should the Constitution be followed and is the Constitution to be admired only to the extent that it is justifiable in utilitarian terms? Is there something in the Constitution that is clearly not utilitarian?

EPSTEIN: The answer to that is sure. I do not admire the provisions which say that slaves count for 3/5 of a person for the purpose of the census, but not at all for vote. It was in the original Constitution, but I am not going to venerate it. I think the provision was a mistake. Maybe somebody wants to argue the opposite. I do not think it will be Professor Peller.

Overall, large parts of the original Constitution are blunders. There were bad provisions which controlled the election of the President and Vice-President, and these were removed by the twelfth amendment in 1804. But it is a theory of utilitarianism which says “Look, for heaven’s sakes, do understand the one thing that Hayek understood so well, that the limits of the public knowledge should very much influence the way in which we structure our public bodies.” There is a critical distinction between public and private bodies. Unfortunately, the state has got the monopoly of force. There are many employers to whom you can turn, there is only one state from whom you have to run. That is the difference you worry about.

QUESTIONER 4: As I heard the two sides going here, it strikes me that you are both really driving at something very similar. I think that Professor Epstein’s position is not that we have this radical bi-polar limited government against the individual, as Professor Peller in some ways tends to characterize the other side; but then on the other hand, I also believe that Professor Peller has a point, that since we do not live in such a neat bi-polar society, that there are more factors involved than just the freedom of contract between two individuals. Now at the bottom of all of this, it occurs to me that maybe the people who were so committed to natural law were not such dummies. Maybe this was the way they tried to resolve this thing. My question is, where do we find a principle or a standard of what is just? If two people making contracts in Professor Peller’s view are not really free, then who is going to help them be free? Is it going to be the state? If the state makes a decision for them does that force them to be free? I know that is not what you are saying, or at least, I hope that is not what you are saying. What you are crying for is an objective standard of how we can measure justice. Now how do we go about finding that standard? How do we determine what is just?

EPSTEIN: I think it is a fundamental point to distinguish between scarcity and coercion. If you argue that scarcity of resources is a form of coercion, there is no such thing as free contract because
the resources in the world are finite. I think that Professor Peller gets himself in that position when he finds that he cannot say when somebody is truly free. The answer is that scarcity coerces. There is always coercion no matter what the social arrangement, so I think that one has to go back to the Hobbesian insight as to what coercion is about. He used to rail against force and fraud. These may be controlled even if scarcity cannot be.

QUESTIONER 4: But still the question I am placing before you is, how do we determine a standard of justice?

EPSTEIN: I gave you the theory that I would use which is freedom of contract.

QUESTIONER 4: But you contradicted yourself because in your main address you sort of kicked out the natural law tradition altogether.

EPSTEIN: No, I did not. I said that you could not use the natural law tradition to support constitutionalism because the natural law was always a default rule. What I said was that you could always reconstruct the justifications and that basically the position would be, I think one—and here Professor Barry and I are close—that Professor Barry calls indirect utilitarianism, which recognizes that all the cost-benefit calculations come into the formulation of general rules, but once the general rules are in place, you avoid the inherent errors of ad hoc exceptions or ad hoc balancing. I think many of the early natural law philosophers were indeed indirect utilitarians, but they just did not use that terminology. You certainly could read Locke that way when he said that there is a happy coincidence between social welfare and natural right. It is not a very long passage, but it is suggestive that the distinction between ontological and consequentialist theories of ethics is in fact more modern than classical. The classical natural law scholars were very smart in certain ways, but they also made a lot of blunders because they were not systematic. They did not have twentieth century knowledge. We know more than they did, not because we are smarter, but because we can build on what they said.

BARRY: I would just like to make one point against Professor Peller. I found that his argument embodied a certain kind of perfectionism. Look at a market exchange process governed by common law rules which nobody designed, and you can always find disadvantages enjoyed by some people or endured by some people and advantages enjoyed by others. There always appears to be an element of private coercion, even in a purely private world. Why does there appear to be that element of coercion? Well, because you have a perfectionist vision of a world without coercion, that is, a world in which all sorts of human things have been eliminated, like self-inter-
est, greed, scarcity, time preference, and so on. If you look at the real world with a perfectionistic vision, you will find coercion everywhere. But you only find coercion everywhere because you have got a kind of vision of a non-coercive world. And I wish that vision were to be explained more fully for people who take a cautious, skeptical, or indirect utilitarian view as I do. I mean, it is possible to look at a market exchange process and see inequality even though the two parties only act to improve themselves—it is still possible to say, well, one comes off slightly better than the other; if it is a pareto criterion, as long as somebody stays where he is and someone gets slightly better, then we say it is still an improvement. Looks very tame from a perfectionist standpoint. But what disturbs me is that we do not have any alternative evaluation which is at all consistent with what we know about human nature and human experience. So what is the alternative, coercionless world you propose?

PELLER: I think that you have mischaracterized my argument if you believe that I was arguing that there is something called coercion that has a natural correlate in the world and I can just go out and match up the word with the thing coercion. My argument is that the mode of thought that operates on the distinction between free will and coercion, and that ends up justifying the gross inequalities of wealth that result from the so-called free market, is itself a political question unless one is a formalist, or unless one believes in a natural law of the status quo, as Professor Epstein attempted to make the distinction between free will and coercion turn on the retention of existing property entitlements. What I am arguing is that the distinction between free will and coercion is merely a result of social power. What we call free will is what is not coercion. What is not coercion is what we call free will. Now unless there is some independent, substantive correlative of these things, I would say that the notion that coercion in a contract, for example, only exists when a gun is held to one's head, is about like the notion that rape only occurs when there is physical force and resistance and the overcoming of resistance. This is the old world. We are in a new world.

EPSTEIN: I hope not on the rape issue, Professor Peller.

QUESTIONER 5: Since the notion of legal coercion does depend, at least to some extent, on the baseline of property rights, since that is what determines what constitutes force or fraud for purposes of the legal system, assuming that one would want to do so, how does one avoid interjecting a traditional natural law justificatory element at the level of a developing theory of initial acquisition of property, as opposed to exchange, which can be handled by reference to subsequently developed contract law?

EPSTEIN: I think that you asked the right question. I think it
can be done, and I think what you have to do is to go back to the
theory of transaction of cost economics, which is not where I would
have started this life twenty years ago.

QUESTIONER 5: Let me interrupt. There are two parts to the
question, one is why would one want to avoid a natural rights justifi-
cation, and the second one is, assuming that one would want to do
so, how.

EPSTEIN: I do not want to avoid it if you can make it go. The
problem is that I do not think that you can make it go simply by an
assertion. What one tries to do is to figure out how those natural
rights serve some social ends. If we had a system of natural rights of
the sort that the Lockeans or the common lawyers envisioned, but it
turned out that we could figure out that everybody was worse off
under that regime than under some alternative arrangements, pre-
sumably, we would want to move from the natural rights arrange-
ment to the other. If the various tests of pareto-dominance make
sense, then you cannot ignore them when it comes to the formula-
tion of natural rights.

Now, it is quite clear that there is an ambiguity in talking about
existing rights structures. There is nobody here in the natural law,
the utilitarian tradition, I take it, who would want to say that if some-
body happened to steal something without being caught, that has
created an appropriate natural distribution of rights which serves as
the baseline for all subsequent transactions. There is a very radical
streak to natural rights and utilitarian theories which says that huge
transfers, like for example, those from the Indians and those ac-
quired by force and fraud from others, are not to be protected. The
great difficulty is to figure out some way to undo these improper
moves without completely undoing the society. A system of wealth
which comes out of apartheid or segregation is not the kind of natu-
ral distribution that I would want to defend, even though it is the
status quo.

The second point is the empirical point. I think Professor
Peller is just wrong when he says that when you look at the distribu-
tion of wealth, the vast inequalities of wealth are attributable to mar-
ket institutions. The empirical argument is that disproportionate
wealth arises from entrenched monopolies protected through legis-
lation that exclude rivals. If you were to use any measure of income
dispersion for market economics against totalitarian societies, or so-
cialist countries, you will find far greater skews where people can
keep out rivals. What competition does, not perfectly, but inexora-
ibly and inevitably, is to reduce certain super-normal profits to nor-
mal returns.

Now, the analytical question, how do you get a system of natu-
eral rights based on first possession, how do you decide what things are both public and private, I think the answer to use if starting from a blank slate is to try to figure out which distribution of original property rights will minimize the number of transactions necessary to reach the optimal social state. That would be the formula. Self-ownership, for example, fits that very well because it now means that everybody has a capacity to deal on his own account; no one has to engage in all sorts of preliminary transactions to decide who is entitled to deal for whom. With respect to the external world, the “no-ownership” position, standard common law probably does better than anything else because first possession is a cheap and easy way to get property rights established. Thereafter the eminent domain calculus says that, where the markets break down because transaction costs are too high, we could overcome it by force. So I think that basically that single regimen, the insight that Ronald Coase started with in a completely different context, if pushed far enough, explains huge portions of traditional natural law theory and essentially makes it much more respectable than the intuitive explanations offered by natural rights theorists.

QUESTIONER 5: The notion of an optimal social state as part of the justification for the initial property rights scheme involves laying claim to a kind of knowledge that the Hayekian analysis would suggest we cannot have.

EPSTEIN: The problem arises only if the argument is used to mandate a set of individual outcomes, but it has less force when figuring out some simple rule that works as a default provision. And that is what the common law rules did. They were extraordinarily simple; they were extraordinarily de-centralized; the cost of implementation of getting everybody into self-ownership was lower, I think, on a first cut than on anything else. The Hayekian impulse is do not try and be fancy and overdo that with something more convoluted and complex just because you want to correct every last error. Simple rules have major practical advantages. Beware of Peller’s skepticism that everything is coercion and nothing makes any sense. Remember, he cannot be a member of the left; he has to drop off the political spectrum given his own views about knowledge and coercion. I think we can make empirical judgments about property. I think the uniform historical sentiment on first possession is pretty good evidence as to its soundness.

QUESTIONER 6: I want to ask Professor Peller about his utopia, to take a step back. He criticized, from my understanding, several social relations, which are the basis of our society, and he said that maybe some of it is based on arrangements which provide new commodities that might be more important to the human soul than
perhaps material gains. As I look around here, I see that people always look at each other in order to get an idea of what they want to be. And so this freedom, this utopia, this new system you propose would ask us all to be saints, which is in some sense a little difficult perhaps. But even that would probably be easier than a utopia which asks us all to be very individualistic, to be very different from each other, to be original. And I want to suggest that this is also something very painful for the human spirit, that it is very hard to be original, and so this particular utopia seems very coercive, and perhaps some of the sorts of social relationships in society that define, in very clear terms, the ways people interact with each other, are perhaps milder and perhaps moderate the coercion that comes from social pressure.

PELLER: I really was not trying to offer a big blueprint for what is or is not coercion. And to respond to Professor Epstein's point that I am off the political map because I believe that everything is coercion, once again, I do not know why this point is so difficult to understand. The point is that coercion is a social construct, and that what gets called coercion is a political choice. And the point is, I think, fairly simple.

Now with respect to the various hierarchies between teacher and student, worker and manager, man and woman, and the like that I have mentioned, that I believe inhibit the possibilities for social interaction, I was offering as an utopian vision the notion that we do not need to accept these as simply givens of life, that they have a social subjectivity to them and, therefore, a contingency. My vision is that we could recover the possibilities for acting out social roles with some conviction and engagement while we are in them. Instead, we find ourselves playing out a part someone else wrote, we know not whom. And towards that I simply will assert from my experience that, for example, even if there is some functional justification for the distinction between teachers and students, or workers and managers, at some point that has nothing to do with the particular concrete embodiment in which they are played out today.

I think that the relationship, for example, in an educational institution, in a law school, between teachers and students ought to be far more democratic, and there is simply no functional basis to the kinds of fears that you are expressing, that there will through democracy and the collective engagement of the terms of social life be some coercion or pressure. I think that the risks of that are far less than the coercion and pressure that exist as we all kind of act out these roles. I think that law schools ought to be run popularly and democratically. I do not think that is such a bizarre concept.

EPSTEIN: But the genius is, heaven forbid, that all law schools
should have to run that way. Let him run his that way, let us run ours our way, and then let us see which way the students come. Then we will get information as to their relative desirability, which we could not acquire if we could made an all-for-one centralized choice. That turns out to be the key element. You may have a vision of what you want to do. But I think one has to recognize, and this, I think, is core to liberal theory, that the standards to apply in deciding what to do with yourself and with others who agree with you are different than the standards to apply in imposing by threat of arms and force your views on your rivals or upon your neighbors. It may well be that there is a best way to organize a law school. If so, one could see all evolution in that direction without any change in the legal norms that govern contracts. There is nothing about the liberal order, or the principle of freedom of contracts, that dictates how law schools deal with students. If schools want to change, there is no law that has to be repealed first. Nobody wants to say that people are “autonomous” in some cultural sense that nobody believes. We all know that acculturation is essential. Anybody who has children knows that they do not just grow up like topsy. The real issue is who is going to fit standards? One at the center, or many at the periphery? It seems to me it is that choice which should make us aware of the dangers of monopoly for social experiences as it leads us to recognize the dangers of monopoly for ordinary economic affairs.

PELLER: The law school example is a particularly good example. As Professor Epstein well knows I do not believe in centralized social power as a political theory. The distinction, though, is in the terms of this asserted natural evolution of institutional forms. And this now matches up with the argument about externalities. I think there are a lot of people who have preferences that their work life, that their educational life, and that their family lives be different, be freer, be more engaged, be more emotionally committed, be more fulfilling, be more reflective of the self and subjectivity. The fact that the current structure does not produce those kinds of institutions suggests not that a slow natural evolution will produce them; it suggests precisely the opposite. Professor Epstein’s point that the market will satisfy everything is contradicted by the failure of the “free market” of education to produce democratically run law schools. In addition, Professor Epstein’s comment again misses the central point that I thought I was fairly clear with, with respect to the legal realists. The point is not centralized social power versus decentralized individual choice. The point is that both those concepts are incoherent. There is no such thing as the free market not regulated by social power.
EPSTEIN: I think we have said all we have to say. I think in the end, it is an invitation to totalitarianism if you cannot distinguish between markets and coercion. The willingness to use coercion will be the death of the market and of personal liberty.
The last time I attended a Federalist Society Symposium was four years ago, almost to the day. On that occasion I talked about two terms in legal debate, restraint and activism, which seemed to me to have become all-purpose terms of condemnation and approbation, respectively—and, really, to have lost all definite meaning. I tried to suggest how they might be used more precisely. I am going to do the same thing today with legal realism and legal formalism, and also relate these terms to economics and to the rule of law and suggest how these four concepts fit together nicely when one is talking about the common law but not so nicely when one is talking about statutory and constitutional interpretation.¹

The terms “formalism” and “realism,” as they are currently used in legal debate, are entirely polemical. They are epithets used for a promiscuous variety of good and bad things, depending on the purposes of the speaker. Formalism can mean anything from casuistry to fidelity to law; realism anything from left-wing ideology to pragmatic, intelligent, and epistemologically mature engagement with the legal system.

These terms can be given precise, nonpejorative, non-polemical meanings as follows. “Formalism” can be used simply to mean the use of logic in legal reasoning. And there is, of course, a place for logic in legal reasoning. If, for example, we have a rule that a contract is not enforceable unless supported by consideration, and a contract is presented which is not supported by consideration, then we can say as a matter of logic that it is unenforceable. “Realism” can be used simply to mean the use of policy analysis in legal reasoning. We get the premises on which to perform the logical operations of formalism from notions of sound public policy. There is nothing illegitimate about this; it has always been an important part of law and it is indispensable for solving many legal problems.

Each of these concepts is susceptible of abuse. The characteristic abuse of formalism, of which Christopher Columbus Langdell is

† Judge, United States Circuit Court of Appeals, Seventh Circuit; Senior Lecturer, University of Chicago Law School. A.B. 1959, Yale; LL.B. 1962, Harvard University. ¹ For a complete discussion see Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 CASE W. RES. L. REV. 179 (1987).
frequently accused, sometimes with justice, is that of smuggling policy choices into the premises for logical reasoning without analysis or even acknowledgement, so that the law is made to seem to have a more logical structure than it really has. Consider this question of perennial fascination to students of contract law: should a person be allowed to claim, as a matter of contractual entitlement, a reward for returning a lost article, if he did not actually know that a reward had been offered? Langdell said no. And he said it on logical grounds: a contract requires—is defined to require—conscious acceptance; if the person who returned the lost property did not know about the reward he could not have accepted that unilateral offer, and therefore there is no duty to reward this person. Langdell's mistake was to impose a definition on the word "contract" without considering why one might want to make some promises and not others enforceable and what the effect of making this promise enforceable would be. Would it lead to more returns or fewer? Actually this is a difficult question but it is one that Langdell thought he did not even have to consider.

The vice of legal realism—of some versions of realism, anyway—is that it is, in a sense, not realistic enough. It leaves out of the picture some important policy considerations. For example, in one brand of legal realism, it was said that decision according to precedent was either not in fact used by judges in reaching decisions or ought not be used. But the decision to defer to prior decisions is itself an important and valid policy which a sensible and disciplined judge would use in his decisional process even if he thought of himself as thoroughly realistic.

What I have proposed, then, is a system of analysis that has a place for concepts and logical deduction but also a place for using policy analysis to create the premises for decision. And from this description it should be apparent that economic analysis fits very nicely into a concept of law which combines formalism and realism. Economic theory is a logical theory—indeed, a branch of applied logic—and although the premises are supplied by notions about human behavior—how people respond to incentives, for example—and about what is valued in society, once those premises are given, economic theory can be used to deduce all sorts of results. These parallel systems of thought, the legal and the economic, can be combined, and have been combined, for example in the Hand Formula, which is a logical statement of the meaning of negligence and can be used not only to deduce the outcomes of particular cases but to de-

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2 See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), for a definition of the Hand Formula.
duce all sorts of interesting doctrines. If you start with the Hand Formula you can ask, if both injurer and victim are negligent should the injurer be liable? By use of economic analysis and the Hand Formula you would come up with a logical answer. This type of analysis, in which economics is used to derive legal results, is I think what common law judges have always done intuitively (perhaps today, more explicitly) and is consistent with what we think of as the rule of law.

It is no accident that my examples have been drawn from common law and that my discussion so far has really been a discussion of the common law. While I think that formalism, realism, economics, and fidelity to the law all cohere nicely when one is talking about common law, when one switches attention to statutes and the Constitution one has a gap to leap, and none of the tools I have mentioned is of decisive assistance in leaping it. The gap is this: with a constitution or a statute, the starting point for analysis has to be a text rather than a concept. Now it may be possible—this is the modern approach to antitrust law—to derive from a text (the text of the Sherman Act,3 for example) a concept such as economic efficiency, and create from that concept a logical system of law, much like the common law of torts or contracts. But there is always that initial step of obtaining a concept from a text. And that is not a step to which formalism or realism or economic theory can provide the key. What we do when we interpret a text is not policy analysis and is not a logical operation; it is not possible, I think, to talk sensibly of deduction from a text. The initial stage, which is interpretation, is a mental process that is distinct from either weighing up pros and cons as in policy analysis or manipulating the rules of logic.

I will give an example that was the subject of an exchange four years ago between Professor Easterbrook, as he then was, and Professor Bator. (I missed Professor Peller’s talk last night but he has also participated in print in this debate.) It involves the clearest provision in the Constitution—that you have to be thirty-five years old to be President. The question is, why is that clear? Suppose a twenty-one-year old presents himself to the electorate, and a court says, you are not eligible. Do we reason that one must be thirty-five to be President, you are not thirty-five, therefore you are not eligible—i.e., do we reason syllogistically? Do we say that it would just be a bad thing for twenty-one-year olds to be eligible? Or do we, in fact, have to go through a different mental process to decide that this person is ineligible? I think the last suggestion is the correct one. What this text means looks clear to us because we live in a

certain society—fortunately in this respect unchanged in the last two hundred years—that has certain assumptions and ways of doing business. We live in a society, for example, in which birthdays are recorded, in which it is agreed at what point one starts counting people’s ages, in which the use of arbitrary deadlines is commonplace—for example, in statutes of limitations—and given this culture in which we live, and have lived for two hundred years, it becomes obvious what the framers had in mind in using this form of words. They did not mean that only mature people could run for President. They meant that you had to be thirty-five years old measured from birth. If we lived in India, where birth is measured from conception, then even though English is an official language of India the provision would mean something different. If we lived in a society that did not record birthdates, or in a society like the ancient Greek in which numbers of years are used in a symbolic rather than exact fashion, or in a society in which it was just unheard of to impose rigid deadlines in serious matters and loose standards were always used to decide important questions, then this “clear” text might well mean something else.

But the provision is not clear by virtue of logic and it is not clear by virtue of a weighing up of pros and cons, although that is indirectly involved. So we have this hump to get over in dealing with texts—the problem of interpretation. We can, in the way I have suggested, identify some clear texts. Unfortunately, most of the ones that we are interested in, or that generate litigation, are unclear, and there is very little agreement on a method of interpretation of unclear texts.

What I described earlier as legal formalism in the common law sphere resembles certain approaches to interpretation, such as textualism and intentionalism, in that they assign a modest role to the judge, that of translator or logical manipulator, rather than that of a policy analyst. But that I think is the only resemblance. I do not think it is possible to be a formalist in interpretation without embarking on the unedifying course of using terms like formalism and realism in an undisciplined fashion. And similarly, while the legal realists may resemble the non-interpretivists in assigning an aggressive role to judges, nevertheless what is involved in dealing with a text and what is involved in dealing with a common law policy question are profoundly different.

My conclusion is that when we talk about the common law, we can, with a little closer attention to terms, discuss legal reasoning in a way that should command broad agreement about principles, though not about details of application. But when we move into the constitutional and statutory sphere, we are in a different arena, deal-
ing with a very different problem, that of interpretation, on which legal analysts have made little progress.
The topic is jurisprudential responses to legal realism, and I would like to take as my text at least the title of a very interesting essay by Richard Posner, which addressed the decline of law as an autonomous discipline. I would like to propose to you a sketch of what a return to some notion of law as an autonomous discipline might look like and to suggest why that is a hopeful and an appropriate response to legal realism. The contrast to law as an autonomous discipline has been, of course, the uncontrolled eruption into law of at least two disciplines, economics and philosophy. And I am ready to plead guilty, at least in my previous avatar, to being an important culprit with respect to the latter eruption.

First let me say a little bit about why the eruption of these various subjects into law and the taking over of law by nonlegal subjects has had such a bad effect, and then move on to sketch how one might again resurrect law as an autonomous discipline and what that would look like. I think one of the worst effects (because it is so displeasing aesthetically, although perhaps not practically very important) of the huge amount of philosophy and economics and political science and sociology leaking into law is the poor quality of the philosophy and the economics and the sociology which we see there.

What is important because of its practical effect is that each of these subjects, but I think particularly economics and philosophy, address large, global, indeed universalistic pictures of how things ought to go in society. The upshot for the law has been a measure of disorder, amateurism, indiscipline, and, alas, often, sheer incompetence, not just in the occasional divagations in court opinions, but also even in law teaching. And, of course, since generosity and benevolence are appealing motivations, and certainly appealing self-
conceptions, it is not surprising that the incompetence and amateurism which come with the eruption of philosophy into law should have caused this indiscipline to take a particular direction both among judges and law professors—that direction is what I would describe as left liberalism.

Now, having sketched the malaise, let me say something about the alternative which, I think, is healthier, though not all that appealing. I give that warning right at the beginning. The alternative is to return to a notion of law as a local discipline. If law is to do its work, which I want to insist is modest work, it must once more be viewed as a local, rather than a grand and global discipline. I think the best examples of that are in areas like contract, commercial law, and bankruptcy, which are replete with technical, picky, often rather disagreeable and unlovely results. Learned Hand once said that in the end—I am not quoting—it is far better for commercial relations that the law not reach out and be generous to protect people who do not protect themselves. That is a correct instinct. It is far better in all of these areas that we live with rather technical, picky, and, in some respects, uninteresting and unlovely rules. Richard Posner refers to something I know nothing about, called the Enelow-Ettelson Doctrine. (Is it a doctrine in the law of insurance?) He frequently speaks of it, and I think it must be a wonderful doctrine; indeed, in order to maintain the aura of mystery, I have forsworn actually to learn what it is. But I firmly believe that the Enelow-Ettelson Doctrine is the kind of thing which I would like to see the law consist of, more than three-part balancing tests—with two prongs.

Now an important reason for resisting this notion of law as really rather technical and consisting of uninteresting picky little rules, is that it is a conception that seems to freeze out the layman and make laymen feel quite puzzled about the areas they wander into. I am not sure that is such a bad thing, but it is exaggerated as a result. I would bet that if the issue is some technical doctrine say of insurance law, then laymen in the insurance industry, that is to say, those that are not trained as lawyers but who are insurance executives, if it bears on their work, probably, know well enough what the doctrine is. And similarly, let us say, purchasing agents who are not lawyers, know well enough what the rules of offer and acceptance, and of consideration are. So I think that this notion of the layman being frozen out is not as bad as it sounds and not the worry it is supposed to be.

I do think that it is by this return to law as a rather technical subject, somewhat cut off from its ethical, philosophical, and other

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3 James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933).
heady roots, that we can once more have a measure of order, predictability, discipline, and limitation put into the law, because it is the lack of these which is the great illness from which the law suffers. And what I am talking about therefore is a return to rules, rather than to vague standards—I admit readily that this is a matter of balance, yet I would like to urge that the balance be allowed to tip rather more decisively in the direction of rules. This is true, not only of common law, but of statutory interpretation and indeed, the Constitution. Although there are problems about having constitutional law go in this direction, I think it is a healthy direction there as well.

The great harm that has been done by legal realism and its child of the 60's and 70's, Critical Legal Studies, is to have put abroad the notion that it is not possible to procure definiteness, certainty, discipline, by virtue of rules, and I would add, in order to make common cause in this respect with Richard Epstein, by virtue of texts and doctrines. I think it is all of a piece, because what the legal realists and the Critical Legal Studies scholars say is that rules in general, texts and doctrines in particular, and also precedents, simply cannot introduce, cannot honestly introduce the kind of discipline and order and limitation which I hanker after. And I think that is the great harm which those two seriously mistaken doctrines have wrought upon our legal, intellectual life. I do not think it is in fact true, that it is not possible to work with doctrines and precedent and texts. It is possible. I cannot provide a method for doing so, but I am sure when you are dealing with a text, or when you are dealing with a doctrine, there is what I would call a kind of decent respect for whatever the material offers. And if you have that decent respect, whether that consists of formalistic logic or whether it consists simply of the kind of response that one would have to any statement by another person which you are trying to understand and carry forward in an honest way, I think that there is a quite sufficient measure of definiteness.

Well, let me close, because we have been enjoined to be brief, with a kind of a picture. A picture which is a response to legal realism. And that picture is a picture of law as a far more difficult, but a far more modest, discipline than it has become—than it has become in the opinions of judges and in the work of the law schools. I would like to propose the picture of lawyers, not as the architects of society, but as its janitors. I would like to suggest that we are modest people, laboring in the basement of the building of society, doing really important work, while the great things that happen, happen up above in the upper stories, and that they are done by entrepreneurs, by businessmen, by artists, by painters, by politi-
cians, by poets, and by philosophers and economists, as well. One of the really bad things that has happened is that we have tried to get out of the basement. In an earlier day, a kind of a bargain was struck with lawyers. If they would stay in the basement, doing something rather boring and technical (the picture is of Bartleby, the Scrivener), then we would be partially left alone, honored after a fashion and paid quite well. Now I think we have welshed on the deal. We insist, these days, on being paid well, and running the show too. I think law studies should once more be hard, rigorous, full of memorization and that we should see far fewer citations in law reviews to Derrida and Foucault.

Let me come back for just a moment to economics and philosophy. The fact is, of course, that both economics and philosophy do address the point that I have made and do rather specifically explain why it is that society is better off if there are people laboring in the basement without paying attention to the really grand ideas—they explain why it is a grand idea that not everybody have grand ideas. Both economics and philosophy explain that and I do not say that lawyers should not be aware of this. They should. In fact, lawyers should also enjoy music, but that does not cause me to sing my arguments to the Supreme Court. So let me close here with this picture of law as a far more modest discipline than it has been allowed to become, a more boring, but a more disciplined discipline. That is my suggestion, and the reason I urge it upon you is that there is nothing all that wrong with pretentiousness and amateurism and intellectual indiscipline except when it gets into the hands of people who wield considerable power.
The intellectual movement we call legal realism is today, I think, most often thought of as having an exclusively negative or critical character. But while this movement historically has had a strongly negative component, it has also had a positive or constructive side as well. It is that aspect of legal realism on which I would like to concentrate in my remarks this morning. But before I get to the positive or constructive side of realism let me just briefly remind you about the other side of realism, the iconoclastic side of the movement, as Karl Llewellyn characterized it many years ago.¹

In the late twenties and early thirties the realists attacked a certain conception of legal science which they associated primarily with the great Harvard treatise writers of the late nineteenth and early twentieth centuries, Beale and Langdell being the particular objects of their intellectual ire. The realists claimed that the Langdellian project, the project of working out in detail in each branch of law a comprehensive and rigorously structured doctrinal science, was impossible to achieve. The law in each of its particular branches is too filled with conflict, with incompletenesses of one sort or another, it leaves too much open, too much to be decided in the particular case, for it ever to be exhaustively controlling in the way that Langdell and his followers assumed it was or hoped it might be made to be.

This critical attack immediately opened up an important intellectual problem for the realists, one they were themselves aware of from the very outset. This was the problem, as it might be called, of arbitrariness in adjudication. Among the various forms of lawmaking, the realists were interested primarily in adjudication. From their critical attack on Langdellianism, they drew the conclusion that there is—most obviously in hard cases, but in the easy cases that judges decide as well—a space or gap between all of the available legal materials that might be brought to bear in the decisional process (rules, principles, policies, and so on) and the decision itself. There would always be, the realists said, some slippage between the normative materials the law gives judges to work with and the case

¹ Edward J. Phelps Professor of Law, Yale Law School.

at hand. That space, they said, can only be filled by an arbitrary exercise of judicial will—by a choice, a decision, a judgment which is not constrained or controlled by the relevant legal rules and other norms but that must be free, even radically free, on certain views of the problem.

This conception of adjudication raised two important difficulties. The first might be described as the problem of intelligibility. If it is indeed true that every adjudication is at its heart an exercise of unconstrained will, as the realists' attack on Langdellianism seemed at times to imply, then it is difficult to know how one can either explain past judicial behavior or predict its future course. As the gap between decisional materials and outcome widens, the possibility of understanding judicial behavior, either in a backward or forward looking sense, becomes more and more problematic.

The second difficulty concerns the justification of adjudicative decisions. If judges do indeed make decisions in an arbitrary way, what basis can there be, from within the resources that the law itself provides, for justifying their decisions or criticizing them? If the decision in a case is undetermined by the available legal materials, how can the judgments that a judge makes in a case be meaningfully evaluated from a strictly legal point of view?

So these were the two problems—the problems of intelligibility and justification as I have called them—which the negative side of realism dramatized. Now to these problems the realists themselves offered a pair of responses. What I want to emphasize is the difference between these two responses and the implications of this difference for contemporary legal theory.

The first response, which I will for convenience's sake call the scientific response, is exemplified in some of the early work of Karl Llewellyn and in those interminably long behavioral studies that Underhill, Moore, William Douglas, Charles Clark, and others conducted in the early thirties. Its most perfect expression is to be found in the mature policy science of Harold Lasswell and Myres McDougal, which assumed its definitive shape in the late thirties and early forties. The second response to the problems of intelligibility and justification I shall call the conventionalist response. It is exemplified most clearly in the late work of Karl Llewellyn.

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2 Llewellyn, Some Realism about Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222 (1931); Llewellyn, A Realist Jurisprudence—the Next Step, 30 COLUM. L. REV. 431 (1930).


The scientific branch of realism itself had two phases, each of which dealt with one of the two problems I have identified. Early on, some of the realists who saw and appreciated the consequences of their negative attack on Langdellianism concluded that a measure of intelligibility could be restored to the judicial process if behavioral laws were identified through empirical research that would explain the past conduct of judges and provide a basis for predicting how they would behave in the future. So these empirically-minded realists set off in search of the social, psychological, anthropological, economic, and other rules of judicial behavior that would describe what judges do in fact, even if the rules in question bear little relation to the norms that judges purport to be following in the actual decision-making process itself. The behavioral rules which these scientific realists claimed to have discovered are hidden regularities that lie below the doctrinal surface and which do not form a part of the law judges consider themselves obligated to apply. It is not the point or function of the law, these realists maintained, to describe the behavioral rules in question. This is the office, instead, of the social scientific disciplines from which they drew encouragement and support, the office of psychology, economics, and so on. The hope of the realists who took up the methods and insights of these other disciplines in an effort to rediscover patterns of regularity in adjudication was that by doing so they could restore the credibility of the old idea of a science of law (which of course Langdell had celebrated) but on a fundamentally different and more secure foundation—on extra-disciplinary or extra-legal premises. In doing so they struck a Faustian bargain, saving the old Langdellian idea of legal science by abandoning the claim that law is an autonomous discipline. From this point on, the intelligibility of adjudication was something to be understood, not from within the law, but from without, from the standpoint of some other discipline.

The second phase of the scientific branch of realism sought to supply, again from a point of view outside the law, the normative guidance which the critical or negative side of realism had made clear was unavailable from within the law itself. McDougal, for example, adopted exactly this strategy. In deciding cases, judges have all sorts of legal norms on which to draw, but often (perhaps, indeed, in every case) these norms run out; they fail to provide the guidance they pretend to. We must therefore look elsewhere for instruction. Where should we look? We should look, McDougal said, to the higher and more comprehensive discipline of political philosophy. There we will find the foundational principles that we

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5 *Id.*
need—and that judges need—in order to decide which of the many incomplete and conflicting legal rules available to us ought to be applied in any particular case. In its normative aspect, as in its purely descriptive one, the scientific branch of realism sought to realize Langdell’s vision of a science of law, but by abandoning the idea of law as an autonomous or independent discipline. Here, too, the foundation for the re-establishment of a genuine legal science was to be found not in the law itself, but outside it, in the extra-legal discipline of political philosophy.

I now want to shift to the conventionalist response to the problem of arbitrariness in adjudication, a response that took a very different turn. This branch of realism, as I have said, is exemplified most clearly in Llewellyn’s later work, and in particular, in his masterful essay on the common law tradition.6

Llewellyn also began by assuming that the law is underdeterminative of decisions in particular cases. There is always, he acknowledged, some free room for the judge to move; indeed, if there were not, presumably we would not need judges to decide cases, but could do it in some more mechanical way. But the existence of this interpretative space or gap should not, Llewellyn argued, lead us to conclude that adjudication is radically arbitrary in the way that some of the more iconoclastic realists like Jerome Frank suggested.7 The process of adjudication is constrained, Llewellyn said, by all sorts of conventional understandings, by local traditions, and by shared professional norms, which guide the interpretation of rules, policies, and principles and give their application a predictability—an orderliness, rigor, and professionalism—which the negative side of realism overlooked.8

Of course, the rigor in question is not perfect, it is not as exact or scientific as one might properly expect in certain other disciplines, but it is pragmatically sufficient. It is enough to do the job and that, Llewellyn said, is all we can reasonably demand of a humane discipline like the law.9 The conventional, professional understandings on which Llewellyn placed such emphasis offered, in his view, a perfectly adequate solution to the problem posed by the discovery of freedom in adjudication. They provided a basis both for prediction and for normative criticism, for assessing the quality of the work that judges do and for saying something intelligible about how judges are likely to decide cases in the future.

The distinction between these two responses to the problem of

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6 K. LLEWELLYN, supra note 1.
7 J. FRANK, LAW AND THE MODERN MIND (1930).
8 K. LLEWELLYN, supra note 1.
9 Id.
arbitrariness in adjudication—what I have called the scientific and conventionalist responses—is not, I think, merely of historical interest. In fact it marks what is perhaps the deepest division in contemporary jurisprudence—the division between, on the one hand, those who embrace one or another of the extra-legal disciplines to which the early realists themselves turned in their effort to put the law back on a scientific footing, and, on the other hand, those who stress the stabilizing force of convention, tradition, and habit in the process of adjudication.

I would put on the scientific side of this divide both the practitioners of Law and Economics and the adherents of Critical Legal Studies, the two best-organized and most influential movements in American academic law today. It seems to me that these two movements, despite their obvious differences, share in common an aspiration to re-found the discipline of law on something deeper, more secure, and ultimately less subjective than the law itself. In this respect, there is a striking similarity between some of Dick Posner’s work and certain aspects of Roberto Unger’s.

On the other side of the divide there is no identifiable movement, only a scattering of individuals. As examples I would name Stanley Fish and Owen Fiss, and listening to Charles Fried, I would have to place him on that side of this particular dispute as well. Perhaps I should also include Ronald Dworkin, who in his latest book puts very heavy emphasis on the notions of interpretive community and tradition as elements in a general theory of adjudication.10

The question to which all of this leads, and with which I would like to conclude, is the question of the ultimate compatibility of these two responses to the problem of arbitrariness in adjudication, a problem the realists placed at the center of jurisprudential attention and which has remained there ever since. Are they in fact compatible strategies? And what are the implications of adopting one of these strategies rather than the other? The scientific strategy is today unquestionably in the ascendency. What is the significance of this fact for the shape of our profession as a whole? I do not propose to answer these questions, but I ought in candor to confess my own allegiance to the conventionalist side in this controversy and to suggest that for those who feel drawn to the ideals of scientific realism, a question must inevitably arise as to whether the dignity of our profession can be maintained if its foundation is placed on something that lies outside it. The scientific realists struck, as I have said, a Faustian bargain: they sought to redeem the promise of Langlell’s science of law but in doing so gave up the idea of law as an

autonomous or local discipline. They thereby placed themselves in
the service of external ideals, making it impossible for those who
follow their lead to think of the law as an enterprise which is valua-
ble for its own sake and not merely because it is a reflection of some-
thing else—something deeper and better and truer than the law
itself.
DISCUSSION: JURISPRUDENTIAL RESPONSES TO LEGAL REALISM

PAUL BATOR (John P. Wilson Professor of Law, University of Chicago Law School): I would like to seize the opportunity of being the organizer of the discussion by identifying some common themes and posing some questions. All three of our speakers spoke about the problem of the gap. It is the most famous gap in the law. It is the gap created by the indeterminacy of rules. The size of that gap is itself a subject of controversy, with the critical legal studies people saying that the constraining power of rules is very small, almost invisible.

But the problem of how we describe what it is that we do within the gap is common to us all. Now, we have had various proposals about that, but I think I would like to ask our panelists to push that project further. Dick Posner said that the gap really exists only in the field of statutory and constitutional interpretation and that it is filled by reference to cultural understandings. So partly he joined up, I think, with your conventionalist camp. It is the background understandings of the culture that tell us what is meant by the proposition that only somebody who is thirty-five can run for President. Charles Fried did not really get into the project of how the gap is filled. What he did was to give us some moral exhortations about the attitude which we should have when we undertake to fill it, which is one of due modesty and old-fashioned virtues. Tony Kronman gave us an historical account of various projects that the realists themselves undertook to try to fill that gap. I would like to invite our speakers, and the audience also, to address this ancient conundrum. What goes on, when judges do law and when practitioners and ordinary people have to figure out what is to be done under a system of rules that have some, but not complete, constraining and determinative configurations? Does one, at the end of the constraint, jump immediately into totally subjective and arbitrary policy science: I do what I please, and it is just a matter of guesswork whether that will be lawful or not, whether some judge will agree with it or not? Or is there something about human intelligence and human language that can be called rational and purposive, and yet, that is not within the sphere of purely formal deduction?

The one theme that was missing in the descriptions given us is something that we do all the time, and that is not logical deduction, and that is not unconstrained policy science, either. We do it in
every enterprise we engage in, particularly joint enterprises. It is making judgments about the aptness of means to ends. It is the process of saying, well now we have an institution, a contract, an enterprise, a corporation, an adjudication, a constitution, and we have an understanding of its purpose. It may just be having a lunch club or a lunch discussion group, and then problems arise as to how to understand the rules of that enterprise when an unforeseen problem arises. It seems to me that what we do all the time in solving that problem is neither logical deduction nor some sort of unconstrained policy choice. Rather, it is judgments—sometimes tacit, intuitive judgments—about what is a suitable way of achieving the common purpose. In the field of the law this terrain has been relatively undervalued. It is an undervalued part of the scene. This terrain is what might be called purposive policy science, where you have to enter into the purpose that is given to you from the outside, and then, in good faith, to see how that purpose can best be accomplished. With that, I think, I will ask the three speakers, in order, whether they want to reprise the discussion, and then I will throw the discussion open to the audience.

POSNER: Well, Paul, unfortunately you have asked a question that is beyond the competence of a janitor to address. Paul's question is an extremely subtle refutation of Charles and of Tony, because he says that what we should be discussing is an issue of epistemology, a very difficult issue—yet if we are to return to conventionalism we shall have to abandon such issues. I would like to address a question on the janitorial plane. I would like to tell Charles what the Enelow-Ettelson doctrine is. It is not a doctrine of insurance law. It is an extremely important doctrine of federal appealability. It is also the single most widely, uncontroversially condemned doctrine of federal law. It has been condemned by every judge and every professor from every corner of the political compass who has spoken on the doctrine in the last thirty years. The doctrine is as follows. If a federal judge grants a stay in a suit that is equitable in character, the stay, whether itself legal or equitable in character, is not appealable as a preliminary injunction under section 1292(a)(1) of the Judicial Code. But if the underlying suit is legal in character and the stay is equitable in character, then the stay is appealable as a preliminary injunction. The doctrine, which emerged in a series of Supreme Court cases decided in the 1920's and 1940's, rests on an elementary historical

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1 See, e.g., Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731 (7th Cir. 1986).
3 See Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955); City of Mor-
mistake. The mistake is thinking that in the nineteenth century, when the predecessor of section 1292(a)(1) (the Evarts Act) was passed, a common law judge could not issue a stay; that if you wanted a stay of a common law suit you had to get an injunction from a chancellor. That was not true in the nineteenth century, and probably was never true. This historical mistake rigidified in a series of very unreflective, very conventional Supreme Court opinions into a rule that is too complicated to be taught in law school, and that is not understood by judges or practicing lawyers because it involves such mysteries as—when a suit asks for both legal and equitable relief shall it be classified as a legal or equitable suit for purposes of the Enelow-Ettelson doctrine? For purposes of deciding whether there is a right to a jury trial, such a suit would be classified as a legal suit; but for purposes of appealability under Enelow-Ettelson it has been classified as an equitable suit. There is also the problem of deciding whether forms of relief that did not exist in the nineteenth century shall be deemed legal or equitable, such as a motion for a stay based on an agreement to arbitrate, which would not have been enforceable in the nineteenth century. There are many other problems as well. Enelow-Ettelson is a monstrosity of a doctrine. I wrote an opinion recently in which I applied the doctrine, as we were required to do, but pleaded with the Supreme Court to overrule it. I quoted opinions from every circuit denouncing the doctrine, and from an article in which the author had urged the federal courts of appeals to practice, as she put it, the judicial equivalent of civil disobedience, and simply refuse to enforce the Enelow-Ettelson doctrine.\footnote{Mathy, The Appealability of District Court Orders Staying Court Proceedings Pending Arbitration, 63 MARQ. L. REV. 31, 69 (1979).}

In addition to urging us to re-orient legal thought so that memorizing, and cherishing, and extending the Enelow-Ettelson doctrine will be at the heart of legal education, Charles urged us to focus more on the details of bankruptcy law. Yet what has made bankruptcy an interesting field, and attracted the attention of very able economists and lawyer-economists who have presented empirical evidence as well as theoretical arguments that the well-meaning bankruptcy reform of 1978 has increased interest rates, increased

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\item gantown v. Royal Ins. Co., 337 U.S. 254 (1949);
\item Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942);
\item Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449, 452 (1935);
\item Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935);
\item Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924);
\item United States v. Girouard, 149 F.2d 760, 765-67 (1st Cir. 1945), rev’d, 328 U.S. 61 (1946);
\item Spector Motor Serv. v. Walsh, 139 F.2d 809, 814 (2d Cir. 1943), vacated, 323 U.S. 101 (1944);
\item Perkins v. Endicott Johnson Corp., 124 F.2d 563, 565 (2d Cir. 1942).
\end{itemize}
the number of bankruptcy filings, and in short had counterproduct-
ve effects on both creditors and debtors, is theory and conse-
quencing, not legal detail. And this example shows that it is not true
that all twentieth century thought is left-wing thought. Yes, Michel
Foucault was a left-winger, and Franz Fanon and many others, but
Milton Friedman is not a left-winger, or Friedrich Hayek, or even
T.S. Eliot. So it is not true that if we return to conventionalism, we
will simply be ridding ourselves of left-wing ideologies. I infer that
Charles himself has no abiding faith in the conventional, because
when he contributed an article to the 100th anniversary issue of the
Harvard Law Review, what was his article about? It was about Sonnet
LXV by Shakespeare. And this article was published only one month
ago.6

I am perfectly happy to conceive of my role as that of a janitor—
I am compensated at about the level of a unionized janitor—but do
I, as I sweep the jurisprudential floor, have to use a bundle of fag-
gots, like the middle-aged women who sweep the streets of Moscow,
or can I at least have an electrical-powered buffer?

Professor Kronman did much the same thing. He showed that
his conventionalism is skin-deep, because whom does he hold up as
a conventionalist? Stanley Fish. I do not know whether Stanley Fish
is a well-known name in this hall. Fish is a literary critic—an expert
on Milton, and the inventor of a method of literary criticism called
"affective stylistics." He is not Jacques Derrida or Hans-Georg
Gadamer, but he is a down-home version of these French and Ger-
man philosophical heretics. Like Derrida, he is a radical skeptic,
who believes that there is no such thing as a text. He wrote a book
called Is There a Text in This Class? and he answered the question
posed by the title in the negative. His view is that every text is the
creation of the reader. He is part of a school of modern philosop-
ical skepticism whose European branches are represented by people
like Derrida and whose law outpost in the United States is the criti-
cal legal studies movement. So beneath the critical legal studies
movement which Tony has placed in opposition to conventionalists
like Stanley Fish is a body of skeptical European thought whose
American epigone is none other than Stanley Fish.

I conclude from all this that modern social thought, whether it
is economic, or philosophical, or what have you, is inescapable. All
the speakers come back to it in one form or another. Conventional-
ism—the law's autonomy—the return to the fifties, or the thirties, or
the 1780's is out of the question. That is not how social thought
works. We will have to come to terms with modern thought—even

6 Fried, Sonnet LXV and the "Black Ink" of the Framers' Intention, 100 Harv. L. Rev. 751 (1987).
use the parts of it that are constructive and relevant to law—and abandon the nostalgia for the olden days when lawyers knew nothing that was not in law books.

FRIED: I cannot exaggerate my pleasure at hearing Dick discourse on the Enelow-Ettelson doctrine. It is worth coming to Chicago for a whole weekend just to hear that. I would like to just say a little bit about Paul’s description of the gap, because I think Paul really got it quite right and I feel very comfortable with his account and I feel that it is entirely compatible with what I was urging. The notion of law as a purposive discipline does go back in its formulation to Lon Fuller. But the way in which one operates in those contexts which Paul described, whether we have a luncheon club or the law or contracts, is a little bit like what Aristotle said about happiness: you attain it by not aiming at it. And I think, you attain the purposes of the luncheon club or the Enelow-Ettelson doctrine, or whatever, by not inquiring or, at least, allowing yourself to be distracted by too deep an inquiry into purposes. I think that the word that I suggested is simply a decent attitude towards the text, or the doctrine or the precedent, and that is this good faith entering into the shared context. But as Wittgenstein demonstrated, the business of following rules cannot be formalized to the ‘nth degree; there is always a place where you hit bedrock, your spade is turned, and what you do is you just follow the rule. The whole difficulty which the pseudo-philosophy of critical legal studies and legal realism raise, is the difficulty about explaining right down to the bottom of the earth and out the other side, how it is that you can follow rules, the rules about following rules, and so on. And that is a mug’s game. What I am suggesting is that it is a mug’s game we do not need to play. And I think my answer to Paul is, do not worry. Oh, incidentally, as to continental thinkers, I did want to say one word about Hayek, whom I revere. Hayek, I think, would be on board with me and Tony and the other conventionalists, as would, I suspect, James Madison.

KRONMAN: I would like to say a word or two about Paul’s observations concerning purposive instrumentalism. But first I feel compelled to say at least a little something in defense of Stanley Fish. I did, I must confess, feel some awkwardness myself in invoking a Milton scholar as authority for the jurisprudential view that I was meaning to defend. But it is a sign, I think, of just how far we have come from the prosaic truths of conventionalism that we need instruction in them from outside our own home discipline. Fish, it is true, is a skeptic, but he is a skeptic of a different kind, indeed, of a radically opposite sort, from the kind of skeptic you find in the critical legal studies movement. Unger’s skepticism, for example, starts
with the premise that the law is full of gaps and that in order to fill them up you have ultimately to step outside the law, and practice moral philosophy. You have first to discover the basic truths about human nature and political life, and once you have these securely in place, then you can begin working gradually back toward, say, the law of offer and acceptance. But you have to start from the Archimedean point that only philosophy can supply, and that is a point by definition outside the discipline of law. Fish's skepticism is of just the opposite sort. What Fish is skeptical about is the effort to supply a foundation for the discipline of law which is deeper than the going conventional practices of the discipline itself. Fish would say, for example, that to know what the rules of offer and acceptance mean and how they are to be applied in particular cases, you have to immerse yourself in the details of the law for a considerable period of time and acquire a set of professional habits; when you have been properly habituated, you will just see how it ought to go in a particular case. But if you think that the way to answer hard legal questions is to step outside the law and address them from some other and more fundamental perspective, then on Fish's conventionalist view you are simply mistaken about the nature of legal argument, what it requires, and what is possible in it. Fish is, I should add, a sworn enemy of the critical legal studies movement. So Dick's rhetorical effort to assimilate the two should not mislead you.

Now as regards purposive instrumentalism, consider something like a breakfast club, or a law school faculty, or any relatively small association of individuals who share a set of common purposes. I think that Paul is absolutely right to point out that when problems arise in the course of the life of such an association, its members do not step back to some intellectual ground zero and begin reflecting about the aims of the organization and the responsibilities of individuals within it from a point of view more fundamental than the point of view which the purposes of that organization itself provide. That is where you start: you start with the aims and ambitions and shared objectives of the people who are engaged in that quite specific activity. But, of course, things do not always go smoothly. There are, first of all, problems of implementation. We may, for example, all be committed to a given set of purposes, but it may also be unclear how they are best achieved in a particular case. Or, more problematically, conflicts may arise among the different ends which the members of a certain group share. We want A and B and C and D, but on occasion we discover they cannot all be had simultaneously, so we must adjust or accommodate these ends, work to harmonize them as best we can.

Now in making these sorts of adjustments (and I think Paul is
right here too), we do not perform some mental deduction, starting with the purposes in question and then reasoning our way *more geometrico* to the proper conclusion in the case at hand. Nor do we just throw up our hands and sit back and wait for some blindingly correct intuition to come to us. We deliberate about the issue. Deliberation is the name of the activity that describes the kind of practical reasoning that goes on in these contextually dense, purposively well-defined situations.

But what deliberation is remains, I think, a great mystery. The nature of deliberation seems in any case to be an issue that has pretty much dropped off the menu of jurisprudentially interesting topics. But deliberation is our distinctive craft. It is what judges and good lawyers practice. Until we have some idea of what it is and how it is distinct both from intuition and deduction, we do not have, we cannot have really, a satisfactory account of what it is that we do when we practice law, whether it is judging or some other activity that is in question. I would just add that I do not think it is possible to give a satisfactory account of deliberation without introducing at some critical point the notion of convention or tradition. I do not think of conventionalism as blind adherence to going practices; every convention worth its salt, every meaningful convention, has an open-texturedness which not only allows but actually requires its development over time. That is the mark of a great tradition, and I think it is the mark of the tradition of the law.

BATOR: I am very happy with that last intervention. I think it is just right. A creative conventionalism tries to understand what are the shared understandings. Jurisprudence should go back and describe that process of deliberation in the light of shared purposes, what it is like. I think we can learn lessons, here, from philosophers of science and epistemologists of science.

QUESTION: When we are talking about introducing, as I think one should, the notion of means and ends, that is, of using the means to achieve purposes of a tool for filling in gaps, is not there an inherent equivocation in the notion of the term “purpose,” in that one can be referring to the purpose of the particular rule or discreet set of rules before you in a particular case, or the purpose of the system of the rules as a whole. And if we are talking about the former, a particular discreet set of rules, do not we run headfirst into the problem of not knowing, and being inherently incapable of knowing, the purposes of particular rules which in fact may not have purposes in that sense in that they emerged spontaneously without any particular designer. So I would just ask for clarification, those who are proposing purpose as an answer, of what they mean by purpose. Purposes of what? Of the system or of the discreet rule?
FRIED: Well, I think that is why I urged Aristotle's answer, that you hit the purpose, like happiness, by not aiming at it. What you aim at is simply to get it right, to understand the rule, to treat it like a text. Incidentally that is why I allowed myself the conceit of writing about Sonnet LXV. Then what you do is, your purpose as an interpreter is, to take that text and take it very seriously as a text, rather than to speculate about what purposes people might have had in enacting it, on the assumption that words and texts do yield answers, or indeed, doctrines as a kind of written text. They do yield answers when you question them, and you do not need to psychoanalyze them. You just need to question them, and I think psychoanalyzing them is the enterprise of going beneath them to ask, well why did you say that instead of saying what is it that you said.

BATOR: My answer to that is that we are constantly referring to our understanding of the function of the specific rule, and we try to understand that in the context of the function of the enterprise. If you and I have a rule that we will meet for lunch every third Wednesday of the month at one o'clock, that is our rule, that is the only rule of our club. That includes all kinds of implicit understandings and shared assumptions that you, in fact, will be there unless you let me know in advance, unless there is some emergency. But if your mother dies a half an hour before that lunch date and you do not have time, I would not regard it as a breach of the rule for you to stay away, even though you inconvenienced me. That is, we have a very complicated set of understandings; they are built on conventions, they are built also on the power of language, and language itself is a conventional set of understandings. It is built on our ability to enter into joint and shared enterprises. And I do agree that a decent respect for the spirit of the enterprise is part of the shared understanding. Now there will be pathologies where that set of understandings breaks down. But we tend, as lawyers, to focus too much on the pathologies and not to pay attention to rigorous description of the vast areas in which these enterprises work very well. It is not a mystery to most of us how to make a good lunch discussion group go. We manage it.

FRIED: That is absolutely correct.

KRONMAN: I would like to add one observation. In inquiring about the purpose of a particular rule, one that belongs to a larger system of rules, it is quite sensible—indeed it is unavoidable—to think of the purpose of the rule in question as being a function of, or in any case as being modified by, the larger purposes of the whole activity to which the rule belongs.

But a temptation arises to think that the purposes of that activity must also be understood in a larger context, so that just as the
rule is embedded in the practice, the practice has to be embedded in something else, and so on, until we reach the supremely abstract level of the whole of humanity, or at least, the whole of American humanity. I think it is that unmooring of the question from local practice—the response to an understandable temptation—which gets us into trouble.

QUESTION: This is primarily addressed to Judge Posner. Even assuming that we ought to make sure that judges can use the power sweepers, are there limits on the extent to which you can incorporate new learning to interpret old words. That is, to what extent is there a difference in incorporating new learning between common law matters and statutory matters?

POSNER: I think there is a difference. I think the common law, in principle, is evolving to adapt to changed social circumstances, so the more we understand about practices the more we can bring the common law into harmony with our underlying purposes. But in the case of a statute or the Constitution, as I said, the first duty is to interpret the text, and it may be that the interpretation results in a policy which is anachronistic and out of phase with modern thinking; but one is nevertheless committed to it until it can be changed through the ordinary course. So I do think economics has inherently a smaller role to play in constitutional and statutory law. On the other hand, I also think there are provisions in the Constitution that invite economic analysis because they set forth considerations that are easily referable to economics. I will just give one example—the fourth amendment, which forbids unreasonable searches and seizures. In the term "unreasonable" is an invitation to balance the costs and benefits of alternative methods of police investigation. As we learn more about the economic consequences of alternative remedies, such as the exclusionary rule versus tort remedies against police officers, we may be able to develop arguments for changing, or in some cases for confirming, existing interpretations of the fourth amendment.
I feel somewhat like Rip Van Winkle, who, opening his eyes on a brave new world, is not all sure he understands what is going on around him. I was greatly comforted by Charles Fried's observation that he deplored the eruption of philosophy into the law. When I emerged from the cave, one of the things that struck me, was current discourse about levels of abstraction. Jacques Barzun remarked that abstraction is a ladder that leads into the clouds, so that if one climbs high enough, then the croaking of a frog and the song of a great soprano are the same because both generate airwaves.

Let me start with an observation that was made thirty-five years ago by Willard Hurst. He said, "when you are talking about constitutional law, you are talking about the balance of power in the community and...the question of how you find meaning boils down concretely here to who finds the meaning."¹ This morning, Judge Posner emphasized that the Constitution is a text. Let me add that it is a text of very special and peculiar significance. It is a text that was designed to limit and hobble the exercise of power by the delegates of the people. That is the starting point from which we have to proceed and to evaluate what the delegates were seeking. Long before Acton, a remarkable North Carolinian, Thomas Burke, emphasized that it was necessary to guard against the greediness of power. On top of that, the founders had a profound distrust of judicial discretion. Even a Tory judge, Thomas Hutchison of Massachusetts, said, "...the judge should never be the Legislator...this tends to a State of Slavery."² It was for this reason that Chancellor Kent referred to judges' "dangerous discretion...and to roam at large in the trackless field of their own imaginations."³

I am a little surprised to hear about varieties of originalism. The only variety I know is the good, old-fashioned kind. Let me define it. I understand by original intention, the explanation that

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³ 1 J. Kent, Commentaries on American Law 373 (9th ed. 1858).
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draftsmen gave of what their words were designed to accomplish, what their words mean. Why, activists ask us, should we allow the founders to rule us from their graves? On such reasoning the text is also not binding. Whence, then, comes the authority of the judges? From the founders that conferred that authority, and it is confined by their written restrictions.

Resort to original intention is required if only because some words in the Constitution are susceptible of an enormous range of meaning. One has only to think of equal protection, for example. It means so much that one commentator says it means nothing. Unless limited by the original intention, those words serve as a crystal ball from which a judge, like a soothsayer, can draw forth anything he wants. That flies in the face of the founders’ distrust of judicial discretion. Then too, one who studies the historical records finds that the states very grudgingly, very jealously, delegated only so much of their powers as they considered necessary for “national” purposes. It is utterly inconceivable that these jealous states would endow the judges with a power that would place them utterly at the judicial mercy, as in fact, has proven the case under the Court’s readings of the Commerce Clause.4 That is not what the founders had in mind at all.

Remember, too, that Hamilton reassured the electorate that the judges were next to nothing—an idea that is incompatible with a delegation to them of the power to re-write the Constitution. That is what we are really talking about—let’s get rid of the euphemisms—may judges revise the Constitution, in order, as Justice Black scornfully said, to bring it “in tune with the times”?5 Let me allude, also, to the basic presupposition—that appears as early as Francis Bacon, and is reiterated by our own James Wilson, and by Chief Justice Marshall—that the function of a judge is to construe, to interpret the law, not to make it. That distinction was drawn time and again in later opinions by the Supreme Court.

We also need to remember that there was a very strenuous struggle over the adoption of the Constitution. In many states it was touch and go. In some, such as North Carolina, adoption was utterly defeated. In order to allay hostility to the document, to reassure the ratifiers, the federalists sought to explain to them the meaning of the text. Thus, Hamilton downgraded the powers of the Presidency to an extraordinary degree. Those assurances were designed to garner votes; they were representations. Justice Story later wrote about similar representations that to repudiate them

would "be a fraud upon the whole people." 6 Activists scorn the original intention, not because they have access to a deeper well of interpretation, but because that intention undermines the modern decisions that have effectuated their aspirations. 7 I share those aspirations, but I won’t warp the Constitution in order to effectuate them. Until activists sought to bolster the Warren Court’s decisions, Judge Robert Bork observed, “there was never any doubt that the document was to be construed so as to give effect, as nearly as possible, to the intentions of those who made it.” 8

What is at stake is revealed by Benno Schmidt, President of Yale University, who recently said, referring to the desegregation decision, that the fourteenth amendment’s general language allowed it to be used to spur a revolution in race relations, despite the clear probability that its authors did not intend it as such. In other words, the Court read general words in disregard of the specific intention in order to work a revolution in race relations. One may agree that a revolution was needed, and yet question whether the Court was meant to be the instrument of revolution. That is the issue that is involved in this colorless phrase “original intention.”

On the basis of a recent study that I published, I am convinced that the Anglo-American doctrine of original intention reaches back 600 years or more. 9 For centuries, courts have turned to the original intention. An English historian, S.R. Grimes, concluded that "the rule of reference to the intention of the legislators . . . was certainly established by the second half of the fifteenth century." 10 My own studies place it even earlier. In 1615, Chief Justice Coke said that in construing Acts of Parliament, “the original intent and meaning is to be observed.” 11 Express words, he stated, were to govern “when the meaning of the makers doth not appear to the contrary.” 12 That is a rule which the medievalists adopted before him, as exemplified by the famous bloodletting in the streets of Bologna. It became the rule, for example, in statutory construction.

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7 "Those who favor abortion, busing . . . and who oppose capital punishment . . . obviously have no faith whatever in the wisdom of the will of the great majority of the people, who are opposed to them. They are doing everything possible to have these problems resolved by a small minority in the courts and the bureaucracy." Bishop, What is a Liberal—Who is a Conservative?, 62 Commentary 31, 47 (1976).
If the intention appears, it overrides the words. Our own Justice James Wilson, second only to Madison as an architect of the Constitution, stated, "The first and governing maxim in the interpretation of a statute is, to discover the meaning of those, who made it." Little wonder, then, that Chief Justice Marshall observed that he could cite from the common law "the most complete evidence that the intention is the most sacred rule of interpretation."  

A constitution is a written document, and as John Selden, the seventeenth century sage, observed, "a man's writing has but one true sense, which is that which the Author meant when he writ it." This is the essence of communication. It is for the writer to explain what his words mean; the reader may dispute the proposition, but he may not insist in the face of the writer's own explanation that the writer meant something different. When a doctrine is 200 years old, said Justice Holmes, it should take a mighty strong case to overturn it.

Activists argue that words change their meaning. To be sure, they do, and were we to write a new constitution, we could use words according to our present meaning. But we have no right to saddle our meaning on the clearly different meaning that the founders assigned to their words. That is just a device for escaping their explanation of what they meant to accomplish. To this day, we seek to ascertain the intention of Congress in construing statutes; every student of statutory construction knows that. And I would ask, why should judges feel bound by the legislators' intention and yet feel free to ignore the will of the framers, a will that was ratified by the people?

Limited government, Jefferson declared, is designed to bind our delegates "down from mischief by the chains of the Constitution." In carrying out their purpose to curb excessive exercise of power, the founders used words to forge those chains. We dissolve the chains when we change the meaning of the words. Certainly the Supreme Court from earliest times was a devotee of the original intention. I call your attention to a rarely noted early case, Rhode Island v. Massachusetts. "The solution of this question [of construc-

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15 J. Selden, Table Talk 13 (Quartich ed. 1927).
16 C. Warren, Congress, the Constitution, and the Supreme Court 153 (1925).
17 The Court "has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument or of the people who adopted it." tenBroek, Use by the United States Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction, 27 Calif. L. Rev. 399 (1939).
tion] must necessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the [ratification] conventions . . . to which this Court has always resorted in construing the constitution.” 19 We are not dealing with some idle originalist fantasies, but with a doctrine that even the activist Thomas Grey said has deep roots in history, deep roots in constitutional law.

Did the founders mean that their intentions should prevail? Madison wrote that “if [the sense in which the Constitution was accepted and ratified by the nation] be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers.” 20 Jefferson pledged himself to exercise the presidential powers in accord with the intention of those who framed and ratified the Constitution. That the framers intended posterity to resort to their intention is evidenced by the preservation of the Convention journal. James Wilson’s reason for doing so, as Madison explained, was that, “As false suggestions may be propagated it should not be made impossible to contradict them.” 21 In other words, we should keep this journal because in the future others may have a false view of what we meant, and this journal will confute them. In the state ratification conventions, for example, there were quite a few framers who attended, and were asked repeatedly to explain what they had meant. And the framer who was a delegate from Virginia, or from Massachusetts, explained to those who were not at the Convention, “Oh no, we had no such purpose in mind, we meant thus and so.” How in good conscience can we disregard such representations?

I close with a seldom noted remark of Justice Harlan, who to my mind was the outstanding judge of this generation, “When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.” 22
Our subject is "Originalist Theories of Constitutional Interpretation," but I want to argue, in a sense, that this is not a real subject; that what is commonly called originalism is not a real or at least not a very coherent option for constitutional interpretation. I know of much dispute about originalism, but most of the proponents of what goes under that name seem to me not to have taken very seriously the theory either of interpretation or of originalism.

The sub-heading for our topic is "textualist and intentionalist options." I want to make clear that the kind of originalism whose viability I dispute is called "intentionalism," i.e., the notion that contemporary constitutional questions are to be answered by reference to the intentions of those responsible for putting the provision in question on the books. What is called "textualism," by contrast, seems to me unproblematic. To be a textualist, as I understand it, is simply to feel that those interpreting the Constitution are bound by its words. It is common to assume that interpreting words is an easy process, and, in particular, to confuse fidelity to language with a narrow literalism. Literalism in interpretation raises familiar problems, and I am certainly not a literalist. But if textualism is merely an acknowledgement of the authority of the Constitution's language, I am a dyed-in-the-wool textualist. Intentionalism, or (as I will call it from here on out) originalism, is quite another thing.

I will first simply mention, without discussing, three well understood and serious problems with originalism. The first is the obvious historical problem. The second is what I call the summing problem: how to define the appropriate group of intenders and then combine their individual subjective states of mind to come up with a constitutional intention. The third is the problem of the easy manipulability of levels of generality and specificity in defining the relevant intention.

I would like to concentrate, instead, on what seems to me a more fundamental problem with the originalist enterprise, one that has received relatively little attention in the discussions of the subject. The problem is basically this. Assuming that we have sur-
mounted the summing problem, so that we can talk of a single intender, consider the hypothetical question of how the original intender would resolve a contemporary constitutional problem had he promulgated the language originally, and had he decided all the cases that had arisen pursuant to it in the meantime, and indeed, had he lived through everything that had happened in the meantime. Is the originalist answer to the contemporary constitutional question necessarily the same as the answer to this hypothetical question, or might it be different? Let us consider those two possibilities in turn.

First, if the originalist answer is necessarily the same as the answer to this hypothetical question, if that is what originalism means, then originalism is meaningful. But it brings with it none of the answers to contemporary questions that those who style themselves originalists so confidently assert it does. It does not tell us that Roe v. Wade1 is wrong or right, nor that the legislative apportionment cases are wrong or right. Originalism, in this sense, tells us precious little about how contemporary constitutional questions are to be answered, because the determinants of an individual's decision over time are many and complex. Individuals often change their minds as they live and learn and grow, or fail to grow.

Consider a single individual first harboring some original intention as he promulgates a constitutional provision, and then successively confronting two different cases that arise under that provision, two cases that are different from each other and different from anything he had thought about when he promulgated the provision. I would assert that the answer to the problem that arises in the second case would very much be influenced by the process of reasoning that went into the first case. We have much to learn about reasoning by analogy, but it is clear that much legal reasoning requires judgment that one situation is like an earlier one, that in real cases those judgments of similarity are seldom unproblematic, and that once one judgment of similarity has been made, there are then two potential bases for further judgments of similarity—the subject of the original intention on the one hand, and of the first decision on the other. I would further assert that the relationship of analogy is not, in any obvious sense, a transitive one. That is, if B is analogous to A, C can be analogous to B, even though C is not analogous to A.

If this is so, then the judge (or my hypothetical original intender) deciding all cases over time is inevitably off on a decisional journey, informed by analogies that after a while may suggest con-

1 410 U.S. 113 (1973).
clusions bearing only a faint historical relationship to what was originally intended. The journey through analogies or other real-world influences on an individual's decisions can quite possibly even lead to a repudiation of something that the intender would recognize as originally intended.

My favorite example of a step in such a journey of analogies is *Yick Wo v. Hopkins*, the early fourteenth amendment case that raised the question (among others) of whether Chinese aliens were entitled to the protection of that amendment. The Court held in favor of their claim. I do not know of a single contemporary constitutional scholar, be he self-styled originalist or some other breed, who claims that *Yick Wo* was wrongly decided, at least in that respect. Yet the question in *Yick Wo* is not identical to any subject of original intention. *Yick Wo* becomes an easy case, if it is one, only by means of a non-obvious, analogical step—and once that step is taken, *Yick Wo* becomes available to inform further steps in the journey that the deciding agency must travel.

Let us now turn to the second possibility: that originalism means something other than answering questions by reference to my hypothetical intender deciding all cases over time. If this is the case, then one must acknowledge that the contemporary decision is governed by something other than the mental state of the intender as it would interact with events and information over time. About any such assertion, I have two questions. First, how do we choose what part of the mental state of the intender that would have actually influenced his decisions to ignore? There is very little discussion of this question in the literature. One scholar who has addressed this question is my colleague in that other part of the Northwest Territories, Michael Perry, with whom I have talked about this subject many times. Professor Perry says that the originalist's obligation is to follow that part of the intender's mental state that he authoritatively established. But I do not know how to identify that part. The intender has a perfectly good way of authoritatively establishing constitutional language, but none that I know of for authoritatively establishing a part of his mental state.

My second question is this. Supposing that we could segregate part of the intender's mental state from the rest, and answer constitutional questions by reference to only that part, what would be the appeal of doing so? I understand the appeal of construing language by reference to the state of mind of the author of the language: the approach has several virtues that I will not belabor here. (In contracts, however, Professor Berger to the contrary notwithstanding,

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118 U.S. 356 (1886).
we do not always take that route; we often prefer the understanding of the addressee of the language.) But when we choose only a part of what actually would have informed the author's decision had it been his to make, we would be more candid to acknowledge that the decision is really ours and not try to clothe it with the authority of the language the intender promulgated by pretending that it is really a decision referable to his intention.

Let me close with a plea for candor. If one takes what I have said seriously, then it is apparent that originalism does not provide a basis for resolving constitutional questions that can be abstracted from the actual process of confronting and deciding those questions. In particular, the role of precedent will likely loom large in any decision making process that is used to elaborate the meaning of language promulgated at one time and then applied to a series of problems over an extended period. Precedent would certainly play such a role for the intender, were he the decision maker.

What really animates much of the originalist enterprise is not a reasoned conclusion that there is a theory there, but rather a dissatisfaction with what is perceived to be mischievous judicial activism. Nothing that I have said is meant to reflect a choice between judicial activism and judicial restraint. That is a debate that has and should be carried on in its own terms and that will proceed to a happier ending, I firmly believe, when we no longer cloud the issue by reference to an unattainable regime of decision according to original intention.
It has become fashionable these days for legal academics to seek their inspiration not from the interpretive methods of John Marshall, Joseph Story, or Chancellor Kent, but from interpretive methods in other disciplines, the more subjective and indeterminate the better. Literary criticism and biblical hermeneutics are held up to us as models. We lawyers, it is said, should learn how to read the Constitution from modern methods of reading such texts as Hamlet or the Bible.

I am not sure I much like modern methods of reading Hamlet, and am quite confident I do not like modern methods of reading the Bible. That, however, is not my point. I do not read the Bible with the same purpose or in the same way that I read Hamlet; and reading the Constitution has yet a different purpose and a different interpretive method. Interpretation is like architecture, in this important respect: form must follow function.

A “good” interpretation of Hamlet is one that helps me to appreciate the artistry of the work. One “good” interpretation might direct my attention to ways in which the choice of language intensifies (or in some instances contrasts with) the action of the play. Another “good” interpretation might explore the play's implicit teaching about legitimate government. There may be an infinite number of “good” interpretations, which is not to deny that many others are “bad” interpretations—“bad” because they are dull, or untrue to the text, or unilluminating. The standard of “good” and “bad” follows directly from the purposes for the interpretation.

What are we looking for, as lawyers, in an interpretation of the Constitution? We are not, I think, hoping to enhance our appreciation for the artistry of the framers (though that may well be an incidental result).

We are, instead, looking for authoritative, national answers to issues of law. Since the text being interpreted is the Constitution, the specific question in each case is whether a decision made by democratically elected representatives of the people was forbidden, in advance, by the people through the instrument of the Constitution. While there may be many close cases, we lawyers do not have the luxury of stating that multiple interpretations are all “good.”

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I submit that there are two essential characteristics of any theory of interpretation under our Constitution, which follow from the function of constitutional interpretation in our system. First, the constitutional text must be treated as “law,” and second, it must be understood as having its origins in the consent of the governed.

To say that the Constitution must be treated as law is to say, among other things, that the interpretation must be of sufficient consistency that like cases are treated alike, and of sufficient coherence that those whose conduct is being governed have a reasonable basis for understanding what is required of them. A jurisprudence under which police are forbidden to search a woman’s purse without probable cause, unless the woman and the purse happen to be in an automobile, in which case police can search the purse even if it is secured and locked, is a jurisprudence that fails this test. Consistency and coherence are fundamental elements in the rule of law; the Constitution, we know from Marbury v. Madison, is law and is no exception.

Second, the interpretation must be fairly traceable to a decision that was made, at some level of intelligible principle, by the people in the course of constitution-making or amending. That the decisions of the legislature may have been unwise, unfair, or oppressive cannot be a sufficient basis for striking them down, if they are within the powers granted by the people to their representatives. One of the proudest boasts of the American people is that we were the first to adopt a form of government for ourselves, by deliberate choice and not by force or fraud. If the Constitution is held to embody principles that the people did not choose, such a holding has no democratic legitimacy. Judicial review is not an intergenerational game of bait-and-switch. The Constitution is law, we know from Marbury v. Madison, and as Chief Justice Marshall went on to say, “the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.”

This is not to deny that the Constitution embodies principles of justice, or as some commentators call them, “aspirations,” beyond the sense of the text. It is that the job of translating “aspirations” into law requires popular participation. The people have not ceded to unelected judges their fundamental responsibility as a self-governing people to pursue justice.

 Knowing why we read the Constitution helps us to decide how to read the Constitution. Form follows function. We are reading it to determine what consistent, coherent rules of law our forefathers laid

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1. 5 U.S. (1 Cranch) 137 (1803).
2. Id. at 179-80.
down for the governance of those elected to rule over us. This was
the classical conception of constitutional interpretation. Unfortunately,
we can no longer say that it is the prevailing conception.
The classical conception is under attack from at least two different
directions.

First, there are those who claim that it is impossible for us to
comprehend what the Constitution was intended to mean, either be-
cause of limitations in the historical record, or because of the
problems of divining the intentions of multi-member bodies, or be-
cause of the indeterminacy of language. These objections are no
doubt familiar, and they are not trivial objections. This is not the
occasion to consider each of them in detail. It suffices to note that
in practical human affairs we are inevitably forced to act in the face
of incomplete information and some ambiguity. This is well un-
derstood in the case of statutes, contracts, wills, and all other legal doc-
ments. It is only in the field of constitutional law that scholars
throw up their hands and claim that the enterprise is impossible. If
a contract is unclear, who would say that the judge can make up new
terms without regard to the parties’ probable intent?

More importantly, we must ask what follows from the proposi-
tion that the intended meaning of the Constitution is unknowable.
Surely that must make the practice of constitutional judicial review ille-
gitimate. If the meaning of the Constitution is radically indeter-
minate, the conclusion cannot be that it means whatever a judge
might hope it means, but rather that it means very little. If it means
very little, then we are stuck with democracy and representative in-
stitutions as our mode of government. We can do without judicial
review better than judges can do without an intelligible constitution.

In this one respect, constitutional interpretation is less difficult
than many other forms of legal interpretation. In other types of
cases—contract cases, for example—the judge must decide the legal
rule that governs the case. Even if the evidence is closely balanced,
and there is little basis for a firm conclusion one way or the other, it
is the task of the judge to decide. Not so with constitutional inter-
pretation. If the judge, after conscientious investigation and reflec-
tion, concludes that he cannot tell whether a challenged
governmental action is forbidden by the Constitution, then he is
free to leave the determination of the legal rule to the elected au-
thorities. There is no reason for the judge to consult his own opin-
ions about economics, moral philosophy, or social policy. In fact,
only if the judge is reasonably sure that a challenged governmental
action has been prohibited by the people through the Constitution
is he entitled to overturn a democratic decision.

A second threat to the classical conception comes from those
who interpret the Constitution as if it froze into place the conclusions reached at the time of the framing about the application of constitutional principles to concrete situations. Take as an example of this mode of interpretation the Supreme Court's decision in *Marsh v. Chambers*.

The question in *Marsh* was whether it is an establishment of religion for a state legislative body to hire a chaplain to deliver prayers for the assembly. Under the Supreme Court's usual analysis of establishment clause cases, a legislative chaplaincy is almost certainly unconstitutional. The Supreme Court, however, upheld it.

The interesting thing about the opinion is that it is based squarely and exclusively on the historical fact that the framers of the first amendment did not believe legislative chaplains to violate the establishment clause. We can assert this historical fact with a high degree of confidence: the First Congress passed the statute authorizing paid chaplains just three days before reaching final agreement on the wording of the Bill of Rights—a controversy in which the wording of the establishment clause was the most contentious point. James Madison, principal draftsman and proponent of the first amendment, voted for the statute and served on the House committee that chose the first chaplain.

*Marsh v. Chambers* is therefore a perfect test. We know, far more certainly than we usually know these things, that the framers did not consider legislative chaplains to violate the establishment clause. What is the significance of this? The Supreme Court, and those who contend that the meaning of the Constitution is fixed by the framers' opinion about its application to specific cases, treat this history as dispositive. If James Madison and the boys thought legislative chaplains were okay, who are we to disagree?

I dissent. I believe that *Marsh v. Chambers* represents original intent subverting the principle of the rule of law. Unless we can articulate some principle that explains why legislative chaplains might not violate the establishment clause, and demonstrate that that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause.

I do not dismiss James Madison's opinion on the issue lightly. That he and other framers at that time believed legislative chaplains were consistent with the first amendment is powerful evidence. At the very least this evidence puts the burden on those who believe otherwise to study the record with utmost care, to try to uncover the rationale for the framers' opinion, and to determine whether that

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rationale, if it can be uncovered, is applicable today. I stand prepared to reject my own dear theories about constitutional meaning if some other theory better explains the historical data.

As it happens, I have thought of four conceivable explanations for why the First Congress might not have considered the legislative chaplaincy a "law respecting the establishment of religion." None of these is both historically convincing and applicable today. I could be wrong about this. Perhaps there is a better explanation, or perhaps one of these is better than I think. But unless I can be persuaded that there is some coherent understanding of the establishment clause, which can be applied consistently in the circumstances of today, I am forced to disagree with the holding in *Marsh*.

The Supreme Court offered no theory whatsoever in *Marsh v. Chambers*—no interpretation of the establishment clause under which the legislative chaplaincy is constitutional. So far as one can tell from the Court’s opinion, there is simply an exception from the establishment clause for legislative chaplains. It is as if the first amendment read: "Congress shall pass no law respecting an establishment of religion, other than a legislative chaplaincy." The decision casts no light on the meaning of the constitutional provision. Indeed, it can be said that *Marsh v. Chambers* does not interpret the Constitution at all.

The insistence on a principle, and not just historical fact, follows from the function of interpretation as enforcing the Constitution as law. If the Constitution is law, it must embody principles so that we can ensure that like cases are treated alike, and that those governed by the Constitution can understand what is required of them. If *Marsh v. Chambers* jurisprudence governs the day, we would have nothing but miscellaneous glimpses of constitutional meaning. The *Marsh* style of jurisprudence suggests that the Constitution does not embody any set of coherent and consistent principles; in short, it suggests that the Constitution is not "law" in any recognizable sense.

It might as well be Hamlet.

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4 The explanations are these: (1) that appointment of a chaplain was considered to fall under each House of Congress’s powers to choose its own officers, and was not passage of a "law"; (2) that the function was purely ceremonial; (3) that "establishment" meant that a particular sect or denomination was given official recognition and the assistance of law, and that so long as the chaplain was elected on the basis of his personal qualities rather than his denomination, there was no establishment; (4) that the chaplaincy was a permissible accommodation of the religious needs of the members of Congress, who were far from their own churches and in a strange city where they might not receive religious care. The first three explanations are unconvincing, and the fourth is outdated.
ORIGINALIST THEORIES OF
CONSTITUTIONAL INTERPRETATION

Michael Moore†

When I first received the invitation to this conference, the letter had a text in it that included the following sentence: "Each speaker will give a ten minute talk." Now, I construed the word "will" to be "should" and took this to be a normative injunction. One of the things in which I have been interested as I have listened to my preceding panelists is how they interpret, by their actions, this authoritative text. One of the framers of this letter came up to me before the talk, and said, "We meant what we said." So both the plain meaning of the text and the framer’s intent here point to the same result, namely, a ten minute talk. Nonetheless, I thought all of the speakers did something quite sensible. The only problem is that what they did is not consistent with their professed originalist theories of interpretation, whether of an intentionalist or a textualist kind. What they did was construe the language of the authoritative text by what they took to be some underlying purposes behind it—presumably a balance of the amount of time needed in order to gain some understanding of their theories, versus the competing purpose of allowing others some time too, as well as the audience, balanced yet again by the fact that those who came later would like to have equal chance as those who were earlier—all of that together leading to an interpretation allowing each a range of roughly fifteen to twenty-five minutes apiece. The evidence was very clear what the intentions were on this issue—we have the framers here and they are telling us—and the text is equally plain. Despite this, no one interpreted the text in a plain meaning or intentionalist way.

Aside from illustrating that originalists about interpretation do not find it desirable to practice what they preach, the point the example makes is that there is a larger debate about interpretation of which the topic for this panel is only a small part. This panel is to focus on the debate between those who want to interpret the Constitution by its text—and you have to say something about what text is—and those who want to interpret it by the intentions with which that text was authoritatively uttered—what is called intentionalist interpretation. Notice that both text and intent are part of Charles

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Fried's "janitorial tools" because they are both tools designed to keep interpretation value-free, either as a matter of linguistic fact (plain meaning) or as a matter of psychological fact (intent). Non-janitorial tools for interpretation include precedent, the purposes behind a rule (meaning purpose in the sense of function not in the sense of intention), and also some general principles that run throughout the law. The larger debate between value-free and non-value-free interpretive theories is not what we are addressing on this panel, but it is important to remember the larger setting in which this panel's discussion takes place.

Let me then talk about the specific debate between intentionalists and textualists. What textualism is, what intentionalism is, and how you might argue for one or the other in some combination against more value-laden theories, can only be seen if we abandon Fried's "janitorial tasks" and do some philosophy. First of all, what is intentionalism? Well, I am afraid Raoul Berger's "old-time religion"—intentionalist interpretation—is badly fractionated. There is not just one kind of intentionalism. Any speaker, including a constitutional speaker, might have two quite different kinds of intentions. First of all, they might have what I have elsewhere called semantic intentions. These are intentions to fix the meaning of a word in a certain way, either by examples that the speaker pictures, or by definitions that the speaker has in mind. Second, a speaker might have a consequence of uttering the word which he or she would like to see achieved by making the utterance that is made. This intended consequence is usually called the purpose of the rule in which the word appears. Those two intentions are not the same thing. Raoul Berger actually mentioned both in the same breath. Those are quite different. If I use the word "vehicle" as I author some legal text, I might intend to fix its meaning by an intended exemplar, such as "blue Ford sitting in front of me." Alternatively, I might have in mind a general consequence I hope to achieve by uttering the word "vehicle" in the authoritative text I am writing (for example, keeping peace in the park, if the rule in which the word appears is, "no vehicles in the park").

There are not only two quite different intentions by which one can interpret a text, there are also quite different levels of force one might give to either such intention in one's overall theory of interpretation. First, there is Judge Bork's position, which is that you must have an intended exemplar from the framers of the Constitution that includes the statute under review in order to overturn that statute. That is to say that the intended exemplar is not only sufficient for constitutional interpretation but also necessary. A second and more sensible version of intentionalism would be one according
to which it is not necessary to have a particular intention in order to overturn the statute, but if there is such an intention, it is sufficient. And a number of people who would talk about intentionality have that in mind. A third, even more sensible version of intentionality would be one according to which it is neither necessary nor sufficient for judicial review that there be an historical intention; it is simply relevant, along with other items to be put into an overall interpretive theory. Under one interpretation—at least of his earlier work—that is Ronald Dworkin's position about how to use certain of the publicly expressed intentions of the framers of legal texts.

Textualism too is badly fractionated as a theory of interpretation. What is it to look at a text? Well, the first question is, what do you think the meaning of a text is? And here you have to leave Fried's janitorial school and do some philosophy of language. Here you have to ask yourself what sort of meaning theory you have in mind when you talk about the meaning of a word or the meaning of a sentence? Very, very generally, I think there are two sorts of meaning theories. First, there are meaning theories that resort to the conventions of the linguistic community that fix (either by paradigm example or by definition) the class of things referred to by a word. Second, there are nonconventionalist theories that say that language picks out items that exist in the world prior to human convention; on such theories, the meaning of the term is given by the nature of the thing to which the word refers. Such nature is not a matter of convention but a matter of how the world stands. These are two very different notions of meaning, with very different impacts on originalist arguments such as Mr. Berger's. Berger wants to argue that you change the meaning every time you disregard an author's intention or the linguistic conventions in place at the time the author spoke. Yet depending on what meaning is, that might not be the case at all. If meaning is the second of the two alternatives, you do not change the meaning of a word when you change your theory about the nature of the thing to which the word refers. Was there a change in meaning when we found out that whales were not cold-blooded fish, but warm-blooded mammals? Or did we mean the same by the word "whale" as those who used the word before but had a very different theory as to the nature of its referents?

As with intentions, there are not only two different kinds of textualisms because there are two different sorts of theories of meaning; here also there is a good deal of variation as to how much force theorists want to give to the meaning, whatever it is, of the text. Some textualists urge that under a stringent plain meaning rule, wherever the meaning of some constitutional text is plain, that is both sufficient and also necessary to overturn a statute; whereas
where the constitutional text's meaning is not plain, the statute survives. A second and somewhat more sensible possibility would be to say that if the meaning of some constitutional provision is plain, that is sufficient to overturn the statute. But on this view, such plain meaning is not necessary for the exercise of judicial review: even in the penumbra (where meaning is not plain) you might overturn the statute by relying on some interpretive technique other than plain meaning. Third, and even more sensible yet, one could urge that you always look for the ordinary meaning of constitutional language, that it is always the place you start in constitutional interpretation, even though it is neither necessary nor sufficient for the exercise of judicial review that the meaning be plain. I myself have defended this last version of textualism, calling it a natural law theory of interpretation.

So much for clarification of the kinds of intentionalism and textualism that exists. With respect to the distinctness of textualism and intentionalism from each other, there is an unfortunate tendency for people who call themselves intentionalists to want to bring to their own theory the normative power of the text, as if the plain meaning of the text were part of the intentions such theorists defend. I think Mr. Berger's quotation from John Selden is of that character. When Selden says that you have to figure out what the author meant in order to figure out what he said, he is just wrong. You do not have the power to make words mean anything but what they already mean. What you can mean by them is a function of your intention. Thus, you can mean by your words anything you like. I can say, "gleeg, gleeg, gleeg," and mean that it is snowing in Tibet. There is nothing wrong—other than a kind of irrationality in thinking that my audience would understand me—in saying "gleeg, gleeg, gleeg," with that as my intention. But what I mean by those words is irrelevant to what the words mean; their meaning (or the absence of it) is untouched by my intention. So there is a difference between what is meant and what is said, and one does not want to collapse the two.

Leaving now the analytic distinction between intentionalism versus textualism, what is wrong with intentionalism as a theory of constitutional interpretation? There are two kinds of arguments against intentionalism, and I think you have heard both today and both are in the literature. One is a possibility argument: you could not possibly find the framers' intentions, even if you wanted to; since you cannot do it, you ought not do it, completes this kind of argument. The second sort of argument is: even if you could find it, you should not try to.

Since I have just been handed a reminder of the ten minute
rule, and although I am not an intentionalist interpreter, let me very quickly look at the second kind of argument against intentionalism. One such argument stems from a fear of judicial power. Another argument is the historical argument that Mr. Berger has made, which is that the framers intended that we interpret the Constitution by reference to their intentions; this historical argument presupposes that we care what the framers intended about how we should take their intentions.

For brevity, let us put aside both of these arguments and ask what I regard as the basic question here: as a matter of political theory, what makes the constitutional text authoritative for us? Do you adopt the kind of political theory about constitution-making that Mike McConnell was adopting, namely, that there is a consent theory that justifies the text's authority? Or do you adopt some other kind of theory as to why that text is authoritative for 20th-Century Americans? Suppose you take the consent theory; that does not answer yet the question of what it is that was consented to. And to use an argument at least as old as Justice Story: if you want to know what it is that has the consent of the governed, look to what was said by the people or their representatives, not what was meant (intended).

There is a very good example of that in Mr. Berger's most recent reply to Powell about framers' intent. It seems that there was a debate about a national bank amongst the framers, including Hamilton. Since the text—the necessary and proper clause—does not speak one way or the other on the issue, the question for Berger is whether or not there was an intention about the bank. Well, it was the case, apparently, that with regard to corporate charters for a canal, there had been an eight to three rejection. Mr. Berger sees this rejection as an expression of an intention that should bind subsequent interpretations of the necessary and proper clause, including application of that clause to the legitimacy of a national bank. Yet I would not see it that way at all. What Mr. Berger's history shows is that the people who did have this opposition did not have the clout to put it one way or the other into the language of Constitution. What they actually thought, apparently, was that it was too controversial and thus they would not put it in. But is not that a perfectly good reason to say the intent of those eight people who voted against canal charters does not count for anything as the choice of all of those people who voted for the Constitution? If one cares about what was really consented to, why not look to what in fact you know was voted on, which is the text, rather than what you only suppose might have been secretly intended, but did not in fact have the votes to get into the text?
Let me close by adverting briefly to the kind of intentionalism that even Bob Bennett shares with Raoul Berger. This is the intentionalism of particular exemplars: if an authoritative speaker had an exemplar in mind when he wrote constitutional language, then you the interpreter ought to use that at least as a starting point for your interpretation. Four critical points: first of all, when you use language, how often do you think of intended exemplars? When the letter used the phrase, "speak for ten minutes," was there a pictured exemplar of a particular person—Judge Posner?—sitting down at the end of ten minutes? The fact of the matter is that when you use language you rarely have such pictured exemplars of anything. It is the case, once in a while, that you do, and arguably the fourteenth amendment equal protection clause had one, the black codes of the South, but those are very rare.

Second point: suppose that in fact there is one; why would you think that such an exemplar is supposed to give the meaning of the word? In ordinary speech you do not have the interpretive intent that Raoul Berger ascribes to the framers; you do not have an intent that your pictured exemplars fix the meaning of your words. If I utter the word "vehicle" and happen to be picturing a blue Ford, I certainly do not intend that class of things only to include that Ford, nor do I intend people to use the Ford as a paradigm example (a la Bob Bennett) and reason by analogy. Third point: If you had intended exemplars and even if they were intended by you to fix the meaning of the words you used, you have to ask yourself whether an interpreter of your words can infer anything else about what you intended? We are going to go to lunch shortly and I intend, if they have a salad, to eat the salad that ends up in front of me. If this lunch is as I expect it to be, your salad—all of yours—is going to be very much like my salad. That does not mean that, because I intend to eat my salad, I also intend to eat your salad. If that were true, I would intend to eat all the salads, and that is not my intention. So what you have to argue, fourth, is what Bob Bennett wants to argue, which is this: because I intend to eat my salad, you then have to analogize your salad to my salad in order to decide whether your salad should be included within the class term, "salad." And that, as he recognizes, is not itself to infer other intentions that I had, because I had an intention only with respect to my salad. So you have to argue by analogy, based on some similarity between my intended exemplar and other salads. Yet there is no relation called similarity that is itself primitive. Similarity is parasitic on there being specific properties by virtue of which one thing is like another. What is the property that makes other salads like my salad? Well, unless the rule's context suggests some other property, I would say, they share
the property of being salads. In which event, you are interpreting, not by the intended exemplar (my salad), but by the ordinary meaning of the word, "salad." What is a salad? Well, figure it out, but my intention about the starting example will not help you at all.
THE ROLE OF THE LEGISLATIVE AND EXECUTIVE BRANCHES IN INTERPRETING THE CONSTITUTION

John Harrison†

The specific form of the question that we're talking about that I want to address is this: are the President and Congress, in the exercise of their constitutional duties and powers, legally obliged to follow the courts' interpretation of the laws of the United States where those interpretations exist as precedents rather than as judgments in specific cases? My answer is, that in the strict legal sense, they are not obliged to follow precedent as opposed to judgments, but as a general rule they will be well-advised to do so in order to keep the government functioning smoothly. This argument presupposes the distinction between legal rules and sound conduct which takes into account legal rules.

I want to start the analysis with a discussion of the position of an ordinary citizen under the United States Constitution. He has a legal obligation to obey the law. That's an analytic truth. The law of the United States consists of the Constitution, which is paramount, statutes of Congress, and treaties.¹ Courts interpret these sources of law, and what the courts say will be either right or wrong, depending on what the Constitution, treaty, or statute really means. Suppose you were a litigant and you had the law on your side in your case, and you lost when you should have won. The fact that you were right does not necessarily do you any good as a practical matter, but it is still meaningful to say that you were right and to say that the court was wrong, that what the court said was something other than what the law really is.

To emphasize the primacy of legal obligation as opposed to what the court tells you your legal obligation is, I want to take two cases. In the first, you take a position on a question—for example, the interpretation of a statute—that has never come up before. The judge decides that you are wrong. What happens? You lose. The

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¹ I do not include the common law as a law of the United States. But see 1, Pt. 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 620 (1953).
second case is exactly the same, except that there is controlling precedential authority on the point that goes against you, authority that you did not know about. What happens? You lose. Then you fire your lawyer. Legal realism is an accurate description of the market for legal services. But are the cases otherwise any different, except that your lawyer is now out of work? In particular, are there any additional consequences from defying precedential authority? If the point is well enough known, you may have to pay the other side's attorney fees because you have wasted everybody's valuable time. But if, for example, the law you misinterpreted was a criminal statute, have you committed two crimes, one of violating the law and one of misreading the precedents? Of course not. In the standard case the sanction for defying the court's interpretation of the law is coextensive with the sanction for defying the law. You lose. Any incidental trouble you get into for wasting other people's time does not change the basic point: the law is the law. Primarily, that is what you are obliged to obey. That's the case of the ordinary citizen.

Does anything change when we move to the case of the non-judicial branches? I will focus on the President because he does most of these things and because Mr. Ross will speak about Congress. Is the obligation of the President any different from the obligation of the ordinary citizen under the law? Well, the President takes an oath to "preserve, protect and defend" the Constitution, and the Constitution says that "he shall take care that the laws be faithfully executed." I agree that he has an obligation to obey judgments, and where necessary to execute judgments against other people. Does he, however, have any obligation to follow precedent where there is no binding judgment in the situation? I do not know of one. His obligation, like that of any citizen, is to the law and primarily to the supreme law.

Some people, however, think that the President is obliged to follow precedent in exactly the same sense that he is obliged to obey law. Where might such an obligation come from? I want to talk about two possible sources. The first is the argument that the Constitution gives the job of interpreting the law primarily to the courts, perhaps exclusively to the courts, and specifically to the country's judicial head, the Supreme Court of the United States. How do we know this? I suppose that we know it because *Marbury v. Madison*\(^2\) says that it is the power and duty of the judiciary to say what the law is.

The correct response to this claim is: No, it does not. The argument that the Constitution allocates the interpretive power to the

\(^2\) 5 U.S. (1 Cranch) 137 (1803).
courts is wrong. The Constitution allocates to the courts the case deciding power, the power to issue judgments, that is where the duty to obey judgments comes from. The power to interpret the Constitution, however, comes from the case-deciding power. To suggest that the power to interpret is primary and the case deciding power secondary, is to misinterpret the Constitution and to confuse cause and effect.

The second argument is a little more subtle. It begins by noting that the President and the entire executive branch have to apply the law constantly, because they have a huge government to run, a government that operates according to the law. The argument is that the executive branch must follow precedent when applying the law because if it does not, there would be constant litigation brought by people trying to force the executive branch to follow precedent, and the executive branch would constantly lose. This argument has something to it, but it is not an argument about legal obligation. It is an argument about what is a sane way to run a government—what is an intelligent thing for the President to do. Yes, there would be a mess if the President always defied the precedents, and that is why he does not do it.

What I want to point out here is that there is a fundamental error in proceeding from arguments about good ways to run the government to arguments about legal obligation. Let me phrase the question this way: does the President have an obligation to make the government run smoothly? In a sense he does—in the sense that it is his obligation to be a good President. But this obligation is not the same as his duty to follow the law. The underlying distinction I want to stress is between the things the President is legally obliged to do and the things he ought to do in order to get the job done right. The Constitution contains many incentives for the President to do his job well: incentives appealing to patriotism, to love of honor, and to love of power. Those incentives, however, are not legal obligations.

Even more fundamentally, the commands of the Constitution should be distinguished sharply from what we might call its expectations. Its expectations are the results that the Constitution will produce if its framers were correct in their predictions of political science—their predictions of how people will respond to their incentives and what they will do. But the expectations are different from the Constitution itself: you can abide by the Constitution, follow your legal obligation, and still cause the Constitution to defeat the motivations that underlie it. Let me give a silly illustration. Suppose that the Senate stops confirming judges. They just do not want to confirm any more judges. Pretty soon, we start running out
I cannot stress too much the distinction between expectations and legal obligations. The Constitution was written, as far as possible, to make legal obligations fairly clear, especially on structural questions like who decides what, how many Senators from every state, and other important matters. It is also true that the Constitution was designed the way it was because the people who designed it thought those obligations would have certain consequences, and it is also true that the designers thought the Constitution would create incentives for people to behave a certain way. To look behind the obligations and the incentives to the design, however, is to misunderstand completely how the Constitution operates. The design—the outcome the designers expected the constitutional rules to produce—is not the same thing as the content of the constitutional rules. If, in order to understand the provision mandating two Senators from every state, we had to debate whether the interests of the small states were being consulted enough in legislation, we would never figure it out. However, we can readily apply the rule that there will be two Senators from every state. That is how the important parts of the Constitution work, by cutting off the larger purposes and the predictions of political science from the simple content of the rules, so that it is enough to follow the rules without inquiring whether they are serving their purpose.

That constitutional arrangement is an instance of an even more fundamental concept that is basic not just to the Constitution, but to the entire rule of law: legal formality. My account of the Constitution distinguishes between the content of the rules and the purpose of the lawmaker. Legal formality distinguishes between the content of the law and everything else. Because the Constitution is formal in this sense, the judge’s job, or the interpreter’s job generally, is to understand the rule, and, at least as to certain rules, not to consult the purpose or the expected outcome. Formalism is so fundamental that I would like to go on about it, but because I am running out of time, I will just urge everyone to keep it in mind.
THE ROLE OF THE LEGISLATIVE AND EXECUTIVE BRANCHES IN INTERPRETING THE CONSTITUTION

Burt Neuborne†

As many of you know, I have spent a good part of the last twenty years as both a law professor and a litigator for the American Civil Liberties Union. Over those years, I have harbored a heretical, but not a particularly novel, belief that the political spectrum is much better represented as a circle than a line; and that libertarians at both ends of the spectrum are often much closer to each other than to the people in the middle. I suspect that there is a great unity of interest among many of us who labor in the libertarian groves, even though we may differ very dramatically on particular issues and the means to our shared ends.

Let me raise with you the problem of judicial precedent. The question of how one construes the Constitution before the courts act, of course, poses no problem. Each branch does the best it can. But assume with me, if you will, that the Supreme Court has acted in a way that is indisputably, formally complete. People may disagree or agree with the correctness or incorrectness of the Court’s decision, but the court has laid down an intelligible and finite rule. The question now is “What is the duty or obligation of the other two branches of government with respect to the precise rule established by the holding of the Supreme Court?”

There are two polar positions in response to this question. We heard John Harrison beautifully expound the first polar position a moment ago. He argued that precedent, even Supreme Court precedent, is nothing but a prediction of future consequences. The government, as any other actor in the legal system, must take into account the prediction of future consequences because it is likely to be haled into court and shellacked if it fails to follow the precedent. As a matter of self-interest, the government ought to, and probably will, comply with the precedent; but no formal legal obligation exists compelling the government to abide by Supreme Court precedent. That theory, and it is a respectable theory, flows from a hard

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and sharp reading of *Marbury v. Madison*.\(^1\) Under this view, the Court's power to expound the law in the first place flows from the power to decide a case; deciding a case is essentially an in-house judicial function. While, of course, the courts should continue, in-house, to perform as they think they should, this does not necessarily mean that the two other branches of the government, the executive and the legislature, are obliged to defer to the judgments of the courts when they are performing their, respective, in-house duties. This theory leaves us, if it is in fact a correct interpretation of what the Constitution permits or even requires, with a cacophonous Constitution; a Constitution that speaks with many mouths simultaneously to the populace; the judicial construction is "correct" because it is the last construction, not because it is the construction that one is legally obligated to follow.

I argue for the polar position on the other side; I believe that as long as the Court's decision complied with the formal constraints of *Marbury*, as long as it satisfied the Article III case or controversy requirements, then judicial precedent should be treated as creating a positive duty to comply. It should be treated as the enunciation of a positive rule of law and not simply a rule of prediction.

Let me make four quick distinctions before we talk a little bit more about what that duty to comply might look like. First, I want to distinguish the notion of duty from the notion of sanction. We are not talking about making every violation of a precedent a contempt of court. That, I think, would be an extraordinary enhancement of judicial power and very bad policy. We are simply asking whether or not there is some formal, legally recognizable duty to comply with precedent, leaving aside the question of sanction.

Second, I want to distinguish the government from private persons, because we may have a very different theory defining the way a private person ought to relate to a Supreme Court precedent, as opposed to the way one of the other branches of government, one of the states, or a local government should relate to precedent. I would like to talk only about the duty of a government official and the way he or she should relate to precedent.

Third, let me distinguish a legal duty to comply with precedent from the right to criticize the precedent and the right to try to foster change by any lawful means—by relitigating the issue or by attempting to overrule it through the legislature or by constitutional amendment. There cannot be any principled argument that says: "Once the Supreme Court acts, everybody has to roll over and accept what they say as correct." Criticism and attempts to change

\(^1\) 5 (1 Cranch) 137 (1803).
and foster re-litigation are part of the system and should be encouraged. There can be no argument from judicial precedent that, as a principled matter, would cast any doubt upon the legitimacy of such criticism.

Finally, let me reiterate the difference between holding and dictum. Dictum can never be any more than a predictive phenomenon. Dictum cannot be read as creating positive law because it goes beyond the Article III powers of the courts in the first place. Although dictum may give a hint as to what courts will do in the future, and thus allow efficient ordering of conduct, it cannot be read, and should not be read, as creating a positive duty to obey. So we are talking only about the narrow precedential holding of a case.

My thesis is that once you have a narrow precedential holding in a case, there is a legal duty on the part of the organs of government to defer to the Supreme Court's reading of the Constitution or the statute. Such a legal duty flows, not from realpolitik, or from fear of losing if forced into court again, but from a positive legal obligation to comply with the law as it is enunciated by the Supreme Court pursuant to the mandates of Article III and *Marbury v. Madison*.

Let me stress that there is a limited practical difference between the two polar positions. I would expect that whether one views it as a matter of realpolitik or a matter of legal obligation, in the vast bulk of situations you are going to have compliance. Although it is an important matter of legal theory, and it can be quite important pragmatically to individuals in a number of cases, one ought not exaggerate the practical consequences of accepting either position here. We are not talking about a breakdown of the rule of law under either theory. We are, however, talking about a very important dispute about what the theory should be. Finally, there may be nuances as between the executive and the legislative branch. Since there can be no argument that people should be forced to refrain from activity that would permit the relitigation of important issues, you may well have a slightly different obligation if you are a legislator than if you are in the executive branch. There may be nuances in the degree of compliance that is required.

With those qualifications, let me quickly sketch the consequences of thinking about precedent solely as a predictive device, and then ask whether or not those consequences are required by the Constitution. I will suggest that they are not required; indeed, they are forbidden by the Constitution.

The first consequence of treating precedent as solely predictive is a dramatic decline in the ability of the Constitution and statutes to
exert serious effect on pre-event, primary behavior.\(^2\) I think all of us agree that law acts best when it acts without the necessity of formal enforcement. The moment that you abandon the notion that the law, as expounded by the Supreme Court, creates a legal duty to obey, then there are at least three, and perhaps more, equally legitimate expositors of what the law is. At that point you have a cacophonous set of voices directed to the public. It is virtually impossible to expect the Constitution or a statute to affect primary behavior in a significant way under cacophonous circumstances because the people who are trying to align their behavior in accordance with what they understand the law to be are being told three different things by three different bodies, each of which has legitimate authorization. The situation is even worse than the cacophonous regime we abandoned as unworkable under *Swift v. Tyson.*\(^3\) A jurisprudence that hopes to use law to influence primary, pre-event behavior cannot succeed if it cannot speak with a single authoritative voice.

Second, and I think equally important, the other function of law is to ascribe consequences to behavior after the event. Think for a moment of what the consequences of a non-acquiescence position would be in the area of post-event behavior. It would mean that anybody with the resources to seek a second judicial opinion could go into court and enjoy the benefit of the rule of law as expounded by the Supreme Court. But those segments of the society that lack the resources or sophistication to get access to the courts would be obliged to live under whatever set of rules they can afford access to, which means essentially what the executive says the law is. That means that the nature of the justice that would be dispensed in the society would often be a function of the resources of the individuals in the society. I suggest to you that a theory of law that says that the law depends on how much money you have and not on a uniform, self-executing duty to comply, is fundamentally inconsistent with our values.

Only a very naive theory of law could argue for such a result. You have to believe that there is always a single, objectively correct interpretation of a statute or a single, objectively correct interpretation of the Constitution to which all three branches have an equal right to attempt to repair. I suppose one can think of the Constitution as that type of naive document, but I know of no one who thinks

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that there is a single right answer to hard cases. Once we admit that interpretation and choice enters into the equation of statutory construction and constitutional law, it seems to me that the jurisprudential underpinning of compelling the kind of cacophonous jurisprudence that I have just described is impossible. The Constitution may not require one or the other. We probably have a choice. We can decide whether we want a cacophonous Constitution or one that speaks through a single judicial voice. It seems to me that based on the law's role in influencing pre-event and assessing post-event behavior, there really is only one choice, and that is to view the word of the Supreme Court as positive law, until it is changed.
I want to propose a small amendment to an aspect of the argument that Attorney General Meese made in his Tulane speech. I think we might as well mention that speech because Attorney General Meese raised the subject we are talking about first. At any rate, I think his speech is interesting partially because, as a pragmatic matter, he is urging the citizenry to have a certain point of view with respect to their right to criticize or even their obligation to criticize the opinions of the Supreme Court. Meese addressed the public and the public’s officials and emphasized that they should maintain in their own minds a clear distinction between the Court’s interpretations of the Constitution and the document itself. To the extent that the document is merged in the public understanding with the Court’s interpretations of the document—to the extent that the Court’s opinions are the law of the land and are binding on everyone—then the Attorney General warned against losing the possibility of criticism and therefore correction of decisions.

This aspect of Meese’s argument seems to me to be potentially important, but slightly wrong. When people say that the Court’s judicial interpretations are the law of the land, they mean that there is a duty to obey. I agree with both Professor Neuborne and Mr. Harrison that the duty to obey does not necessarily entail any confusion of the Court’s opinions with the original document. Even direct parties to a case can lose and still criticize the Court’s interpretation as being wrong vis a vis the ultimate legal standard. I think that the Attorney General’s point, however, can be shifted slightly. It is useful to focus on the effect of the “law of the land” mentality not on the public, but on the Court itself.

It is sensible to believe that the larger the Court believes the public’s duty to obey is, the more the Court will perceive expressed disagreements as illicit, as evasions, or as improper confrontations rather than as points of view that are entitled to at least some attention and respect. I think that in important areas such as school de-

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segregation, abortion, and prison litigation, we can see that the Court's exalted view of its rulings as the law of the land have, in fact, distorted constitutional interpretation by converting the fact of disagreement or resistance in the political arena into grounds for altering and enlarging constitutional principles. Under this mentality, the Court perceives public dissent as defiance. In response to this defiance the Court interprets the meaning of the Constitution not on the basis of precedent, text, history, or even some consideration of moral philosophy that might be relevant, but on the basis of the Court's effort to protect itself from what it perceives as illegitimately motivated disagreement.

What I am suggesting to you is that the disagreement itself becomes a cause of constitutional meaning. I will give you one quick example from a case that you are probably all familiar with. In *Thornburgh* the Court invalidated a series of so-called informed consent requirements for abortions. The *Thornburgh* opinion is full of extravagant claims. For example, the Court asserted that Pennsylvania's requirement that women be informed of the detrimental physical and psychological effects of abortions, including medical risks, was "the antithesis of informed consent." The Court's reason for this surprising conclusion was that the information would "increase the patient's anxiety." Now, it seems to me obvious that this confuses the possible effects of receiving information with ignorance. It is true that the consent provisions of the statute were almost certainly designed to discourage abortions, but I do not think that fact justifies the Court's assertion that the scheme "wholly subordinate[d] constitutional privacy interests." An effort to persuade someone not to utilize her constitutional right is not the same as the total subordination of that constitutional interest. The extravagance of the claims made in the *Thornburgh* decision suggest that the opinion was driven as much by the Court's anger at perceived defiance as by the merits of the case.

In *Cooper v. Aaron* the Court refused to subvert constitutional principle in the face of violent public opposition. *Thornburgh*, however, represents quite a different approach, one that I think is becoming a part of modern constitutional culture, where constitutional principles grow simply because the Court cannot tolerate expressed official disagreement. The *Thornburgh* decision demonstrates how much this attitude has expanded in recent years. After

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3 *Id.* at 764.
4 *Id.*
5 *Id.* at 759.
all, *Roe v. Wade* did not decide the consent issue raised by *Thornburgh*; the *Thornburgh* result was not a matter dictated by precedent. In theory at least, the provision of information might even enhance the right articulated in *Roe*, rather than be inconsistent with it. It seems to me that the shift that has taken place rather dramatically since *Cooper v. Aaron*, in cases like *Thornburgh*, is that we are becoming accustomed to the idea that the direction, the emphasis, even the mood of Supreme Court opinions is a kind of official orthodoxy binding on everyone else in the society. When those other parts of society do not accept that orthodoxy, the punishment is for the Court to change and expand constitutional meaning.

So, in summary, what I am trying to suggest is that, to the extent that the Court does not recognize that interpretation is a shared enterprise, the meaning and limits of constitutional principles will be defined in response to a wholly irrational and irrelevant consideration, namely the Justices' anger. *Thornburgh* suggests three circumstances where officially expressed disagreement with Supreme Court opinions is particularly appropriate. The first is that the issue was not clearly decided by any prior decision. The second is that the initial constitutional decision was exceedingly doubtful, evidenced even by dissenting views on the Supreme Court. The third is that the ordinary experience and ordinary thinking of non-lawyers were relevant to the kinds of considerations, moral and otherwise, that necessarily played a part in the constitutional judgment over which the Court had no monopoly.

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7 410 U.S. 113 (1973).
I have spent most of my professional life as a lawyer representing the interests of Speaker O'Neill, Speaker Wright, and the House of Representatives, normally in disputes with the Department of Justice. Therefore, when I got an invitation to talk with the Federalist Society about Attorney General Meese’s speech at Tulane, I assumed that I was not being asked to come and sing a harmonious part in the chorus praising the Attorney General’s view of the world. However, when I reviewed again the Attorney General’s speech, I found that in large part the ideas that he put forward are neither remarkable nor particularly controversial. Let me go through some of the main parts of Meese’s speech that have not been focused on yet in this Symposium.

The first is that there is a difference between the Constitution itself and constitutional law. Meese described constitutional law as the body of the decisions of the Supreme Court. That is hardly something that can be argued with. The second is that Supreme Court decisions do not have an absolute sense of finality about them. Again, that is something that cannot be argued with. Certainly the Supreme Court has reversed itself and has been reversed by the passage of amendments, and it is folly to suggest that the Supreme Court forever closes an issue once it decides it. Third, the Attorney General wanted to make it clear that the art of constitutional interpretation is not the sole province of the Court. That again is an area where there can be broad agreement. Congress, on an everyday basis, although perhaps not as effectively as some might hope, engages in constitutional interpretation. There are many bills that are proposed either from within the institution or from outside that get thrown in the trashbin simply because the members feel that they would be unconstitutional if enacted.

The fourth point that the Attorney General made, and the one that I will spend the rest of my time discussing, is controversial. Let me quote for you exactly what he said. In talking about Supreme Court decisions, he said: “But such a decision does not establish a

† Counsel for the U.S. House of Representatives.
supreme law of the land that is binding on all persons and parts of
government henceforth and forevermore." Let me suggest that
there is a difference between a Supreme Court decision binding the
President of the United States and the underlying law, be it the Con-
stitution or a statute, binding the President. If we look at it in terms
of either the Constitution or the statute being the device that is
binding the President, then it follows that the executive branch is, to
that extent, bound by the decision of the Supreme Court. The
Supreme Court decision does not state a law in and of itself, but
instead it simply explains what either the Constitution or the law
says. This explanation, I suggest to you, is binding on the executive
branch when it attempts to execute or administer the law.

I have limited my focus on the binding nature of Supreme
Court decisions and the underlying law to the executive branch be-
cause I believe that it does not have the same binding effect upon
the legislative branch. The reason that Supreme Court decisions do
not have the same binding effect upon the legislative branch is that
when Congress faces a decision from the Supreme Court that it does
not agree with, it has the option of passing another law, perhaps the
exact same law, and seeing whether on second consideration the
Supreme Court will rule differently. This has, on occasion, hap-
pended, and in fact there are occasions where the Supreme Court has
invited the Congress to submit the question again.

Similarly, Supreme Court decisions do not have the same bind-
ing effect on the President in his role in the legislative process, a
role which should not be denigrated and that the President plays
very well. The President participates in the legislative process by
suggesting the passage of laws or by vetoing a bill on the grounds of
constitutionally and sending it back to Congress. Instead of an
override, the result of a veto may be the passage of a substantially
different bill that takes into account the objections that the Presi-
dent registered. He participates in the legislative process and cer-
tainly should not be foreclosed by any prevailing decision of the
Supreme Court. It is entirely permissible for the President to veto
legislation on the grounds that he believes it to be unconstitutional,
notwithstanding the fact that there may be in existence a ruling of
the Supreme Court that holds directly to the contrary. The Presi-
dent is well within his constitutional prerogatives in issuing such a
constitutional veto just as the Congress is well within their constitu-
tional prerogatives in passing a statute notwithstanding a Supreme
Court decision.

I think that what it comes does to is that the Attorney General's

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2 Id. at 983.
name of the word “final” to describe the effect of a Supreme Court decision is mistaken. The significance of a Supreme Court decision is that it is the prevailing reading of the law. It is the President’s obligation in executing the law or administering the law to follow that law whether it is constitutional or statutory. The President has no constitutional warrant to ignore the prevailing reading of the law in implementing either enacted statutes or constitutional provisions. To that limited extent, I disagree with John Harrison and say that there are instances in which the President cannot feel free to abrogate his responsibility to execute the law as it has been enacted because he desires to raise a test case or because he believes that a law is so unconstitutional that he cannot see how a court might have upheld it.
HARRISON: I want to make one sort of diagnostic suggestion based on what Burt Neuborne said to help show where our opinions differ. Neuborne said that you do not want to have a naive version of right answerism. I subscribe to a fairly naive version of right answerism, not so naive as to think it is easy to find the right answers, but strong enough to hold that it is meaningful to say that there is a right answer even if we do not know exactly what it is. I think that how hard your notion of law is and how much you believe in right answerism is a barometer of where you will put considerations like the two he urged, which are very real ones, about certainty and about possible unfairness to people who cannot afford to go to court to get the executive overruled. The harder your concept of law, the more likely you are to put those considerations on the prudence side of the law/prudence line. The softer your notion of law and the more kinds of considerations you allow into what is law and what is legally correct, the more likely you are to allow considerations like that to influence your judgment of what is or is not a legal obligation.

NEUBORNE: That is an exceptionally perceptive diagnosis of what often differentiates people, like me, who think that the Supreme Court’s decisions (and possibly the decisions of the circuit courts as well) carry with them some positivist sanction; and people, like John Harrison, who think that they do not. The issue really turns to an almost paradoxical degree on how sure you are that you know what the right answer is in a given case. I harbor a good deal of skepticism about the notion that there is a single right answer to almost any difficult judicial problem. There are easy cases, to be sure, but the hard cases that often confront the Supreme Court, both in statutory and constitutional questions, seem to me to almost always carry with them powerful arguments on both sides. The hard cases require more than a dogmatic assertion that there is a single objectively existing external barometer that tells you when a court is right or wrong. It seems to me that the great challenge of modern jurisprudence is to deal with error deflection in those cases where there is genuine doubt as to what the right answer is.

If there is really a single right answer, then all the branches of
government should have an equal right to look for it. If what we are doing is looking for the law of gravity, everybody should be able to look for the law of gravity. But if, as I think, in a much, much more sophisticated conception of law, law is an interplay between text, intent, and the institutional organ given the responsibility of making final determinations and breaking ties, then we have a situation where the very indeterminacy of law cries out for some form of authoritative voice to speak it, and that authoritative voice in our system is the Court.

ROSS: I will try to bring a note of practicality to our discussion. These questions, as to whether or not the President is bound by the law, come up in the real world. What it boils down to is whether the President or, more often, someone else in the executive branch, will follow a law as enacted by the Congress or whether they will refuse to follow the dictates of the Congress. The President had a recent confrontation over the Competition in Contracting Act of 1984, a bill that was designed, perhaps ill-advisably to cut the cost of defense contracting by bringing a greater degree of competition into the contracting process. The President thought that certain aspects of the bill were unconstitutional. Notwithstanding those constitutional concerns, he decided to sign the legislation into law. The Attorney General wrote an opinion discussing what the executive branch thought was unconstitutional about the law, and the director of the Office of Management and Budget instructed all departments of the executive branch to ignore the law. Now, I do not believe that is a power prerogative that is within the ken of the executive department.

The President, when faced with what he or she believes is an encroachment by the Congress into constitutional prerogatives, has two alternatives. The first, which the President foreshadowed in this case, would be to veto the bill, and to see whether Congress could have mustered the super-majority necessary to pass this objectionable law into statute. The second would be to wait for an appropriate case to arise where there were people to challenge the law, and to hope that the Court would agree with his view of the law as opposed to the Congress' view of the law under our Constitution. It is, however, dangerous to any system based on the rule of law for the executive to believe that a third option exists which is simply to ignore those laws which he or she does not agree with on constitutional terms, regardless of whether it is a law which is intended to have the executive do something or whether it is a law that is intended to prevent the executive from doing something.

\footnote{1 Pub. L. No. 98-369, 98 Stat. 1175 (1984).}
HARRISON: That is certainly an important issue in this context because it points up our differences in approach. Suppose an earlier President had signed the law and then a new President comes in and refuses to apply it. (There is a difficulty in the same President signing it and then not applying it.) What the President is saying is that this law that Congress passed is a statute of the United States but it is contrary to the Constitution and he cannot follow it. Formally, that is exactly like what John Marshall did in *Marbury v. Madison.*\(^2\) To say that the courts can do this and that the President cannot is to appeal to the notion that the courts have this special role, and that is exactly the issue on which we are differing.

NEUBORNE: Suppose that the President said that the statute was contrary to the Constitution and that the case was brought and the President lost. What does he do in the next case? Does he say in the next case, I lost the last time, but that was just the last time, and since I have a continuing right to construe the Constitution my own way, I can continue to refuse to enforce this law? Can the President force anybody who wants a contrary result to drag him into court to get a court order? Is that not what the real, practical problem is in ascribing to the President or the executive branch an autonomous power to construe the Constitution and law even after the courts have spoken?

HARRISON: Absolutely. I think that if the President thinks that the constitutional issue is important enough or that the political issue is important enough, then he or she has a legal right to force those with contrary interpretations to get a court order. The President has to be prepared to take the political heat resulting from such actions, but it is legally entirely permissible for the President, just as it is for an individual, to say, "Okay, sue me."

ROSS: I would disagree with that because under the Constitution the individual does not have the obligation to enforce the law that the President does. Our constitutional system does not intend the President to become a lawbreaker.

QUESTION: My question is for Mr. Ross. I work for the Secretary of Health and Human Services, enforcing statutes that have been passed by your client. Most of my life is controlled by, and the battles I fight are in defense of, statutes that the House compromised and worked out through very elaborate and time-tested procedures with some very clear and specific language. I do a lot of work with the Social Security Act of 1935,\(^3\) and the House spends a lot of time, periodically, amending it or fine-tuning it. Is there any

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\(^2\) 5 U.S. (1 Cranch) 137 (1803).

\(^3\) 42 U.S.C. §§ 301-1397f (1982).
kind of outrage or even sophisticated notice being made that, from a Jeffersonian point of view, the courts are intruding very viciously on those kinds of hard fought compromises and specific details that not only the Speaker, but the other 434 representatives, have worked so hard on? Do you notice any kind of legislative outcry against judicial intrusion, or is it strictly something that we should only expect the President to defend?

ROSS: There are a number of instances in which the mood in the House after a particular decision is “How could they do that? We made it clear, we said what we wanted, and they’ve done the exact opposite.” Now, those sentiments are not always well founded, but they are there. I am not sure that I would ascribe any Jeffersonian motive to it.

QUESTION: I have a question for Professor Neuborne and Mr. Ross. Imagine that there had been a decision of the Supreme Court saying that the Alien and Sedition Acts were constitutional and did not violate the first amendment. Jefferson becomes President, and he did not sign this bill. He decides that he is going to bring no cases under the Alien and Sedition Acts because he thinks that they are unconstitutional. Is he doing something bad? Or is there perhaps something to be said for pluralism in constitutional interpretation as in other matters?

NEUBORNE: I guess you are really asking that if my political ox gets gored, am I willing to say the same thing. I have the luxury of sitting in a room this afternoon and not having my political ox gored, so I can say yes, I am the world’s most principled individual, and I never compromise principle. Whether, in the real world, I will compromise it, I do not know, but I think that the principled answer to your question is that if the Supreme Court had passed on the constitutionality of the Alien and Sedition Acts, and had made it very clear that those acts were constitutional and that the President believed that there were appropriate acts to bring within the discretion that any prosecutor has of allocating scarce resources among lots of cases, it would be inappropriate for the President to not enforce the law simply because he disagrees with it.

ROSS: I would agree with that. The law is the law whether we like it or not. There are ways of changing the law, but, just because an individual does not like a law does not provide the individual with an excuse to ignore it. Similarly, the executive branch is not excused from enforcing it.

NEUBORNE: It is one thing to make a judgment as a prosecutor that the allocation of your scarce resources is best used in en-

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forcing another law because it would be socially defeating, an improper allocation of resources, or inefficient to enforce a particular law. There are a host of reasons why a good prosecutor makes hard judgments about where to put the resources of his or her office. But it is an illegitimate form of argument to say: “Even though I know that I could enforce that law, I know I could make it stick, I know that it is something that is within my capacity to do, I simply choose not to do it, because I disagree with what the Supreme Court says the law is in this area.”

QUESTION: Would you urge that more obscenity prosecutions be brought?

NEUBORNE: No, I think that they are socially self-defeating. But if a prosecutor thought otherwise, I would not go up to him and say: “Look, let’s talk outside, maybe I can persuade you that the Supreme Court is all wet in these things and even though you would be able to go get the bookstores and close them down, let me see if I can give you a brief which will persuade you that the Supreme Court decisions are wrong.” If I could persuade the prosecutor, then I could make a private deal with him about whether those laws get enforced. That is not the way a prosecutor should act.

ROSS: I would simply add that I took the question to have factored out things such as prosecutorial discretion, and my argument is not against there being any prosecutorial discretion; it is simply based solely on a question of constitutionality.

NEUBORNE: The prosecutor can have reservations because, often, there is legitimate doubt about whether something is or is not constitutional. But if you have the very same statute that was upheld the day before by the Supreme Court, and the prosecutor’s reservations are strictly personal reservations and not the reservations of what the Supreme Court of the United States says the law is at a particular time, then those are not appropriate reservations to take into account. Could the prosecutor hide them? Sure. In the real world would the prosecutor be able to do something? Sure. Is it right? No.

QUESTION: In the period between the Schechter decisions of 1935 and the NLRB decisions of 1937, the Roosevelt administration seemed to take the attitude of legislating first and litigating later. In other words, the administration pushed statutes that it

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knew the Supreme Court would invalidate with the secret purpose of shifting the blame for the Roosevelt administration's lack of ability to come up with reforms consistent with the Constitution onto the Supreme Court. I wanted to ask the panel if they believe that the executive or the Congress has the duty to at least consider the constitutionality of a bill before passage? If so, does the passage of a bill which obviously violates the Constitution, or which the Congress or the executive or both reasonably should realize will be invalidated by the Supreme Court, violate a public trust, in that public officials take oaths to uphold and support the Constitution?

HARRISON: I will start by saying that I think that Congressmen have a legal obligation under the Constitution not to vote for bills that they think are unconstitutional. Also, it seems to me inappropriate for a member of Congress to vote against a bill on constitutional grounds where the Court says it is unconstitutional but he disagrees; I do not think that counts as a vote based on constitutional considerations. Moreover, although this is not the official opinion of the executive branch necessarily, I personally have serious reservations about whether the President can get off the hook on this question—whether he can sign a bill that he thinks is unconstitutional just because he knows that the Supreme Court is going to uphold it. I am certain that he can do what Andrew Jackson did which was veto on constitutional grounds something that the Supreme Court had already upheld.

NEUBORNE: My sense is that it is the duty of the legislative branch to take into account what they believe the Supreme Court says the law is and, based on that good faith judgment, determine whether or not they are passing a constitutional act. Since that is almost always a question of very serious doubt, I think the practical consequences of it are very, very slim. You would have to almost be repassing the same act the day after the Court upheld it before you got a really tight issue. Most of the time there are arguable distinctions between the statutes. If there are arguable distinctions between the statutes that the legislators in good faith feel distinguish the statute, then I think that is the end of the question; it is up to them.

NAGEL: I think that if you put the question in terms of a public trust, then yes, the legislature that passes a law that they think is unconstitutional under judicial standards is breaching a public trust because they are bringing on a certain amount of unpredictability and disorder. Sometimes, however, there are other considerations that are more important than that. If they are convinced that the Court's judgment or predicted judgment is wrong, then they also have an even greater public trust to pass the law under their own
judgment of the Constitution. Let me add just one additional factor to support that conclusion. The question that much of this discussion is skirting around is: what are the sources of law? It seems to me that one of the sources of law, of constitutional law, even a source of traditional legal meaning of constitutional law, is, as Judge Posner said this morning, the political culture. I think that the political culture should not be disabled from participating in that system because if it is, even traditional legal indicators of meaning like text are going to be impoverished.

ROSS: I would say that as a theoretical matter, members of Congress have an obligation to vote against legislation that they believe to be unconstitutional. However, as a practical matter, it is very rarely that clear-cut when the matter is on the floor of the House. One good example is the Gramm-Rudman Deficit Reduction Act, in which there were many people expressing the opinion that certain provisions of that statute were unconstitutional. Well, we all know that portions of that statute were held unconstitutional; however, it was not these portions that people were warning about. Thus, it may be expecting too much for the Congress to have a crystal clear idea of what will be held constitutional when you are talking about the types of legislation that are normally being considered.

QUESTION: If the President thinks something is unconstitutional, how can he sign it even if the Court will uphold it? How can he administer the law according to the Court's view rather than his own, when he sincerely believes in his own?

HARRISON: I do not have a final answer to that, but the answer that I am satisfied with for the moment is that the President is really no different from any other citizen. Legal obligation is legal obligation: the duty to take care that the laws are faithfully executed has various consequences, but they are not consequences that create any obligation upon the President different from any other subject of the legal system. If we know that a citizen can ignore his own conscientiously formed view of the law and follow the courts, then I think that the other branches can do the same. The other branches are placed in the situation of the citizen; they can either stand on their own view and litigate, and probably lose, or they can tell their consciences that they are going to go along with the courts instead.

NEUBORNE: That begs the question of my position. The whole question is whether or not a member of the governmental family is to be treated identically with a private person in that situation.

QUESTION: I have a question for Professor Neuborne. Did I understand you correctly, that from your position, you would reject Abraham Lincoln's position on *Dred Scott*\(^8\) given in his first inaugural address?

NEUBORNE: Well the Lincoln position on *Dred Scott* is a complex one. Much of what Lincoln rejected in *Dred Scott* was dictum, and that makes it quite easy. I know of no theoretician who believes that dictum has any self-executing, binding quality, and ninety-five percent of *Dred Scott* is dictum. To the extent that Lincoln was urging that the holding of *Dred Scott* be disavowed by the federal government and not be complied with, rather than having it be overturned by some more constitutional means, the answer is, I think, yes, I do disagree. In fact, *Dred Scott* was dealt with by the thirteenth and the fourteenth amendments and not by executive non-acquiescence.

QUESTION: I would like to ask Mr. Ross how he can reconcile two of the propositions in his speech. One position seemed to be that Congress had the right even against a Supreme Court decision on a particular bill simply to pass the bill again in the hopes that the Supreme Court would change its mind. The other position, one that I open with, is that the executive is incorrect, in a case like the Competition in Contracting Act of 1984,\(^9\) to refuse to carry a statute out on the grounds that it was unconstitutional when there was no Supreme Court case clearly on point. Why would the President's oath to uphold the Constitution not give him this power, a power that you assert that the Congress has even in the face of a particular Supreme Court decision. So, I am trying to avoid the question of whether this is a Supreme Court decision particularly on point and put the question to you just starkly in terms of Congress' greater power to interpret the Constitution in legislating than the executive has in executing the law.

ROSS: I will answer that two ways. First, the power that I claim for the President is in the legislative process. One should not confuse that process with the implementation of the law once it is passed. During the legislative process, when an idea is being enacted, it is entirely appropriate for the President or the Congress to state what they believe they want the law to be. However, when you get outside the legislative process and you have an enacted statute, the President and the executive branch than have other obligations that they must carry out, which is to implement that law as it has been enacted. Let me suggest to you that the idea that the President's authority and duty to the Constitution would excuse nonen-

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\(^8\) *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

forcement of a statute that he believes to be unconstitutional is a very dangerous toy to give to any executive. All of us on the panel have agreed that the President may keep his view of the Constitution and its impact on a particular statutory scheme, notwithstanding a Supreme Court decision on the subject, and that the President can seek to have that decision overturned. If we were to allow the President's belief that the statute is not constitutional to serve as an excuse for nonenforcement of the statute, then we would have a situation where no matter what happened, no matter how many times a statute was passed, no matter how many times it was upheld by the Supreme Court, a recalcitrant executive could simply ignore the law. That is not the system of government that we have.

HARRISON: It would be an extremely dangerous power in the hands of the President not to enforce the law that the Congress had passed because he thought it was unconstitutional. That is the same power as judicial review, which is also extremely dangerous.

NEUBORNE: Until the Supreme Court speaks, I think that the President has equal providence with Congress on the issue of constitutionality, and if he has a conscientious scruple about enforcing that statute, then that is what you have courts for. It is only after the courts have spoken that I would be troubled by a President that continued to ignore the statute.

QUESTION: Professor Neuborne, I think, correctly pointed out that what we are primarily discussing here is a question of philosophy of law with implications not so much for disposition of individual controversies, but for the effects of an idea on society and on government. Professor Nagel pointed out some of those effects, suggesting the possible increased arrogance among the judiciary and increased timidity among the other branches or citizenry. Professor Neuborne made this concession on the grounds that the practical consequences between a realpolitik approach to this question and a duty to obey the resolution of it were not very different, and then proceeded to address the philosophical issue. Both of his justifications for finding a duty to obey, however, were profoundly practical, and if his assertion about duty to obey and realpolitik producing very similar results is true, then the point he made really should not be valid in practice. There should not be much difference in preventive behavior because, as he asserted, the incentives set up under the realpolitik and duty to obey approaches are so similar, and there should not be that much difference in the equality of protection that people with and without resources get in these two situations. Given that, is he not in fact granting enormous philosophical power to the Court essentially for no reason?

NEUBORNE: First, I do not really think that there is all that
much difference between philosophy and practicality. Pragmatism has a very important role to play in philosophy. Philosophy is not divorced from the real world, and I do not consider it a sin to make an argument about legal theory which takes into account the implications in the real world of that legal theory. It is one of the things that good philosophers should do. But second, I think you misstate the position. In the vast bulk of situations the issues would come out the same. The problem is what do we do about those potentially very important situations where they do not come out the same.

I should have made this disclosure at the beginning because I think it is appropriate at a forum like this for you to know what my biases are: I am counsel in a case in which I challenge the executive's failure to acquiesce in established precedent in the context of Social Security Administration cases. You know, a real world situation. Suppose that the Supreme Court construes the Social Security Act as giving entitlement X, and the President believes it gives only entitlement Y. The Supreme Court's decision is unequivocal. Is it then lawful for the President to continue to administer the Social Security Act so that individuals applying for the entitlement do not get it and have to take the government to court in case after case after case? Those people who do not have the sophistication to get to court do not get the entitlement. Now that is not an ivory tower problem, that is the problem of hundreds of thousands of people over the last couple of years in the context of administrative non-acquiescence. That is a very important practical question, and I think there is only one answer to it: "The rule of law means that everybody gets the same benefits whether or not they can afford a lawyer."

QUESTION: My question is for Professor Neuborne. All of the remarks since your presentation make it pretty clear that there are all sorts of constitutional norms and levers which avoid some of the worst consequences both you and Mr. Ross point to. What I would like to know at this point is what are the precise constitutional nightmares that we face if we do not accept your position that decisions in the Supreme Court should be treated as positive law?

NEUBORNE: The constitutional nightmare is dual. In large numbers of situations—in National Labor Relations Board settings, in settings involving the Social Security Act, in settings involving the administration of the entitlement programs, to the extent that the executive believes its obligation to comply with Supreme Court precedent is essentially a prudential one—the executive picks and chooses based on, I am sure, good faith judgments about whether it

10 Steiberger v. Bowen, 801 F.2d 29 (2d Cir. 1986).
should or should not comply. That means that it is then purely a function of the resources available to the group affected by the statute. The wealthy will live under a set of laws that are enforced in the courts because they can afford to take the executive to the next step. The poor, unless we provide them with vastly increased resources, must abide by the executive law. Many of you, I think, would agree that it would be absurdly inefficient to create an expensive machine to enforce something which should have been done in the first place. But unless we are willing to create that machine, then the consequence of not giving the poor those resources is to say that there are two systems of law in the country: one for the rich, and one for the poor. That is a constitutional nightmare.

QUESTION: Do not the so-called underprivileged or underclass have recourse to the legislative system to make up for that imbalance that you would say would occur in the advocacy system?

NEUBORNE: Would that it were so.

ROSS: If I could just follow up on that, I think, not to denigrate the nightmare that Professor Neuborne identifies for individual citizens, that if you are talking of constitutional nightmares, the system that you suggest would also emasculate the legislative branch from being able to enact policy. The entitlements that Professor Neuborne is talking about are entitlements which were guaranteed by the passage of a statute, and what you would be doing is you would be giving the President a non-reviewable ability to negative a law which goes far beyond the legal authority he is given.

NEUBORNE: Exactly. It is a de facto extension, expansion, of the veto power to enormous proportions.

HARRISON: To claim that much for it is to omit, I think, the requirement that the view taken of the law by the executive has to be one sincerely held. In the correct case, we are talking about a situation where the executive really disagrees with the courts about what the law really means or the courts disagree with some members of Congress about what the law really means. This is simply a consequence of separation of powers, where one group of people pass the law and somebody else executes it. For the President to execute the laws incorrectly is a violation of constitutional responsibility, but for him to execute them as he best understands them and with an eye on various powerful considerations of prudence, is precisely what the constitutional arrangement contemplates.

NEUBORNE: In fairness to the current administration, I should make clear that I know of no situation in which they have refused in good faith to comply quickly and expeditiously with a decision of the Supreme Court in the area of entitlements. The litigation we have going on now involves the self-executing power of
That is a much harder question and we did not get a chance to discuss that here.

QUESTION: Mr. Ross drew a distinction that I thought was interesting between a President's power to interpret the Constitution in legislative and non-legislative situations. I would be interested to know whether Professor Neuborne agrees in this context. Assume that the Supreme Court has been confronted with a Draconian quota system, challenged as reverse discrimination under the fourteenth amendment, and the Supreme Court says it is not offensive to the fourteenth amendment. Shortly thereafter, the Congress passes some bill which proceeds to legislate along the same lines, and codifies the Supreme Court decision. It is presented to President Reagan who vetoes it on the grounds that it is his judgment that this is an unconstitutional bill. Do you think that is an appropriate exercise because this is the legislative process?

NEUBORNE: The answer, I think, is this. It is clear, at least to me, that the President is not obliged to sign the bill under those circumstances. The President does not have to subordinate his judgment about what is good policy to the judgment of the Supreme Court or to the courts, or to the Congress. It would, however, be intellectually dishonest for him to couch his veto message on the grounds that the bill is unconstitutional. I think it would be much more intellectually honest for the President to say: "The Supreme Court and I have a principled disagreement about what is constitutional here and what is not. I profoundly believe that they are wrong. I recognize that they have spoken, and therefore, I cannot say to you that this bill is unconstitutional. I can say, however, that it is my judgment that it should be unconstitutional, and therefore, as President, I will not sign it." I think that is appropriate.

COMMENT BY DOUGLAS H. GINSBURG (Judge, United States Court of Appeals, D.C. Circuit): I notice that the discussion glided very smoothly from one of prosecutorial discretion to one of a situation described by the non-acquiescence policy. I offer a distinction for your consideration that I think the hypertrophied sensitivities of a law professor can overcome, but that practical judgment might embrace. The President's decision, because of his own constitutional views, not to enforce a particular law necessarily because he believes that it is unconstitutional, stands on a very different footing than placing impediments or burdens on citizens exercising a right or claiming an entitlement under an Act of Congress. This is true even if that burden is placed where it is thought to be constitutional, for constitutional reasons.

The difference is that in the non-prosecution case the President
is deciding not to bring the coercive power of the state to bear on the individual. That, I think, puts the decision on a very different footing than one where he decides to burden the individual, notwithstanding a congressional determination upheld by the Supreme Court to the contrary. I think that we should err on the side of tolerating that decision because as a practical matter the alternative is not that the force will be exerted, but rather that the President, assuming that this is an act of conscience, will have to dissemble as to the grounds for the non-enforcement. That strikes me as an unhealthy result.

NEUBORNE: I wish I could buy into that distinction because it would make my position a lot easier. Although I do not disagree, I think that the force of the distinction you make between the difference in not imposing government power versus putting a burden on a citizen has force, but the force that it has for me is not to allow the President to justify what he is doing based on constitutional grounds when the Supreme Court has completely undercut that position. It seems to me that it ought to allow a law enforcement official to say: “Look, I’m not enforcing this within my prosecutorial discretion. I can’t pass the buck and say that it’s unconstitutional. I take full responsibility for the judgment not to enforce this law and if you want to do something to me, you can. You can vote me out of office. But I’m not going to hide behind the Constitution in making my judgment.” That would be much more intellectually honest, and I think theoretically more correct.

GINSBURG: But I think you can say that the President would not, could not hide behind the Constitution, while in fact he can. In fact he exposes himself to further legislative response by invoking the Constitution. We saw that in the impoundment situation. If the President were to say, for reasons of constitutional interpretation, that a particular law would not be enforced during his administration, then you would get a new kind of law. What you would have instead of a law saying X is unlawful, is a new law passed by the Congress saying that the Attorney General and the United States Attorneys must expend the following sums in the furtherance of this law and report back on all complaints received under the statute every six months and so on and so on, and the tussle between the two branches would have been played out. That strikes me as a very unhealthy way of resolving the matter.

COMMENT BY FRANK EASTERBROOK (Judge, United States Court of Appeals, Seventh Circuit): I have been troubled throughout this discussion by the fact that no one has articulated what he sees as the basis of judicial review. We have been trying to make comparative judgments about the extent to which particular
branches are bound by constitutional constructions without having articulated what that basis might be. It came out most forcefully in the exchange between Mr. Harrison and Professor Neuborne in which Professor Neuborne ended up saying: “Well if it’s true, as Mr. Harrison says, that there are right answers to constitutional questions, then obviously it follows that the executive, legislative, and judicial branches can give different answers.” So from the fact that there are right answers, there are multiple answers. From the fact that there are many possible answers, it must follow that there is only one answer, that is, whatever answer the judge gives. It seems to me buried in that is a very unusual theory of judicial review under which what the judge is doing is sorting from a large variety of permissible answers, announcing one, and that one becomes binding. It seems to me that as soon as one says that there are a large variety of permissible answers, it ought to follow that no choice from within the permissible zone is necessarily binding on everyone else, in other words, that Mr. Harrison and Professor Neuborne have everything exactly backwards: if there is one right answer, everybody had better follow it, but if there are multiple permissible answers, we do not have a theory under which everyone must follow one answer.

HARRISON: Since we have everything backwards, let me answer for Professor Neuborne. As I understand it, his position—which seems to me a different and very interesting form of right answerism—involves a two-stage theory of law. At the first stage, law is relatively clear and definite, but it does not take you all the way to one right answer. Instead, the first step imposes a constraint, it narrows you down from thousands of possible answers to, for example, ten possibilities. The second stage is driven by the need to come up with a right answer, but it is limited by uncertainty and complication: no one of the ten possibilities can be said to be correct just on the basis of its content. So instead of a rule for identifying the right answer based on the content of the answer, at the second stage you have a rule based on the identity of the answerer: what the Supreme Court says is correct by definition. Thus, for Professor Neuborne, the reality of multiple plausible answers combined with the need for one, single rule leads to the conclusion that only one person can have the right answer: from many truths, one view of the truth. My approach, which defines correctness entirely in terms of content and not at all in terms of the identity of the answerer, leads from one truth to multiple permissible views. In response to Judge Easterbrook, I think that our positions naturally lead to that outcome and that it is only paradoxical on the surface.

NEUBORNE: In a very interesting way, the debate between the two of us and the paradox that Judge Easterbrook has pointed
out, is the paradox between Protestant theology and Catholic theology in terms of the interpretation of the holy writ. I have felt for some years now that the great discussion about using literary texts as a paradigm for talking about the Constitution is somewhat beside the point. As an ACLU lawyer, it has always seemed to me that there have been three groups that really know what constitutional adjudication is all about: Talmudic scholars, Jesuit seminarians, and ACLU lawyers. We each have a holy text; we labor over it for a great deal of time, and we spend a good deal of time worrying about how the authoritative answer comes out. Each group has evolved a theory of an “answerer.” What I am saying is, given my perception that law is essentially indeterminate in many, many settings; and that a false determinacy is intellectually dishonest in many situations; and if, as I believe, society requires that there be an authoritative voice so that we can have pre-event ordering and post-event equity, then you need a theory of an “answerer” that will allow one of the potential answers to become the authoritative one. I believe Marbury gives us that. Judge Easterbrook’s perception that this whole debate begins with legitimacy of judicial review is exactly right. It is in the necessity of deciding a case or controversy that I believe that the judicial branch assumes the legitimate mantle of the “answerer.” It is the mechanism that gives us the authoritative voice that breaks us out of the trap of cacophony. I believe that cacophony in the law is the terrible price that we would pay if we went any other way. I do not contend that the Constitution compels my view. I say merely that the Constitution permits it. And it is so clearly better, that it is the path we ought to go down.

HARRISON: What Professor Neuborne just said is a consistent application of his view of the nature of law: we can say with confidence that the Constitution permits only a certain limited number of answers, but we cannot necessarily determine with confidence which of those is the right one, so it is not correct to say that there is a right one. I hope that line of argument sounds familiar, because it leads into the final metaphor I want to suggest about classical law (and I will call my view classical): classical law is classical as classical theories are distinguished from quantum theories. In quantum theories, there is not a right answer about a lot of questions. Certain complementary characteristics of systems are simply not defined. In a classical theory there are answers to all the questions even if we are not sure what they are.
STARE DECISIS: PRECEDENT AND PRINCIPLE IN CONSTITUTIONAL ADJUDICATION

Charles J. Cooper†

Let me say at the outset that it is high time that the Federalist Society devoted a panel at a national symposium to the doctrine of constitutional stare decisis. For if there is any principle that is fundamental to the true conservative, if there is any doctrine that is inviolable to the true conservative, if there is any rule that is cardinal to the true conservative, it is stare decisis. And if you don’t believe me, ask any true liberal.

Isn’t it amusing that liberals, who only recently have perceived the profound value of “stability of the law,” have taken to lecturing conservatives on what it takes to be a true conservative?

Listen to Sidney Blumenthal, a Washington Post writer who fancies himself as an expert on conservatives. He has denounced conservative attempts to “rescind the standing law” on “settled” constitutional questions. Blumenthal explains that “[c]onservatism is a defense of tradition,” and he bemoans calls for a return to a constitutional jurisprudence of original intention. This path, he says, “attacking at least 60 years of Supreme Court precedent,” is “unprecedented” and “a radical departure from settled law.”

My favorite authority on true conservatism, though, is Professor Alan Dershowitz of the Harvard Law School. As he explained during the 1984 presidential campaign, “truly conservative justices . . . will abide by the notions of stare decisis, . . . [a]nd they will not move in to simply count the votes and try to overrule a prior decision.” Any attempts to undermine settled cases, such as Roe v. Wade or Miranda, would constitute a departure from true conservative principles. But if you vote for Ronald Reagan, he warned in 1984, “Mr. Meese will appoint judges who are essentially sworn to a program of reversing certain Supreme Court decisions. Some-

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3 410 U.S. 113 (1973).
thing the liberals have never done.” Perish the thought!

The truth, of course, is that stare decisis has always been a doctrine of convenience, to both conservatives and liberals. Its friends, for the most part, are determined by the needs of the moment. Justice Douglas, writing in 1949, candidly described the phenomenon: “Today’s new and startling decision,” he said, “quickly becomes a [new] coveted anchorage for new vested interests. The former proponents of change acquire an acute conservatism in their new status quo. It will then take an oncoming group from a new generation to catch the broader vision which may require an undoing of the work of our present and their past.”

Justice Douglas, of course, was describing the conflict between the Lochner-era Court and the Court of which he was then a member. But his observations are equally applicable to describe today’s rush to embrace constitutional stare decisis by those who, only a short time ago, thrilled to the sight of the Warren Court engaging in the judicial equivalent of strip-mining. As Professor Phillip Kurland has observed: “The list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook.”

The shifting allegiance to stare decisis by Justice Robert Jackson vividly demonstrates the point. In 1937, when he was a lowly Assistant Attorney General in the Justice Department stumping in support of President Roosevelt’s court-packing plan, Jackson said this: “Precedents are the most powerful influence in aiding and supporting reactionary conclusions. The judge who can take refuge in a precedent does not need to reason.” Thus, he called for enactment of a law permitting Roosevelt to appoint a “majority of the Court [with] the courage to throw overboard the doctrine that precedents rule constitutional decisions. A minority has already indicated a will to relax this dead hand.” But, he complained, “[a]rchaic procedure [and] musty precedents . . . make government by litigation impossible.”

The court-packing plan failed, but Roosevelt got the Court that

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5 MacNeil/Lehrer supra note 2, at 2.
6 I am not here speaking, of course, of vertical stare decisis; that is, the obligation of lower federal courts to follow decisions of the Supreme Court. There is no serious debate regarding this obligation, perhaps because the alternative is so obviously chaos.
7 Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 737 (1949).
10 Id. at 10-11.
11 Id. at 11. Elsewhere Assistant Attorney General Jackson argued that the Supreme
he wanted nonetheless, a Court that included Jackson. In 1944, after the Court’s task of replacing the old with the new was pretty much complete, Justice Jackson returned to the issue of precedent: “I cannot believe,” he told the American Law Institute, “that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would . . . substantially impair the rule of stare decisis.”

Similarly flexible in his attitude on stare decisis is Justice Goldberg. Anticipating, no doubt, a reexamination of many Warren Court rulings, Justice Goldberg attempted in 1971 to construct a new theory of the doctrine. Realizing that his participation from 1962 to 1965 in the Warren Court’s unprecedented string of constitutional overrulings “suggests a ‘credibility’ problem,” Goldberg admitted that “making my defense of stare decisis at all convincing requires justification of the Warren Court’s overrulings.” Those overrulings were justified, according to Justice Goldberg, by “a general and neutral principle that has long been observed, although, as far as I am aware, it has never before been fully articulated.” Justice Goldberg described his “neutral” theory of stare decisis as follows:

The principle to which I refer . . . is that stare decisis applies with an uneven force—that when the Supreme Court seeks to overrule in order to cut back the individual’s fundamental, constitutional protections against governmental interference, the commands of stare decisis are all but absolute; yet when a court overrules to expand personal liberties, the doctrine interposes a markedly less restrictive caution.

Notwithstanding his use of the term “neutral,” this theory of stare decisis is a convenient doctrine for Justice Goldberg. A close Court’s contradictory decisions on the binding nature of precedent were precedents supporting his call for the Court’s departure from precedent:

It is true that the precedents of the past hang like a shroud about the Court. But the degree of devotion to precedent in lieu of reason is in that Court’s discretion, even by its own precedents. A minority of the Court has expressed [its] will to freedom. Justice Brandeis has said: “The rule of stare decisis, though one tending to consistency and uniformity of decision, is not decisive. Whether it shall be followed or departed from is a question entirely within the discretion of the Court which is again called on to consider a question once decided.” (Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 at 405-409).


12 Jackson, Decisional Law and Stare Decisis, 30 A.B.A. J. 334, 334 (1944).
14 Id. at 74-75.
examination of Justice Goldberg's writing on constitutional issues, especially his votes and opinions during his tenure on the Supreme Court, reveals a rather straightforward constitutional philosophy: constitutional decisions that contract personal freedoms are erroneous; constitutional decisions that expand individual liberties are correct. Indeed, Justice Goldberg has said as much. In a recent article, he explained that "the Supreme Court itself has overruled prior decisions restricting the rights of Americans to liberty and equality and, indeed, has courageously enlarged these rights."16 One searches the United States Reports in vain for a case in which Justice Goldberg invoked this theory of stare decisis in affirming an earlier constitutional case with which he disagreed. Thus, far from neutral, Justice Goldberg's theory of stare decisis is carefully designed not only to justify many Warren Court decisions overruling precedent, but also to shelter those decisions from the rigor of reexamination by successors who do not share his constitutional philosophy.

I think that the doctrine of stare decisis, in the context of written (i.e., constitutional or statutory) law, suffers from two serious weaknesses: First, it is inherently subjective, and few judges, including Supreme Court Justices, can resist the natural temptation to manipulate it. Second, and more fundamentally, its avowed office is to shelter error from correction.

Both of these deficiencies were on display in the Supreme Court's recent decision in Johnson v. Transportation Agency.17 In Johnson, a male employee in the roads division of the county transportation agency was passed over for the position of road dispatcher in favor of a female employee found by the district court to be less qualified. He argued (1) that he had been denied the promotion because of his sex and (2) that Title VII of the 1964 Civil Rights Act was intended by Congress to prohibit such discrimination. Five Justices of the Supreme Court agreed—that is, agreed that Mr. Johnson had been passed over solely because of his sex and that Title VII had been designed to ban such discrimination. Yet a majority of the Supreme Court nonetheless denied him relief and thus ensured that countless persons like him would suffer precisely the kind of sex and race discrimination that Title VII, according to five members of the Court, was designed to forbid.

This candid judicial repealer of a duly enacted congressional statute came about because two of the five Justices who believed that Mr. Johnson was entitled to relief under Title VII invoked the doctrine of stare decisis. Justices Stevens and O'Connor could not

bring themselves to join Justice Brennan's opinion, but joined the result because they did not want to overrule the *Weber* decision.\textsuperscript{18} *Weber*, you will recall, held that the racially discriminatory exclusion of a white male from a craft-training program is not prohibited by the section of Title VII that provides as follows: "It shall be . . . unlawful . . . for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . .."\textsuperscript{19}

Let's take a moment to examine Justice Stevens' discussion of stare decisis, for it provides an extraordinary illustration of the extent to which stare decisis can be a doctrine of convenience. Incidentally, while the *Johnson* case raises the stare decisis issue in a statutory rather than a constitutional context, I believe that the following points apply equally in both contexts.

Justice Stevens defined the issue thus: "[T]he only problem for me is whether to adhere to an authoritative construction of the Act [—*Weber*—] that is at odds with my understanding of the actual intent of the authors of the legislation."\textsuperscript{20} Noting the "undoubted public interest in 'stability and orderly development of the law,'" Justice Stevens decided to adhere to *Weber* because (1) it had been decided and (2) it was, as he put it, "now an important part of the fabric of our law."\textsuperscript{21}

For his standard, Justice Stevens borrowed from Benjamin Cardozo's book, *The Nature of the Judicial Process*: ""If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.""\textsuperscript{22} In relying on this passage, however, Justice Stevens failed to recognize that Cardozo was discussing the role of stare decisis in the development of the common law. After all, Cardozo made the point in 1921, when he was a judge of the New York Court of Appeals, the bulk of whose decisions dealt with the common law. And much of the rationale underlying the operation of the doctrine of stare decisis in the common law context is simply inapplicable in the statutory or written law context. Justice Stanley Reed, when he was Solicitor General, explained the distinction well. Noting that "'[s]tare decisis has been a guiding principle of the common law from its beginnings," Justice Reed wrote:

\textsuperscript{20} *Johnson*, 107 S. Ct. at 1459 (Stevens, J., concurring).
\textsuperscript{21} \textit{Id.} at 1459.
However, the doctrine of *stare decisis* has a philosophic necessity in the common law system which is not found elsewhere. The other systems apply a written document to the concrete controversies which come before the court . . . . The judge who applies a section of a civil code, a constitution or a statute, must always measure the decisions of his predecessors against the document which they were interpreting. However high the authority of the prior decisions, they remain inferior to the law itself. Contrast with this the philosophy of the common law jurisprudence. There is no law but the judicial decisions themselves. The judge who decides a case fashions the law as he decides. His decision, at the moment of its pronouncement, joins the mass of decisions which constitute the common law . . . . Right or wrong, they are the law. Accordingly, the common law judge who does not follow *stare decisis* does more than to differ with his predecessors; he quite literally changes the law.23

Thus, if the lawmaker in the first instance is the judge, as in the common law, then the judge is free to change the law, but should do so only for reasons that outweigh the public interest in stability in the law. That the governing common law precedents are in conflict with the “mores of the day,” Cardozo thought, as do I, is sufficient reason to depart from the common law precedents. But if the lawmaker is the legislator or the framer, the judge is not free to change the law, regardless of how inconsistent it is with the judge’s view of the mores of their day. While the Supreme Court has often exercised the powers of the legislature and the framers, it has never claimed them.

Let’s indulge the assumption, however, that “the mores of [our] day” are somehow relevant to issues of statutory construction, and go on.

Justice Stevens next concluded that “the mores of [our] day” “favor adherence to, rather than departure from, precedent.”24 To sustain this proposition, he offered one proof: namely, that Chief Justice Burger, in his dissent in *Weber*, “observed that the result reached by the majority [in that case] was one that he ‘would have been inclined to vote for were [he then] a Member of Congress considering a proposed amendment to Title VII.’ ”25

Now, Chief Justice Burger is many good things, but to my knowledge Justice Stevens is the first to regard him as a failsafe barometer of the “mores of [our] day.” To the contrary, if one consults

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23 Address by Solicitor General Stanley Reed at the Meeting of the Pennsylvania Bar Ass'n, transcript at 133 (Jan. 7, 1938) (on file at Cornell Law Review).
25 *Id.* (quoting *Weber*, 443 U.S. 193, 216 (Burger, C.J., dissenting)).
something that at least purports to measure the "mores of [our] day"—public opinion polls—one finds that a large majority of the American people consistently oppose the granting of race and sex preferences in the workplace. Indeed, shortly after the Johnson case was handed down, U.S.A. Today published the results of a nationwide poll showing that 58% of the women surveyed disagreed with the Court's ruling.26

So, Justice Stevens' analysis reduces to this: he cast his vote in favor of permitting sex discrimination that he believes is barred by Title VII, because a five-Justice majority made a similar error in 1979 regarding race discrimination, and the error is now a part of the fabric of our law, because it is in harmony with the mores of our day in 1987, which mores are clearly reflected by the fact that in 1979 Warren Burger would have voted in favor of a measure permitting sex discrimination had he been in Congress. So strained is this reasoning that the candid mind is tempted to suspect that Justice Stevens' vote was driven instead by the decision's result, which he praises elsewhere in his opinion.27 The temptation becomes difficult to resist upon an examination of a prior comparable case: Monell v. Department of Social Services.28

In Monell, the Supreme Court held that municipalities are subject to damages liability under section 1983.29 In so doing, the Court overruled the contrary case of Monroe v. Pape,30 decided seventeen years earlier and followed in several subsequent cases. Justice Stevens overcame his devotion to stare decisis and voted with the majority, but he did not write separately. In subsequent opinions, however, he has provided two justifications for his vote in Monell. Both reasons betray the inherent subjectivity and manipulability of stare decisis. First, Monroe did not qualify for stare decisis, according to Justice Stevens, because it was "egregiously incorrect."31

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27 See 107 S. Ct. at 1458, 1460.
29 Section 1983 reads in part:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
31 The "egregious" error test is evidently an evolving standard. In Florida Dep't of Health and Rehabilitative Serv. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1981), Justice Stevens adhered to Edelman v. Jordan, 415 U.S. 651 (1974), although he thought it erroneous, on the ground that it "represents an interpretation of the Eleventh
Weber, then, must be just "incorrect," not egregiously so. But the truth is that calling Weber "egregiously incorrect" is an understatement. As Professor Gerald Gunther noted shortly after Weber was handed down, "there has rarely been a case in which the normal ingredients of statutory interpretation, the text and the legislative history, were so one-sidedly against the majority."32

His second justification for overruling Monroe is that "Congress phrased some older statutes [such as section 1983] in sweeping, general terms, expecting the federal courts to interpret them . . . on a case-by-case basis in the common-law tradition."33 And what was the sweeping, general term at issue in Monell? "Person."

Quite apart from the inherent subjectivity of the doctrine, application of stare decisis in most cases, including Johnson, is objectionable for a more fundamental reason. The point was made well, and very well, by the Pennsylvania Supreme Court in 1787:

"A Court is not bound to give the like judgment, which had been given by a former Court, unless they are of opinion that the first judgment was according to law; for any Court may err; and if a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgement, he being sworn to judge according to law. Acting otherwise would have this consequence; because one man has been wronged by a judicial determination, therefore every man, having a like cause, ought to be wronged also.34"

I find this argument powerful, more powerful than the countervailing arguments based on stability and predictability. And it is at its strongest in constitutional cases, for judges are oath-bound to rule in accordance with the Constitution, not with prior opinions interpreting the Constitution.35 But it is not strong enough to support the necessary consequence of its own logic—i.e., that no issue

Amendment that had previously been endorsed by some of our finest Circuit Judges [and] therefore cannot be characterized as unreasonable or egregiously incorrect." Four years later, in Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 304 (1985), Justice Stevens was won over. In a dissenting opinion, he stated that "additional study has made it abundantly clear" that the decision "can properly be characterized as 'egregiously incorrect.'" Id. Justice Stevens refrained, however, from disclosing what new learning on the subject had been unearthed by the additional study.

32 Gunther, Burger Court: Nine Men Search For What is Right, Regardless of Law, Nat'l L.J., Aug. 13, 1979, at 60, col. 2; see also Mintz, Court Ends '79 Term in Dissonance, Wash. Post, July 8, 1979, at A1, col. 2. (Philip Kurland remarked of Weber: "The majority opinion was without substantial basis in any way, shape or form.").
33 Guardians Ass'n v. Civil Service Comm'n 463 U.S. 582, 641 n.12 (1983).
34 Kerlin's Lessee v. Bull, 1 U.S. (1 Dall.) 175, 178 (1786).
35 The place of stare decisis in constitutional law is even more tenuous. A judge looking at a constitutional decision may have compulsions to reverse past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.
is decided finally until it is decided correctly. This view rejects the claims of stare decisis in all cases, and that is farther than I am willing to go.

In defending his suspension of the writ of habeas corpus, Lincoln did not end his argument with the point that the Constitution authorizes the President to suspend the writ whenever rebellion threatens the public safety. That the suspension was necessary to the survival of the union was alone sufficient, Lincoln argued, whether or not it was constitutional. As he put it:

"The legality and propriety of what has been done . . . are questioned, and the attention of the country has been called to the proposition that one who is sworn to 'take care that the laws be faithfully executed' should not himself violate them. Of course some consideration was given to the questions of power and propriety before this matter was acted upon. The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?"

In essence, Lincoln believed that his obligation to abide by a single provision of the Constitution had to give way to his larger

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Douglas, supra note 7, at 796; see also Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-10 (1932).

36 Assistant Attorney General Robert Jackson expressed sympathy for this position:

Legal philosophy sets up a method of thinking that is not accepted by any other profession. Unreasoning devotion to precedent is so normal for the lawyer that Joseph Choate in eulogy of James C. Carter, noted as almost an eccentricity of the genius "that he was not always willing to admit or to recognize the binding force of precedents, however numerous, which failed to run the gauntlet of his own reasoning powers. One of his favorite maxims was, that nothing was finally decided until it was decided right."** And Choate referred to this trait as "vulnerable!"


37 Special Session Message to Congress (July 4, 1861), 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 25 (J. Richardson, comp.). Lincoln was responding to Chief Justice Taney's conclusion that only Congress is authorized under the Constitution to suspend the writ of habeas corpus "when, in cases of rebellion or invasion, the public safety does require it." Id. U.S. CONST. art I, § 9; see Ex parte Merryman, 17 F. Cas. 144, 148 (1861).
obligation to take all necessary measures to save the union. While the analogy, to be sure, is imperfect, I think Lincoln's reasoning provides useful insight for a judge deciding whether to yield to a prior constitutional decision that he conscientiously believes to be erroneous. I think Lincoln's reasoning provides useful insight for a judge deciding whether to yield to a prior constitutional decision that he conscientiously believes to be erroneous.\(^3\) Surely a judge need not vote to overrule an erroneous precedent if to do so would pitch the country into the abyss—if to do so would cause such harm to the body politic that, in a relative sense, it would be on the order of killing the body to save a limb. True, this is a standard that few cases can satisfy. I am advised by experts in such matters that the paper money case is one such case,\(^3\) and the claim seems entirely plausible to me. Judge Robert Bork has made a similar point regarding the commerce clause cases on which much of the modern administrative state has been constructed.\(^4\) I do not doubt that there are other cases that would qualify under the Lincoln-esque standard I have described.\(^4\) But only such a stringent standard can justify following a precedent rather than the Constitution when the two are in conflict. In all other cases, I, along with Herbert Wechsler, "stand with the long tradition of the Court that previous decisions must be subject to re-examination when a case against their reasoning is made."\(^4\)

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\(^3\) I say "conscientiously believes to be erroneous" in order to distinguish those close and difficult cases in which the judge cannot elevate his inclination on an issue to belief. In such cases, stability and predictability in the law, a proper respect for the views of one's predecessors, and a sense of modesty regarding one's own infallibility are reason enough to follow precedent.

\(^3\) Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870).

\(^4\) There are some constitutional decisions around which so many other institutions and people have built that they have become part of the structure of the nation. They ought not be overturned, even if thought to be wrong. The example I usually give, because I think it's noncontroversial, is the broad interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private expectations, and so forth have been built up around that broad interpretation of the commerce clause that it would be too late, even if a justice or judge became certain that that broad interpretation is wrong as a matter of original intent, to tear it up and overturn it.


\(^4\) For example, while I do not agree with those who maintain that Brown v. Board of Education, 347 U.S. 483 (1954), was erroneously decided (see R. BERGER, GOVERNMENT BY JUDICIARY 116-39 (1977)), I think that, even if it was, it is among those cases that would qualify for application of stare decisis.

TEXT AND PRECEDENT IN CONSTITUTIONAL ADJUDICATION

Patrick Higginbotham†

Giving to this panel the topic, "the conflict between text and precedent in constitutional adjudication," has a generous assumption that we will find common turf on the large field it describes. On one level, the whole idea is oxymoronic in that precedent that conflicts with text is not precedent. But this only points up the difficulty of describing the role of precedent, an understandable difficulty because one's view of precedent is bound up with views of law itself. Because language is the lawyers' tool, or as Charles Black puts it, the linseed oil of the law, it is equally understandable that the lawyers' response to the topic is, "what is text and what is precedent?" It is then the disabilities of a legal education, or perhaps the absence of much more, that lead me to describe precedent with its difficulties before turning to its fit with text.

I

Even describing the role of precedent quickly engages political view because precedent is inevitably in part, sometimes in large part, in the eye of the beholder. Yet, it is my strong conviction that the concept of precedent has force and sufficient discipline to decide the great percentage of cases that come to our court, including constitutional issues; it is my observation that it in fact does so. That a little mysticism, priestly role playing, and postured discovering of the law has survived the realists and "law and" supporters, or even that they are yet important to the acceptance of judicial law making, does not mean that the concept of precedent lacks content at its core. As Professor David P. Bryden put it in denying that constitutional law is all politics and no law, "[t]he difference between a partial myth and a complete myth is the difference between Abraham Lincoln and the tooth fairy."1

In defining precedent we must distinguish among a larger set of rules that also bind successors to a decision. While these rules may incidentally serve purposes similar to the purposes of stare decisis, their primary purpose is to cope with the increasing size and output

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of the courts and to manage the mechanics of judicial decisionmaking. For example, our circuit, as do many others, has a formal rule that one panel cannot overturn another, and permitting only the en banc court to reject our own precedent. Absent an intervening decision by the Supreme Court, we adhere to this rule regardless of how wrong-headed the panel deciding the subsequent case may believe the former case to be. Relatedly, we provide by rule that a panel cannot decline to follow a decision of a sister circuit if it will create a conflict among the circuits. These rules of orderliness are similar to rules in some state appellate courts that insist that a unanimous decision can be overturned only by a unanimous court. I leave to devotees of game theory the exploration of how such rules can affect outcomes. For now, I want to lay aside such rules.

Next we should keep in mind that the bind of first decision differs in its horizontal and vertical reaches. District judges do not treat decisions of other district judges as binding and, apart from conflict reducing rules, circuit courts do not treat decisions of sister circuits as binding. In talking about precedent, I am then talking about how the Supreme Court treats its own precedent and how precedent binds on its vertical reach—first treating precedent in its common law tradition as stare decisis, that is, to stand by decided cases, and then adding to the mix, constitutional text.

As Roger J. Traynor pointed out: "in modern Italian stare means to stay, to stand, to lie, or to sit, to remain, to keep, to stop, or to wait. With delightful flexibility it also means to depend, to fit or to suit, to live and, of course, to be." As we will see, Italian may better describe some views of precedent than Latin.

The values claimed for precedent are familiar. Professor Wasserstrom lists four major justifications: certainty, reliance, equality, and efficiency. He lists as minor justifications: practical experience, a notion resting "upon the hypothesis that judge-made law enables the legal system to adapt itself quite readily to new situations and novel controversies by responding to these situations in an a posteriori fashion as they arise"; restraint upon the individual judge; and the termination of particular litigation. There is little to quarrel with here. It is in applying the doctrine that its strengths and weaknesses take definition.

In describing the mechanics of stare decisis, it is important to keep in mind that the deciding court cannot fully control the precedent force that its decision will have in the future. That strength

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4 Id. at 74-81.
is in the main given by the later decisionmaker. Of course, the first
decider may write broadly and may even disclaim a holding, but the
accepted decisional process makes this effort less than fully effective.
That is, we accept that it is the rule of the case or *ratio deciden
di* that
binds, and the successor court has play, often considerable, in de-
ciding what that holding is. As Karl N. Llewellyn teaches, the later
court can confine the first case to its facts concluding, for example,
that “[t]his rule holds only of redheaded Walpoles in pale magenta
Buick cars.”5 A court may equally give full sway to all that was said
in the earlier decision. Faced with multiple prior cases, it may si-
multaneously give broad and narrow readings. Stated in its happy
form, it is the Janus faced, as Llewellyn called it, quality of stare
decisis that allows the case method to evolve doctrine. Stated in
more fearsome terms, it is a considerable source of judicial power, a
power that may aptly be called the heartbeat of common law deci-
sionmaking. That is, the courts obedient to stare decisis have the
range, at least within an outer circle of an earlier case, to push the
law, often to push off in a quite different direction from the first
court, without overruling its decision.

It is important to remember that the stare decisis concept, or
document if you prefer, offers no guidance for the interpreting court’s
choice of whether it will give a broad or narrow reading to the first
holding. The push one way or the other must come from elsewhere;
elsewhere I will for now leave as judicial attitude. In its common law
mode its rationale is marked by heavy reliance upon analogical rea-
soning, or description, often leaving unidentified any regression line
or guiding value.

It would seem that as decisions are reached and a line of cases
are developed by a succession of broad and narrow readings, the
ambit of each succeeding deciding court is circumscribed, and so it
may be for the intellectually honest court. But under the tradition,
the deciding court’s ambit of discretion is in part a function not only
of its honesty, but also its creative ability, or so it seems. There is a
baseline and it is that point at which facile restatements of prior
holdings, restatements of cases and discovery of underlying prin-
ciples, become dissembling; but between blind adherence and dishon-
est statement lies a sometimes significant area that does seem to
reward the creative jurists with the opportunity to impose their will.
Nonetheless, as courts push toward the limit of dissembling treat-
ment of precedent they disserve the values of stare decisis. There is
a point at which there is no predictibility, where expectations are so
unsettled that parties cannot adjust their affairs. Such creative juris-

prudence at this point begins to raise questions about whether the “law” is any more than the judges’ individual predilections. But the difficulties are largely ones that revolve around the effectiveness of rules and less about the power or authority of the decisionmaker.

I suggest that this occurs far less in the world of daily decisions than my academic friends suppose. Law professors are bright and creative. In their teaching and scholarship they thrive at the margin where legal doctrine is developing, is uncertain, and, delights of delights, internally inconsistent. Students barraged with socratic slicing of these cases are given a skewed view of stare decisis and perpetuate a voguish belief that law is little more than the judge’s predilection. But with this aside I return to my main point, that the predictability of judicial decisions must rest in part upon some awareness of the attitudes of the judges that are reading the precedent, given the latitude of the honest judge. As Judge Schaefer put it in a lecture at this law school some twenty-one years ago:

If [the judge] views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and aspirations of his time.6

So far I have not spoken of constitutional text or focused upon the precedent force of decisions construing text. That is, I have not described a system where the values are given and the force of precedent is therefore different.

II

In turning to precedent and constitutional text, I start with Justice Frankfurter’s oft cited statement that “[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.”7 Questions about the power of common law courts usually ask whether a particular decision ought to have been left for the legislature; for the most part the lawmaking function of the common law judge is accepted on the assumption that the legislature is available to correct errors.

Citing a dissenting opinion by Justice Brandeis, Justice Stevens stated in an opinion joined by Justices Brennan, Stewart, and Blackmun that “[t]he doctrine of stare decisis has a more limited application when the precedent rests on constitutional grounds, because

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‘correction through legislative action is practically impossible.’”

Justice Brandeis in turn cited Justice Miller, who wrote in 1869:

> With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court . . . .

Brandeis’ opinion, handed down in 1931, cited forty cases in which the Supreme Court overruled its earlier decisions.

But this describes the Supreme Court’s treatment of its own precedent and accepts its shorthand explanation that because Congress cannot overturn their decision, the Court must be more willing to do so. It does not develop a distinction between duty owed to the Constitution and duty owed to decisions construing it. Presumably, at least two sitting Justices, looking horizontally, see such a difference. Justices Brennan and Marshall persist in their votes against the death penalty in all cases despite contrary votes by a majority of the Justices. Presumably, they justify this persistence as a rightful adherence to the Constitution and not to decisions concerning it; or as Justice Frankfurter put it—the Constitution as the Justice reads it.

III

How the Supreme Court treats its own precedent is instructive of how inferior courts ought, in turn, to treat rulings of the Supreme Court; at least an inferior court, though unable to overrule, may employ accepted principles of stare decisis to define the holdings of the Court.

It ought to be unnecessary to remind that courts, including the Supreme Court, are empowered to decide cases and controversies. They are not empowered to pronounce rules of governance other than in the decision of cases and controversies. Because constitutional law is then the holdings of cases, their reach is informed by the way in which courts treat precedent, and courts do here have a regression line; the value choices are made—by text.

Of course, inferior courts must follow the Supreme Court. But, this duty of obedience is defined in substantial part by the accepted manner of treating precedent, and presumably no other branch of government owes decisions of the Court any greater duty of obedi-

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ence than is owed by the lower courts. Sometimes then, the faithfulness of lower courts and other branches of government to decisions of the Court are in part in the eye of the beholder. I conclude this opening by using two famous cases to illustrate the difficulty.

In 1948, the Supreme Court in *Shelley v. Kraemer*, speaking through Chief Justice Vinson, concluded that enforcement by state courts of racially restrictive covenants controlling the sale of real estate was state action. While inferior courts were obligated to obey the holding of *Shelley*, it’s holding if read too broadly was fairly debatable. So read, the Court would have found state action in most of the state action cases that followed. For example, in *Evans v. Abney* the Court faced the question of whether under *Shelley* the enforcement by the courts of Georgia of a common law reverter, whereby Senator Bacon’s park was returned to his heirs, constituted state action. How free was the Court of Appeals for the Fifth Circuit to conclude that it did not? Ultimately, Justice Black, writing for the Court, concluded in *Abney* that this judicial involvement was not state action. *Shelley*, broadly read, would also have answered the state action issues presented by the sit-in demonstrations of the early 1960’s, but the Court chose to rest their decision elsewhere.

That the duty of obedience owed by inferior courts is informed by how the Supreme Court treats its own precedent is also demonstrated by the development of the first amendment issue of clear and present danger. In 1917, two years before Justice Holmes wrote *Schenck v. United States*, Judge Learned Hand, then a district judge, had interpreted the same statute at issue in *Schenck*, the Espionage Act of 1917. In his opinion in *Masses Publishing Co. v. Patten*, Judge Hand took a different tack than Holmes did two years later in *Schenck*. Judge Hand focused on the nature of the utterance itself rather than engaging in the predictive exercise of clear and present danger. We now know that in correspondence with Professor Zachariah Chaffee, Jr., Judge Hand was critical of Holmes’ formulation. When *Dennis v. United States* reached the Second Circuit in 1951, Judge Hand was Chief Judge of the Second Circuit and

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10 384 U.S. 1 (1947).
12 Id. at 445 (“Similarly, the situation presented in this case is easily distinguishable from that presented in *Shelty v. Kraemer* where we held unconstitutional state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes.”) (citation omitted).
15 244 F. 535 (S.D.N.Y. 1917).
16 Id. at 539.
took his pen to the clear and present danger test. In reviewing these convictions under the Smith Act,\textsuperscript{18} Hand interpreted clear and present danger to ask "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."\textsuperscript{19} This was in substantial part an implementation of Judge Hands' original \textit{Masses} approach. Speaking through Chief Justice Vinson, the Supreme Court in the \textit{Dennis} opinion affirmed, expressly adopting Judge Hand's formulation. Justice Frankfurter's concurring opinion referred to the \textit{Dennis} defendants' reliance upon Holmes' formulation of clear and present danger, stating:

\begin{quote}
In all fairness, [defendants' clear and present danger] argument cannot be met by reinterpreting the Court's frequent use of "clear" and "present" to mean an entertainable "probability." In giving this meaning to the phrase "clear and present danger," the Court of Appeals was fastidiously confining the rhetoric of opinions to the exact scope of what was decided by them. We have greater responsibility for having given constitutional support, over repeated protests, to uncritical libertarian generalities.
\end{quote}

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\begin{quote}
... If past decisions are to be used as a guide and not as an argument, it is important to view them as a whole and to distrust the easy generalizations to which some of them lend themselves.
\end{quote}

\begin{quote}
... Viewed as a whole, [these] decisions express an attitude toward the judicial function and a standard of values which for me are decisive of the case before us.\textsuperscript{20}
\end{quote}

Was Judge Leonard Hand faithful to his duty to follow precedent?


\textsuperscript{19} United States v. Dennis, 183 F.2d 201, 212 (2d Cir.), aff'd, 341 U.S. 494 (1951).

\textsuperscript{20} Dennis v. United States, 341 U.S. at 527-28, 539 (Frankfurter, J., concurring).
There is, I think, a threshold problem before you get to the question of what you are going to do with resolving a conflict between text and precedent, and that is, are there in fact any conflicts between text and precedent? This is not a purely facetious question because it is possible to take the extreme positivist point of view that what the precedent says is indeed what the text means. This is not a point of view that I adopt at all, but it is jurisprudentially very interesting, and it is not totally easy to explain what is wrong with this point of view. One piece of evidence that suggests that the cases that you read cannot be authoritative in the same way as the text is the highly contingent nature by which precedents are actually decided. Imagine nine Supreme Court Justices heading into the courthouse to conduct their businesses one day and there is about to be a five to four decision, and two of the conservative Justices or two of the liberal Justices happen to be run over by a bus and killed. This sort of thing may change the outcome of the decision, but it is rather troublesome to say that if the vote had been taken yesterday, then the verdict for the plaintiff would have been correct, but now since it is going to be taken today, that the judgment for the other side is correct. We feel rather uncomfortable allowing correctness to turn on that sort of thing and yet, that is the sort of coincidence that dictates so many, many judicial decisions that actually get made. It is interesting to contrast this problem with how we would feel if this was a vote on legislation or a constitution. If on the way to the Constitutional Convention several people were run over by a bus and did not make it to the vote, and the vote went the opposite way and the Constitution had been written differently, we would indeed have a different idea of what the Constitution correctly said. It is because of this sort of reasoning that I think that judicial decisions are instinctively on a very different basis than textual legislation or constitutions.

So let us just make the rather simplistic assumption that there are at least some decisions that might be called incorrect. For in-
stance, say maybe \textit{Marbury v. Madison}\footnote{5 U.S. (1 Cranch) 137 (1803).} was decided incorrectly. \textit{Marbury} is sort of an interesting case in that it is the one that nobody at the Federalist Society thinks actually was decided incorrectly. At the last panel, we heard many people talking about the power of the courts not to bind the legislature and the fact that when a judge decides a case the decision only has authoritative impact with regard to the facts of the particular case. If precedents do not have this kind of limited impact, of course, then the executive is not going to be bound. Well how do they prove this? Well, they cite \textit{Marbury v. Madison} as precedent. \textit{Marbury} seems to have this unusual magical flavor of being able to survive any criticism of the judiciary or the system of precedent at all.

Once you decide that there exists in fact the possibility of incorrect decisions, that really changes somewhat the nature of the question you are asking. Once you decide this, then it seems at first blush to be a very easy question: “What ought a judge to do when he or she is faced with one of these incorrect decisions, assuming that he or she in fact decided that the decision is incorrect?” There is an instinct when you are presented with one of those cases, and it is an instinct that I sympathize with very strongly, which is, once you have decided that the decision is incorrect, it really does seem immensely, immensely problematic to go ahead and apply it anyway.

Which is more important, the real meaning of the Constitution or some precedent that made its way into the law books? When I am faced with a decision that I truly feel is incorrect this way, I have something of the same feeling as I did a few weeks ago when I read in the \textit{New York Times} a little announcement about what the Pope had decided about various forms of surrogate motherhood and birth control and whatnot, and I read this whole long complicated list of things about what the Pope had decided that God really wanted. As somebody pointed out in the last session, there is an enormous resemblance between this problem of comparative religion and the problem of constitutional interpretation. You have this authoritative interpreter, the Pope, but is he really speaking the truth when he gives some kind of religious interpretation? As I read this long discussion, about how if I was infertile it was all right for me to have sex but it was not alright for me to have artificial insemination, I came away with a clear feeling that this is simply intrinsically implausible on its face. I just do not believe that God says this. And when I read \textit{United States Reports}, I often have this same feeling. In fact, you can push the resemblance a little further; as I was reading this \textit{New York Times} article, and it had all this incredible detail about
one's uterus and times of conception and all this stuff, I wondered why does this seem so familiar, and all of a sudden I realized, my God, this is *Roe v. Wade* again. On some level, I think this is what I really believe about precedent.

When I read one of these outrageous opinions, and believe me, *Roe v. Wade* cannot hold a candle to some of the Supreme Court's choice of law decisions that are my real interest, I find myself outraged by these decisions. I think that I actually do believe that it is very important for judges to be willing on the drop of a hat to re-examine a decision that is clearly wrong. Evidence that this really is my true belief is that I write law review articles about these opinions that criticize these opinions and point out how stupid they are, and suggest in the most tactful way that I can that at the very first opportunity and with all due deliberate speed, that the Supreme Court ought to do whatever it can to get rid of these decisions that I dislike so much. Now I cannot really believe that I am asking the Supreme Court to do something immoral. If I am willing to argue in print that these decisions ought to be overruled, it must be because I believe that the Court would be doing the right thing.

So, on one level, I think I do believe that it is important to re-examine precedent whenever it is necessary, whenever you are faced with something that is clearly a stupid decision. On the other hand, because I see very good arguments on both sides of this, the problem is that the argument, if you really believe it, goes much too far. This really is a problem about the relationship of truth to hierarchy. This is a problem that arises whenever you have some kind of "truth," but you also have a hierarchy that is involved in enforcing the truth. Someone lower in the hierarchy or later along in the system of stare decisis is going to be in the position of having to decide whether to do what she thinks is true, or whether to do the thing that she is authoritatively supposed to do according to the institutional arrangements of which she is a part.

I am going to give you two examples that show why I think it is so problematic to strictly go with the very sympathetic position that you do the thing that is true rather than the thing that is required by the institutional hierarchy. One of those was actually alluded to this morning by Judge Posner when he was discussing the now famous *Enelow-Ettelson* doctrine. Posner prefaced his remark, after he said this is the most moronic doctrine that he had ever seen, with the statement that he had, of course, applied it. Now, why of course did he apply it? Well, I think that part of what he was saying was that as an appellate judge, subject to Supreme Court review, he felt that

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2 410 U.S. 113 (1973).
this was an additional reason for applying the doctrine. We have to keep in mind that stare decisis is not merely a matter of whether the Supreme Court follows what the Supreme Court did five or ten years ago. We also have to decide whether this is something that we want appellate judges to follow, because they too are going to be faced with the problem of deciding: “Should I do the institutionally authoritatively correct thing, or shall I do what I think is true?”

There is one final example that I want to give, and I think this one is very problematic. It has to do with the executive branch. When I mention the executive branch, you probably think about the example that was given in the last panel about whether the executive branch should follow the Court. That is not the example I have in mind. I am talking about the hierarchy within the executive branch. Certainly, the President has a role in enforcing the Constitution. Certainly, the people operating underneath him play a part in that role. Suppose someone who is operating within the executive branch is supposed to, routinely, on a case by case basis examine every decision that the President made, and make up his or her own mind about whether this ought to be enforced. Those who would have later courts or the executive branch ignore or overrule Roe v. Wade would rarely also require that every member of the executive branch re-examine all of the President’s instructions to assess their constitutionality.

I hope, if anything, that I can convince you that this is a very complicated problem. There are good arguments on both sides. It is simply not enough to say what Mr. Cooper says, which is that because these are idiotic decisions they have to be overruled. You have to think about what this means in the entire context of the institutional hierarchy and also perhaps in terms of what it means in terms of original intent. What, after all, was the framers attitude towards stare decisis? If the framers themselves had believed in stare decisis, then you can, at least, make the argument that this sort of slippage in the judicial process was built into the Constitution and protected in some way. I do not know enough history to know whether that is a plausible argument. I hope merely that it is something to think about.
STABILITY AND RELIABILITY IN JUDICIAL DECISIONS

Frank H. Easterbrook†

Text and precedent are an old pair. So old it should frighten us that we do not have a theory of their interaction. Precedent is the device by which a sequence of cases dealing with the same problem may be called law rather than will, rules rather than results. (In a system of civil law there may be no “precedent” at all, on the conceit that the Code contains all rules and the gloss none.) To have a theory of precedent is to have a theory of the extent to which judges’ acts are law. Yet we do not have such a theory. Veteran judges such as Cardozo can proclaim that no theory is possible, that adherence to precedent is simply a matter of trial and error, and that when adherence is too dissonant with other rules or too harmful because of effects of the rules, we shall stop adhering.¹ There we have it—a grand balancing test, with neither a maximand nor weights to produce a decision when the criteria conflict, as they always do. Few Justices hint at a theory of precedent; no Justice has produced a consistent theory; although the academy is awash with competing theories of substantive law, there is no contest in the theory of stare decisis. Not because one candidate has swept the boards, but because no one has a principled theory to offer.

This backwater of the law is nonetheless incalculably important for the theory of adjudication as well as the practice. Precedent is important for reasons other than the desire that likes be treated alike, so that decisions can be called law. It is valuable for reasons classical liberals should approve because it is the way in which rules arise without a central authoritative decider. The stock of precedents is produced by generations of judges wrestling with hard questions. They study the problems and record their conclusions, as traders of coal study its qualities and make their bids. Like the price of coal, the system of precedent may incorporate more wisdom

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¹ See B. Cardozo, The Nature of the Judicial Process 142-80 (1921). Karl Llewellyn took the position that the interaction of judges on a multi-judge court, and a sense of the leeway in the existing cases, rather than texts and rules, are the sources of stability in decisionmaking. K. Llewellyn, The Common Law Tradition 19-61 (1960); see also Grumman Aerospace Corp. v. Mayacamas Corp., 108 S. Ct. 1133 (overruling the doctrine).
than any single trader or judge possesses. Precedent decentralizes decisionmaking and allows each judge to build on the wisdom of others. In a world where questions arise faster than the information necessary to supply answers, this is a boon. Precedent not only economizes on information but also cuts down on idiosyncratic conclusions by subjecting each judge's work to the test of congruence with the conclusions of those confronting the same problem. This increases both the chance of the court's being right and the likelihood that similar cases arising contemporaneously will be treated the same by different judges.

Yet to express the role of precedent as one of economizing on information and of cutting down idiosyncracies is to show why it will be unstable. Although the system of precedent impounds information and wisdom greater than any judge can bring to bear, no particular decision does so. A given case may have been tossed off between sandwiches or based on a factual blunder. In principle, modern judges have all the information available to their forbears, plus any discoveries in the interim, and the benefit of hindsight. Judges often decide cases on the basis of predictions about the effects of the legal rule. We can examine these effects—both for other strands of doctrine and for the world at large—and improve on the treatment of the earlier case. This possibility of improvement makes precedent unstable. It ought to be unstable, provided we can focus judges' attention and bring to the case sufficient care to be sure that our information exceeds that of the judges who acted earlier. Yet this also means that we do not have—never can have—a comprehensive theory of precedent, any more than we can have a complete theory of the "just price" of wheat, or of when to spend more time studying the attributes of securities. There is an equilibrium degree of disequilibrium.

Precedent is under pressure from other sources as well, sources that ensure continual evolution and occasional sharp breaks. One is the power of ex post claims. Precedents—rules—are based on categorical predictions: rule utilitarianism, when that is the system of reasoning. Each case may seem to be an exception. Perhaps the rule may be subdivided; perhaps a claim of act utilitarian nature appears to countermand the rule; perhaps a simple ex post claim for "fair" division of the stakes, the future be damned, will appeal to

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2 For example, the infamous Enelow-Ettelson doctrine. See Employers Ins. of Wausau v. Shell Oil Co., 820 F.2d 898 (7th Cir. 1987); Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731 (7th Cir. 1986); see also Grumman Aerospace Corp. v. Mayacamas Corp., 108 S. Ct. 1133 (1988) (overruling the doctrine).

judges. These are all temptations to be resisted, but judges often yield. That will put pressure on good rules. Sometimes the power of these claims will produce bad rules (multi-factor balancing test with two tiers, three prongs per tier, and four tines per prong); these flabby cases should come under pressure in turn. Too many forks in doctrine produce forks in tongues.

There will also be pressure because no one can quantify how bad is bad enough. We can see the virtue of abandoning *Plessy*, *Swift v. Tyson*, *Lochner*, even *Low v. Austin*, despite the fact that each lasted fifty years or more. *Low,* for those who don’t remember, was the original-package doctrine of 1872, disabling states from taxing or regulating goods until removed from their original packages. It led to all sorts of bizarre warehousing adaptations and doctrinal curlicues. It is the reason why only a constitutional amendment could produce Prohibition: without the amendment, states could not stop the importation and distribution of liquor in its original package. One day in 1976 the Court overruled *Low,* in a case where the parties hadn’t even asked. After the original package doctrine vanished, everyone instantly forgot what it had been all about.

Doctrines with sufficiently bad pedigrees or sufficiently bad effects must go, but this is argument by weasel word—how bad is bad enough? Do reliance interests counsel caution? Surely some, but how much? We have no way to reduce these questions to a common metric and therefore no way to give the answer.

Next there is the problem that the alternative to disavowing precedent is manipulating it—and again we have no sound way other than shared values of the legal culture to deal with such manipulation. Some “manipulation” is beneficial. The need to get around a doctrine may show that there is some problem. Just as a series of anomalies in the data may spur scientists to propose a new theoretical model, so a series of “manipulative” cases that evade or mischaracterize some existing precedent may set the stage for overruling. Or they may show the value of the precedent, leading the manipulative cases to be buried and the original doctrine to be reaffirmed.

Manipulation as experiment is inevitable and sometimes beneficial. But like biological mutation, manipulation may do a lot of harm to a few people before dying out. How do we recognize and

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5 *Plessy v. Ferguson,* 163 U.S. 537 (1896).
8 *80 U.S. (13 Wall.) 29* (1871).
control manipulation, to separate the beneficial experiments from
the claims of just-this-one-time, the siren song of ex post division?
Neither legal system nor legal culture contains a method of identify-
ing the "good-ness" of a given manipulation, and there is no way to
control it. Manipulation is possible because the precedent does not
constrain the selection of which factors matter. Was Plessy a case
about blacks on trains, or was it about Jim Crow? It could have been
read broadly or narrowly. Which features of a case matter will be
influenced by subsequent developments in the legal culture.

Then there is the problem of public choice.10 Kenneth Arrow
showed that when institutions make decisions by majority vote, they
will generate logically inconsistent results unless the voters have
very similar orderings of choices. Over many years the court will
leave behind precedents that, if not inconsistent, generate inconsis-
tent implications. We have been told in tort law, for example, that
physicians must give elaborate warnings of the risks of their ser-
vice, to protect the autonomy of the patients to decide what treat-
ment to receive. We have also been told that laws requiring
physicians to give warnings about the medical service of abortion
are unconstitutional infringements on the autonomy of physicians—
apparently, and incongruously, because these warnings might affect
the patients' choices.11 Faced with such tension, what does the sys-

10 See generally Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802 (1982).
if almost all would prefer it to the final choice. The technical proof is daunting. The insight is simple. Consider an example in the Supreme Court: abortion and sodomy. Both deal with sexual privacy. Suppose decisions occur in this sequence: (1) does the right of sexual privacy protect abortion?; (2) is this right the same as the right of sexual privacy about sodomy?; (3) does the right protect sodomy? The abortion case is decided 7-2 pro, and we learn in Bowers that eight of the nine Justices think abortion and sodomy are identical cases; so if all follow stare decisis, sodomy is protected. Now reverse the order of decision: if sodomy arrives first and is held not protected, then abortion also is not protected. The link between result and the sequence of cases was broken only because some justices, Powell in this instance, put stare decisis to one side. No sound system of law allows such fundamental questions to turn solely on the order in which cases arrive for decision—but stare decisis could do so unless tempered.

There must be play in the joints. Only the optimal amount is uncertain. For a long time judges have said that statutes are different from common law and constitutional law. Courts should attach a meaning to a statute, then let Congress act or not; a court could only confuse Congress and increase uncertainty by revisiting the subject; Congress can correct mistakes. I doubt that this is so. A statute, like a constitution, is a text—a way in which decisions taken in the past influence the present. To treat a statute as different denies this role to the text. It assumes, in other words, that as soon as the judges have spoken, the decision of the past ceases to matter, and the only question is what the sitting Congress wishes. This simply denies the purpose of the enterprise: to enforce the decisions of a prior Congress. (I put to one side decisions under statutes, such

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15 You could give less weight to precedent even at the expense of logical consistency. Consider what would happen if the rule of Griffin v. Illinois, 351 U.S. 12 (1956), under which the state must pay for a criminal defendant's transcript on appeal—even if there is no constitutional right to take an appeal, were used to require the state to pay for everyone's newspaper. See Schauer, Precedent, 39 STAN. L. REV. 571, 588-91 (1987). This possibility—rather, the variant in which parents say that the Constitution requires free transportation to school—is before the Supreme Court in Kadrmas v. Dickinson Pub. Schools, 402 N.W.2d 897 (N.D.), prob. juris. noted, 108 S. Ct. 63 (1987).
16 See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986). One of the most famous overruling decisions also contains a strong statement of the special durability of the construction of a statute. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77-78 (1938). E. LEVY, AN INTRODUCTION TO LEGAL REASONING 32, 54 (1948) contains a sophisticated argument in support of this approach. Most other treatments of the point are more assertion than argument. The Court itself has never offered more than fragmentary justifications for its custom.
as the Sherman Act, that transfer a dollop of law-making power to
the courts after the fashion of the common law. I am concerned
here with statutes that might be thought to contain rules rather than
an allocation of power to make rules.)

Treating statutory interpretations as binding—even as "part
of" the statute—might be the best way to proceed if we had one
perpetual Congress sitting full time. But we have had 100 Con-
gresses, all different. Today's Congress may leave in place an in-
terpretation of a law simply because today's coalitions are different.
The failure of a different body to act hardly shows that the inter-
pretation of what an earlier one did is "right."

More than that. It takes less political support to block a law
than to get one passed. The structural features of government make
legislation hard. To break a filibuster requires 60% of the votes,
substantial time, and concessions on other subjects; all may be in
short supply. Suppose Congress #1 passes a law because it has 65
votes in the Senate and the time to pass it; Congress #2 with 59
Senators supporting the original rule may be unable to reenact it or
unwilling to do so given other priorities. Senators who had ex-
tracted concessions in exchange for their support of the bill on the
first occasion may demand a new set of concessions—and these, cu-
mulatively, may have been too high a price to pay had all been de-
manded in the first instance. There are many related points. For
example, the judicial interpretation itself may create a legislative
constituency, a form of political wealth effect that makes undoing a
decision costly. Agenda influence is at work and may defeat a ma-
jority will as a committee sits on a bill. The coalition may settle on a
second-best position if the first is removed.

We must think of Congress as a discontinuous body. Doing this
affects the theory of precedent. If the purpose of statutory construc-
tion is to carry out the decisions of the enacting body, the quies-
cence of a later body does not reflect at all on the propriety of the
interpretation.17

17 The difference between Monell v. Department of Social Serv., 436 U.S. 658, 695-
701 (1978), and Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987), makes the
point. Although one Justice wrote both opinions, they employ utterly inconsistent
methods to decide when a statutory decision may be reconsidered. Monell says that the
Court may revisit an issue when necessary to produce (1) consistency with prior practice
(as opposed to holdings) and (2) consistency with recent "willingness" of Congress to
legislate municipal liability in other statutes; and when (3) there is an absence of reliance
interests and (4) a plain error in the earlier decision. Transportation Agency talks only
about congressional acquiescence. The two approaches lead to very different results.
Adding United States v. Johnson, 107 S. Ct. 2063 (1987), where all the Justices except
Scalia and Powell switched sides from their position in Transportation Agency, shows the
problems of the enterprise. See also Grumman Aerospace Corp. v. Mayacamas Corp.,
108 S. Ct. 1133 (1988), in which the Court unanimously jettisoned a 53-year-old doc-
Even if Congress were a continuous body, there would still be two objections to treating statutory interpretation as a special case. One is constitutional structure. Inferring legislative authority from inaction is what the one-house veto case was about. To change the law you need the concurrence of Congress and President. The action of the President and one house won’t do it. So why should a proposal by the Court change the law if Congress does not act? Remember, there is a one-house veto within Congress; bicameralism and all that mean that a single house can “veto” a change in the law in response to a “proposal” embedded in a judicial decision. Inaction of the legislature as a whole means nothing more than that one house or the President balked. If the first construction of a statute is sacrosanct, then the Court can change the law forever by making a proposal that is followed by the inaction of a single house of Congress. That is structurally unsound. We wouldn’t say that if the President promulgates a regulation and Congress doesn’t change the law, then the regulation is the law, beyond recall. There is no reason to treat cases differently from regulations.

The second objection appears in Justice Scalia’s dissent in Johnson v. Transportation Agency. It is based on logrolling. Suppose a majority of both houses wants something (say, preferences for women in employment) but can’t get it—because of a filibuster, be-

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18 At least, I offer only two. Professor Eskridge offers some others in a critique of the accepted doctrine quite different from mine. Eskridge, Overruling Statutory Precedents, (forthcoming in Geo. L.J. (1988)). He proposes to relax the strong presumption against revamping a statute when changing circumstances (including later statutes)—“subsequent developments in social mores, public policy, and social trends”—have made the old interpretation outmoded or undesirable. This proposal depends on his model in Eskridge, Dynamic Statutory Interpretation, 155 U. Pa. L. Rev. 1479 (1987), which in turn accepts too much of G. Calabresi, A COMMON LAW FOR THE AGE OF STATUTES (1982) for my taste; statutes are not just helpful advice on how courts should go about governing. Attention to changing mores is more appropriate in constitutional law, for reasons to which I return. Still, Professor Eskridge’s treatment is an uncommonly thoughtful combination of survey and critique, which no one interested in the subject can overlook.


20 Treatments that portray the Court and Congress as partners in a dialogue, producing a form of “constitutional common law” or “statutory common law,” see G. Calabresi, supra note 18; Merrill, The Common Law Powers of the Federal Courts, 52 U. Chi. L. Rev. 1 (1985); Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975), disregard the nature of Congress as a divided and discontinuous institution, in which a single house, sometimes a single member, can block action. By treating Congress as a “person” holding the same views today as twenty years ago, they assume away the most interesting problems.

cause of a veto, because it wants something else even more and must give up its highest hopes to satisfy opponents. So it settles for color-blindness, in exchange for which it gets wide application, a federal enforcement agency, and other benefits. If a court later flips the color-blindness rule into a preferential rule, the new rule will be impossible to repeal—that original majority is still there. But using the inability to repeal the rule as a reason to stand pat on it simply ignores the fact that legislation is compromise—that laws are not enacted section by section, but as a package. If courts become instruments by which packages are undone, laws will be harder to pass. Bargains must be kept to be believed, and inferences from legislative inaction are a means by which bargains are broken.

Having challenged the shibboleth that it should be harder to overrule a statutory decision than a constitutional or common law decision, I want to kick sand on the shibboleth that it should be easier to overrule a constitutional decision than a statutory or common law decision. (No, they are not the same thing.) I agree with but do not take up the cry: “If the Justices expect the rest of us to take their decisions seriously, they had better take them seriously themselves.” None of the sitting Justices feels bound by precedent in the way the second Justice Harlan did. Today’s Justices cast their votes just as if prior cases did not exist, adding for good measure (often with transparent insincerity) that “even if the earlier case were binding on me, I would still vote the same way because . . . .” That, however, is not my target; nor is the fillip that the same Justices often blubber about their colleagues’ faithlessness to precedent; Justices who take this line simply ensure that their successors and comrades treat their opinions in the same way they treat others’. I am concerned with the widely-shared belief that it should be especially easy to revisit a constitutional holding because these decisions are immune from legislative upset. Statutory and common law cases may be revised by Congress; constitutional doctrines may be revised only by amendment and by the Court; since amendment is so hard, it follows that revision by the Court should be easier. Everyone supports this position—with what enthusiasm in a given case depends on whose ox is being gored, but every Justice subscribes to the basic proposition.

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25 Two cases decided on the same day—Solorio v. United States, 107 S. Ct. 2924 (1987), and Welch v. Texas Dep’t of Highways, 107 S. Ct. 2941 (1987)—make the point.
Yet the Constitution is a text and, like a statute, designed to constrain the options of the present by a decision made in the past. The objective in each case is to understand and apply that decision. That the decision may imbue the living with discretion (whether through an open-ended clause of the Constitution or through a grant of power to regulate in the "public interest, convenience, or necessity") is a detail; we are interested in either case with transmitting the original decision free from garbles, and it is a garble to misunderstand a rule or to treat a grant of discretion as if it were a rule. The text (its history, structure, and so on) identifies the correct treatment for either Constitution or statute.

The observation that it is hard to amend the Constitution does not imply that judges should revise their work more freely. Consider why the Constitutional Convention made amendment so hard. One reason is to ensure that a super-majority of the people supports any constitutional rule—whether a grant of power to the national government, or a constraint on the exercise of power by government—at the time of its inception. Another is to ensure stability in the structure of government. The political branches and the people can plan against the background of known rules; statutes presuppose certain constitutional doctrines (think of all the statutes, both passed and foregone, that presuppose the existence of a "dormant commerce clause"). They can plan not only transactions and statutes but also campaigns of constitutional change.

Ready overruling of constitutional cases interferes with both objectives. It reduces the stability of governmental institutions, denying the polity the benefit (if such it is) of continuity. Not coincidentally, it saps the drive for change in the constitutional text. People who seek amendment know that the Court may change the rules at any moment, making their campaign unnecessary or even counterproductive (depending on the new rules the Court supplies). Legislators may explain their inattention to proposed amendments

_Solorio_ overruled _O'Callahan v. Parker_, 395 U.S. 258 (1969); _Welch_ overruled _Parden v. Terminal Ry._, 377 U.S. 184 (1964). In each case the majority (Rehnquist, C.J., White, Powell, O'Connor, and Scalia, JJ.) appealed to the principle that constitutional interpretation should be flexible. Although Justices Brennan, Marshall, and Blackmun, dissenting in _Solorio_, chastised the majority for disregarding principles of stare decisis, 107 S. Ct. at 2934, 2941 ("blatant disregard for principles of stare decisis"), the same three (joined by Justice Stevens), dissenting in _Welch_, complained that the majority was eliminating an aberrant case while taking the landscape as given; they proposed to overrule more than 100 cases and completely recast the law of governmental immunities, 107 S. Ct. at 2962-70. It did not trouble them that the same contention had been raised and rejected quite recently. I do not join the battle about who was right on the merits in _Solorio_ and _Welch_. I raise the cases only to show that all nine Justices in these cases were willing to revise constitutional rules, and the dispute seemed to be only about whether to do so by the quart (the majority) or the tank car (the dissenters in _Welch_).
STABILITY AND RELIABILITY

with the refrain that the proposal may be unnecessary. (This was one of the many excuses given for opposing the Equal Rights Amendment. Whether the prophesy was self-fulfilling is an interesting question that I do not pursue.) Proponents of the amendment perceive the gains of change as less when the Court may come 'round, so they work less hard. The Court's emphasis on the difficulty of amending the Constitution therefore may lead, paradoxically, to an increased difficulty in securing a change.

As for stability: it does not take much argument to demonstrate that ready alteration of constitutional rules makes the effects of statutes and private bargains less predictable. So although I do not quarrel with the proposition that the Court ought to inter recent mistakes before they do serious damage, I doubt that judges should be any more ready to unravel long-standing constitutional doctrines than they should be to revise long-standing statutory interpretations. Indeed, things should work the other way. Precisely because constitutional rules establish governmental structures, because they are the framework for all political interactions, it ought to be harder to revise them than to change statutory rules. The reasons for making amendment hard apply as well to overrulings.

Doctrines of the last twenty or even forty years do not have the same structural effects as the dormant commerce clause (a product of the mid-nineteenth century) or the application of the Bill of Rights to the states (which had been going on slowly since 1897, long before the acceleration in the 1960s). They still have widespread effects on planning. Take Miranda v. Arizona, which the Court unanimously reaffirmed a few years ago even though a majority of the sitting Justices probably would not have thought the doctrine attractive as a matter of first principles. Miranda has become a structural decision on which other doctrines and institutions depend. For example, to the extent Miranda makes it harder to obtain convictions, courts respond by increasing the sentences of those who are convicted, so as to keep general deterrence constant. The higher sentence levels are built into the guidelines that control sentencing in federal courts, and into the penalty structures of state

26 See, e.g., United States v. Scott, 437 U.S. 82 (1978) (overruling United States v. Jenkins, 420 U.S. 358 (1975)); Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 963 (1977) (overruling Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973)). The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870), are the most famous flip-flop of this kind. It is easy to call such reversals "self-inflicted wounds," but the costs of, say, leaving the first Legal Tender case, Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869), standing would have been much higher.

27 See Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897) (takings clause); see also Hurtado v. California, 110 U.S. 516 (1884) (laying groundwork for some incorporation, although Court did not follow Hurtado's path).

law. One could not change *Miranda* without being prepared to re-think criminal sentences. So too with civil liability. We can contemplate “good faith immunity” for the police with more equanimity, given *Miranda* and the pressure it places on police to behave, than we could if only the pre-*Miranda* voluntariness doctrines governed interrogations.

A slightly different way to put this is to say that a constitutional overruling depends on moral and prudential judgments more than strictly legal ones. On the legal side, we can tell that a given rule has been eroded, but the erosion usually marks a moral or prudential problem—moral in the case of *Plessy v. Ferguson*,29 prudential in the case of *Betts v. Brady*,30 two cases properly dispatched even under my approach. The willingness of later generations of judges to evade or cabin the cases suggests that they were wrong, and even if not wrong were causing more trouble than they were worth. Other doctrines have received different treatment. “Substantive due process”—a doctrine without a constitutional foundation,31 but one practiced by judges ever since Justice Chase invoked “natural law” in *Calder v. Bull*32—has been expanded rather than contracted through time. We see little effort to evade or challenge it in the legislature, no moral revulsion, no indication that the body of the law has rejected a transplanted foreign organ. Later Justices should respect such a doctrine as part of our governmental structure whether or not they think it wrong as a matter of first principles.

To accept the structural features of a doctrine is not necessarily to accept any given application. The application of this doctrine to produce a case such as *Roe v. Wade*33 is not immune from scrutiny. The structural aspects of any constitutional doctrine should be more enduring than any one application. (I am not interested for current purposes in applications and express no views on any legal rule.) There is, moreover, a genuinely difficult problem in understanding the level of generality at which a constitutional doctrine should be preserved. Take the application of the equal protection clause to subjects other than race. That was accomplished long ago and is the basis of much of our existing governmental structure. But the conclusion that laws must be equal with respect to things other than race does not assist us in knowing what “equality” is; it is an empty vessel that can receive many libations. Judges should be shy about taking any rule at a high level of generality. Exceedingly general

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29 163 U.S. 537 (1895).
30 316 U.S. 455 (1942).
32 3 U.S. (3 Dall.) 386, 387-89 (1798).
33 410 U.S. 113 (1973).
rules, coupled with the understanding that judges have the power to interpret the law, transfer effective legislative power to the courts.\textsuperscript{34} None of these limitations, however, affects the point I have been making, so long as it is clear that the proposition “doctrine X should be left in place unless there is a consensus that it is wicked” is not equivalent to “doctrine X should be pressed for all it can be worth.” Just as the Court wisely has declined to discard \textit{Miranda}, so it has wisely declined to extend it.

I have brought you a few contentions: that the role of precedent should be similar for all decisions interpreting texts, with any difference in the direction of making it harder to revise constitutional interpretation, and that precedent can be a destabilizing as well as a stabilizing influence. Beyond those affronts to accepted wisdom I have little to say. I began without a theory of stare decisis and end that way.

\textsuperscript{34} See American Jewish Congress v. Chicago, 827 F.2d 120, 137-40 (7th Cir. 1987) (dissenting opinion).
As the last speaker of the day, I appear before you with considerable trepidation, not only because you have heard a lot of speeches by now, but because before I came I read a statement made by one of my colleagues on the Ninth Circuit. It appeared in the Federalist Society article passed out to you today, "Right Place at the Right Time." The article says that you clapped thunderously as my colleague Judge Noonan boomed in righteous indignation, "the enemy is ranting, empty-headed, mealy-mouthed liberalism." Well, I will try not to be empty-headed or mealy-mouthed, but I guess I am the enemy, at least, according to my colleague Judge Noonan—because I stand here today not only as a judge but as an unreconstructed liberal.

I do not condemn all conservatives. Nor do I believe all conservatives have disrespect for the law—only some. The political attack on the role of law and the courts engaged in today by the Justice Department's representative is not only unseemly, it is unfortunately nothing new. Whether it is that the executive branch is above the law, or that the Supreme Court should have no respect for precedent, the Department's message is and has been, consistent. It is not too surprising that there was little mention of justice by the representative of the Justice Department. It is surprising, however, that there is respect neither for law nor order. It is not my place, as I said, to judge any or all conservatives today, or to fulfill Mr. Cooper's prophecy that liberals will tell conservatives to obey the law. Rather, I will try to tell you how I as a liberal try to apply the law, and how I try to answer the question of the conflict between text and precedent in constitutional adjudication.

Preliminarily, I should say I am a strong believer in precedent. I think that our willingness to respect precedent has made our legal system the success it is, and I believe firmly that we must interpret our Constitution in light of the precedent which has been developed over the past 200 years. Still, we all agree that there are times when precedent may properly be overruled. One way to explain when this
may be done in constitutional cases is to put it in terms of today’s topic—when precedent conflicts with the Constitution.

The basic question is how do we determine whether there is such a conflict? Must there be a conflict with the text, or is a purported conflict with the intent of the drafters enough? Must the conflict be with the literal language of the Constitution or the founders, or may it be with the purpose or objectives that underlay the choice of particular terms or phrases? How certain should a judge be of the true meaning of the Constitution before he votes to override precedent? The topic raises all the issues inherent in the question, “How should a judge reach decisions?”

Hard as it may be to accept, there are no absolutist answers to these or almost any other questions in the law. There are frequently several plausible and potentially correct answers. Often there is no necessary answer. The basic questions posed today and the basic questions we face as judges are steeped in uncertainty. All require judgment, application of philosophy, values, yes, balancing. And all require a sense of justice—a sense that is too often lacking. The fact that there may be a choice among plausible answers makes law no less important a tool, and compliance with the law, including judicial decisions, no less essential a responsibility.

We cannot leave it to each President and each individual to decide which parts of the law he will obey. Fifteen years ago, we had a President who thought he was above the law, who thought he was not required to obey the law. I thought the question of the President's accountability was put to rest at that time, and I think it must now be answered unequivocally in the affirmative if any doubt remains. To me, that is what the legal system is about, that is what the Constitution is about. Respect for law, respect for justice, and respect for order applies to all of us—Presidents, judges, Congressmen. If the President can disobey the law or treat Court decisions as non-precedential, Congressmen should be able to disobey the law, and I suppose we judges would also be free to ignore the Supreme Court. Sometimes it may seem to some of you as if we judges do that. I can assure you that we do not do it deliberately. We may have legitimate disagreements, but all judges I know, conservatives and liberals, try to follow the law as they understand it. We may have some disagreements on how we reach our decisions, but I do not know any judge personally, or any judge with whom I have had contact, who does not believe it is his duty to follow, obey, and apply the law. I do not think we believe we have any greater right than anyone else in this country to disregard the law.

Now, whether you obtain your meaning of the Constitution by limiting your examination to what you believe a number of individu-
als thought two hundred years ago, whether you believe there is a
discoverable natural law waiting for you to come along and reveal it,
or whether you believe that you should look for basic constitutional
concepts and apply them to society’s changing circumstances in
light of society’s changing values, you are still only talking about
selecting a technique. No particular technique leads to a necessary
result when we decide legal problems. One can rely solely on the
literal words of the Constitution and still find oneself faced with two
equally plausible interpretations. So, too, we can look at the legisla-
tive history or the words of the founders and not know the “right”
answer with any certainty. Most often the answer we reach is influ-
enced by our fundamental philosophy as to the role of government
and the rights of individuals. These basic views dictate the conclu-
sions judges reach more often than does our choice of process.

Nevertheless, the process is important, and the technique is
also. But none of these questions are as simple as they appear. The
technique, like all else, is ordinarily a mixture, a melange. We do
not just read the language of the Constitution and ignore the words
of the founders. We do not just read the words of the founders and
ignore the language of the Constitution. We do not just read both
and ignore the cases that the Supreme Court has decided. Finally,
we do not overlook the philosophy of the law that we have devel-
oped over a lifetime, through study and experience, through pain
and through turmoil. Judging is a complex matter, and we look at
all of the factors, subjective and objective. Now, that brings us to
the unfortunate fact that in the end we need to apply our individual
intelligence, our individual understanding, our individual judgment,
as judges, to those problems. Fortunately, (to respond to the Solici-
tor General’s comments) we are not janitors. Fortunately we have
been trained to use the best legal reasoning and the best legal
processes possible to arrive at what we believe to be the correct an-
wers—to exercise our best possible judgment. That is all we can
do in a system of law and justice administered by mortals.

Now, let us consider a specific question. Was there a conflict
between the fourteenth amendment and Plessy v. Ferguson?1 Some
would say yes, some would say no, even today. Conversely, does
Brown v. Board of Education2 conflict with the intent of the drafters
of the fourteenth amendment? Again, we can probably find legitimate
disagreement on that point. Certainly, it is a historical fact that
those who supported the fourteenth amendment also supported a
system of segregated schools. While I think that most of us now
agree that the answer to the constitutional question is clear, it is

1 163 U.S. 537 (1896).
certainly not one that could be arrived at simply and unequivocally by reading the literal words of the Constitution or examining the intent of its adapters.

The question whether a conflict between text and precedent exists is usually a murky one. Almost never, if ever, is there a conflict between the plain, unambiguous, literal language of the Constitution and precedent. If it were all that clear from the literal language, the first Justices to address the issue would normally perceive that fact and follow the plain meaning.3

The real issue is when should the Supreme Court overrule precedent. As I have already noted, there is almost never a conflict between precedent and the plain meaning of the constitutional language, at least not one that is apparent to most judges. There may, however, be a conflict between precedent and the “true” meaning of the constitutional provision even if that meaning is not apparent simply from a quick, literal reading of the constitutional language. We may, in some instances, have to study history. We may have to attempt to obtain a fuller understanding of constitutional purposes and objectives through a variety of examinations and disciplines. So, what do we do when we think that there may be a conflict? How do we decide whether there is in fact a conflict between the meaning of the Constitution and precedent? Well, as I said, there are various techniques, but in most instances none leads to a necessary answer.

Part of the problem is our reluctance to acknowledge what we do when we make choices. A good example is found in three cases decided in one decade by the United States Supreme Court. First, in Logan Valley,4 in 1968, the Court said that there was a free speech right to picket in shopping centers during labor disputes. In 1972, in Lloyd v. Tanner,5 the Court said that Vietnam protesters were different; they were not allowed to picket in shopping centers. In 1976, in Hudgens v. NLRB,6 the Court said there is no difference between labor speech and political speech; therefore, the picketing permitted in Logan Valley must be prohibited under Lloyd. Accordingly, the court overruled Logan in the name of respecting the precedent established by Lloyd, although Lloyd expressly said it was not

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3 In this discussion I am talking about the role of the Justices rather than the role of circuit court judges. In our circuit, as in Judge Easterbrook’s, we are not free as a panel of three judges to overrule our own precedent. Only an en banc court can do that, and we sit infrequently en banc and only rarely overrule our own precedent when we do. So, with rare exceptions, the answer to when a precedent should be followed in our court is clear—always.


overruling Logan. I think a legitimate criticism may be offered of the Supreme Court's technique because there was a deception in the way the Court arrived at its result. There was a lack of honesty that can only injure the judicial system.

There is too little honesty in all too many of our opinions when we describe how we reach our conclusions. For example, and I am as guilty of this as anyone else, when you finish reading one of our opinions, ordinarily you would think that the judge believed there was not the slightest possible doubt as to the proper outcome. The arguments in the opinion appear so persuasive, at least to the author. The result seems so simple and obvious; all the arguments favor one side. But that is not how it really is. There are hidden choices in every decision, choices that are difficult and complex, that take us down different roads and lead us ultimately to different results. We ought more frequently acknowledge that there is real doubt as to the outcome, set forth in our opinions some of the doubts we have, and admit to some of the choices that we have made along the way.

Now, in making those choices, I would have to say that every judge I have ever known is influenced by his fundamental philosophy of law and of life, by the changes that have occurred in society, by his view of his role as a judge, and his view of the legal system, as well as by stare decisis. The choices involve personal, subjective elements, but they fit within an orderly process of reasoning, within a logical, rational process of attempting to determine the meaning of the law. Some people in this country have a longing for simplistic answers, for the return to a simpler society, to a day when law was law and men were white males. It would be nice if we could fit all of our problems into neat little pigeonholes, if we could all become janitors, or even computer operators who need do very little but push a button and obtain an answer from a machine. But most problems that concern the public do not have simplistic solutions, and they require judges to judge, to exercise judgment, to do their best to try to understand what the law is.

Our basic constitutional principles are ordinarily stated quite broadly. We can legitimately draw various interpretations and justifications, and precedent usually exists on both sides. The primary disputes that we have today reflect longstanding differing views of the law, both procedural and substantive. Often, one view has prevailed in some occasions and the opposite view on others. We can find numerous cases in the books adopting the varying principal views. As judges, we can find persuasive precedent for almost everything, and, in many cases, we can find strong precedent for both sides of the argument. That is when our judgment is required.
Now, when a Justice decides, through whatever complex process of reasoning he follows, that under his view of the meaning of the Constitution a precedent conflicts with that document, or to put it differently, that he believes that the last group of Justices to consider the issue was wrong, under what circumstances should he vote to overrule precedent? Here, I think I agree in part with Judge Easterbrook, although I am not certain how much.\(^7\) I know he does not like balancing, but he agreed that often there is no clear answer, that there are a number of factors to consider. I believe we must give weight in varying degrees to a number of factors, and I do not think we can do it by applying the law of economics. I do not think we can engage in a statistical analysis. I do not think we can profitably apply a cost-benefit analysis.

Yet there are factors that we must apply. It is easier to list the factors than to say what a judge should do once he identifies them. The factors are as follows: How sure is a Justice that he is right? How well established is the "erroneous" precedent? How wrong does the Justice believe the precedent to be? How important are the rights involved in light of the Justice's own view of the essence of the Constitution? How disruptive will the change be? How likely is the reversal to last and be stable?\(^8\) Is there a principled way to limit rather than overrule the precedent?\(^9\)

Now take all these factors and add them up, and there is still no mechanical system, no mathematical formula, that allows you to arrive at a foreordained judgment. We cannot assign points to each factor, and even if we could, not one of them is itself subject to a precise mathematical application. Each invites an answer from a scale rather than an absolute yes or no. So in the end we must make an overall judgment by weighing and balancing—yes, this will often yield a subjective judgment, but always, we would hope, a principled and reasoned one.

What we could do to aid those who should have more respect for law and order, and for judicial decisions, is to strip the masks, remove the mysteries, eliminate the rationalizations, expose the myriad of choices, and make them understand that law is truly complex. They should also understand that judges are generally honest, decent people. Judges do apply their personal philosophies, and

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\(^7\) I do not believe, for example, that a precedent is without force simply because reasonable men could arrive at a different result or the decision was issued by a divided Court.

\(^8\) See Justice Rehnquist's dissent in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985), in which he suggests that the next time there is an appointment to the Court, the Justices will reverse the precedent once again.

\(^9\) Is that what Justice Powell attempted to do in advance, somewhat inartfully, in Bowers v. Hardwick, 106 S. Ct. 2841 (1986)?
that is why the judges who have been appointed during this administra-
tion generally have one philosophy, and why many of the judges
appointed in the past administration have another. Unfortunately,
the last administration did not have an Attorney General who was as
committed to a particular philosophy of law as the present one. I
have no criticism of the present Attorney General for having that
kind of commitment. I wish some of the past ones, however, had
had a similar commitment to their administration's point of view.

To end with a specific: if basic human rights are involved there
is far more reason to overrule precedent than in other cases. Now,
that reflects my view of what the Constitution stands for; others will
disagree. I believe that our understanding of fundamental rights
changes as society progresses. We no longer put people in stocks or
stone them, although we still have capital punishment. If the Consti-
tution expresses a set of fundamental principles, as I believe it
does, then its interpretation must change with the times.

In my opinion, historicists, or as they sometimes like to call
themselves, interpretivists, do an injustice to the Constitution if they
seek to freeze its meaning so that a particular clause can be applied
only to specific circumstances contemplated at the time of its enact-
ment. I will not get into that debate here. But if at the time of Plessy
v. Ferguson\footnote{10}{163 U.S. 537 (1896).} we thought separate but equal was constitutional, it was
because that was the specific view of at least some framers of the
fourteenth amendment. Was that their general view as well? That is
the issue you heard about earlier. But more important than whether
the specific or general intent should control, or even what the gen-
eral intent was (and each side can find arguments as to whether
Plessy should have been overruled under traditional criteria), by the
time Brown v. Board of Education\footnote{11}{347 U.S. 483 (1954).} was decided society simply knew
better. Therefore, the court was right when it overruled an erro-
neous precedent. Plessy was a fundamental decision that adversely af-
fected basic rights, and that, we learned with the passage of time and
with increased wisdom, was contrary to the essence of our Constitu-
tion. That knowledge alone, regardless of the applicability of the
other criteria, necessitated the abandonment of Plessy as precedent.

To me the Constitution is not a cold, bloodless document. This
country and our Constitution stand for far more than freedom of
contract, far more than Adam Smith's economics. They stand for a
government that will promote the general welfare, and for the right
of individuals to be free from arbitrary governmental actions. The
Constitution stands for a just society, and for justice. In my opinion
when Justices make their decisions, when they decide whether to
overrule what they think may be erroneous precedent, they should do so with those fundamental concepts firmly in mind.

To conclude, there is unfortunately no simple answer to the question before us today. Sometimes precedent should be overruled; sometimes it should not. There is no mechanical, no mathematical, no rigid formula for deciding when. Justices must weigh the various factors they have identified as important in making such determinations. Unfortunately, we may not agree on all of those factors; some of us might utilize different ones. But whoever is on the Court must take precedent seriously, must apply the factors he deems appropriate, and must do his best to try to give the Constitution the interpretation he believes proper, in light of history, in light of its text, in light of precedent, and in light of the fundamental values that the Constitution incorporates and that illuminate its meaning.
DISCUSSION: THE CONFLICT BETWEEN TEXT AND PRECEDENT IN CONSTITUTIONAL ADJUDICATION

MICHAEL KINSLEY (Editor of The New Republic): I want to ask Charles Cooper if he could address a point that I think that Judge Reinhardt and Judge Easterbrook both made in slightly different ways. It seems quite obvious that if the Supreme Court has done something completely stupid and everybody on the current Supreme Court agrees about that, then they should overrule it. I guess if you had to put this point in a nutshell, it would be a question of humility. In most circumstances, it is not all that certain to people what the proper result is. Even if it is certain to them, they should have a grain of doubt in their minds whether, if at least five of the nine Justices were wrong in the past, they could be wrong themselves. In addition to this kind of humility, this kind of sense of uncertainty, should a sense, as Judge Easterbrook put it, of the institution being more important than any individual justice play some role and give them some reluctance about simply overturning a precedent because they happen to think it was wrong?

COOPER: I think you properly characterized it as a sense of humility or perhaps judicial modesty. I certainly concede that if the judge cannot conclude that he or she is persuaded that the precedent is an error, it is entirely appropriate to defer to the decision that has been made. That to me is a sense of modesty. Once the judge persuades himself or herself that the decision was in error, and I candidly confess there are degrees of persuasion, I think fidelity to the law and the lawmaker, and in essence to our system and to the notion of consent by the governed, requires that the judge vote to overrule the decision.

KINSLEY: Should the degree of certainty be higher if there is a precedent than if this is a new question on which the Court has never ruled before?

COOPER: If a challenge has been made to the reasoning of the decision, I think the reasoning should be tested and if it survives the rigors of re-examination, certainly it should be adhered to. Again, if one cannot conclude that it is wrong, then I think it has survived the rigor of re-examination.

HIGGINBOTHAM: Well, with regard to the degree of persuasion, I first want to emphasize the obvious; the distinction between the horizontal and vertical reaches of precedent, which is a distinction we keep blurring. The authority of the Court to re-ex-
amine its own precedent is quite different from the authority of an inferior court to re-examine precedent of the higher court. First, with regard to the horizontal reach of precedent, and we are talking about constitutional precedent, I remind you that both Justices Brennan and Marshall have noted in every death penalty case that they view the death penalty as unconstitutional; that is an automatic two votes for a stay in every death penalty case. Of course, the Court has “authoritatively” spoken on that basic issue. Nonetheless their vote is, and it is the same each time, that in all circumstances, the death penalty is unconstitutional. That signals two Justices’ view of the Court’s own precedent. Of course, they are not disregarding the controlling force of the majority vote; rather they are repeating their continuing view that the issue is not settled.

It is a different matter when one is looking vertically because there are also quite different interests involved. When one turns vertically, other institutional concerns are important, not the least of which is orderliness. Now, an inferior court judge, it seems to me, has the latitude to read precedent within the limits of stare decisis. And while we cannot define it scientifically, there is inevitably a plain holding, if we are intellectually honest. The fact of the matter is, that when we look at it, if there is no way around it, we abide by it, although we may not like it. If you believe that constitutional text has been misread, and you cannot within the authority given to you to so read precedent, then you have a choice, you either abide by it or resign as an inferior court judge.

On the other hand, the Justices ought to reconsider when persuaded that they are wrong. And in considering whether they are wrong, they must weigh the considered view of those who have gone on before, and weigh that expectations may have been settled. Having done so, if yet persuaded, they turn it back.

EASTERBROOK: I want to make one point about the question of how confident someone should be before he votes to overrule precedent. The stability interest in a system of precedent is that it collects contributions of many people, each of whom has given a great deal of study to some area of law. That suggests some difference in the way in which you think about overruling a precedent. There is a difference between overruling a precedent that can be picked out as itself a sore thumb in the law and overruling a precedent that would call into question a very large body of precedent that judges have contributed to and worked on for a much longer period. In a case in which the attack is being made on a single reading of a statute which is not embedded in a very strong set of doctrines, there seems to me no particular reason why you should demand a higher than ordinary degree of confidence. To the extent
there is a higher than ordinary degree of confidence, it is simply that you have the benefit of hindsight, something that your predecessors lacked, and you have everything else they had, and you can make your own decision accordingly.

Suppose the question, however, was whether we should suddenly reverse, nearly one hundred years after it was decided, Ball v. United States, the first important double jeopardy case. Overturning this precedent would mean that the double jeopardy clause picks up the English system of double jeopardy so that any time a conviction is reversed on non-jurisdictional grounds, the defendant may not be retried. That is the English system. Before we say that our double jeopardy clause really picks up the British system of former acquittal and former conviction, we would have to be exceptionally confident that we understood not only the genesis of the double jeopardy clause, but also all the consequences of making that move. That is a body of doctrine that has been elaborated on for a very extended period, and it has not proved to be terribly unsatisfactory in outcome. You would naturally, in dealing with such a body of doctrine, demand a substantially greater degree of study and confidence than you would in dealing with single shot decisions on a particular statute that does not appear to affect or come from a much broader study or much broader doctrine.

COOPER: I certainly do not have any disagreement with that analysis. It may well be that in undertaking the re-examination of a well-established body of doctrine, you have to do a whole lot more work, and I do not regard that as problematic.

HIGGINBOTHAM: The other observation is that we are talking principally about the practice of overturning precedent. I suggest to you that the law changes more often than not by the Supreme Court simply cutting precedent back to an irrelevant state, by stripping the legs from it, and by narrowing precedent, than by expressly overruling it. Stare decisis has allowed the Justices to do this.

REINHARDT: Well, I thought we were going to clear up our disagreement after Mr. Cooper’s first rebuttal. My notes of what he said are, that if the judge cannot conclude that the precedent is in error, he should not vote to overrule it. Well, of course. Who would vote to overrule precedent if he thought it was right? That was, however, the only limitation that Mr. Cooper advanced. As I understood his response, it was that if the judge thinks the precedent is wrong, then he should vote to overrule it. Then, in this next response, he added, the judge may have a lot of work to do, he may

1 163 U.S. 662 (1896).
have to read the precedent and look at its reasoning, and then decide whether it is wrong. As I understand his position, it is still that there is no role for precedent other than as a document for a judge to read—the way he would read a brief—to see what the legal reasoning is and whether he believes it is correct.

If that is the position of Mr. Cooper or the Justice Department, I am in complete disagreement with it, and I am in agreement with Judge Easterbrook's position, at least in general. I believe that there are a number of factors we must give weight to in deciding whether to overrule precedent. I mentioned them previously. The weight to be given the various factors may differ depending on the type of case involved. As an extreme example, I might mention Justice Brennan's and Marshall's votes on the death penalty. Those votes probably would meet the test that I offered. Is it a fundamental right? How persuaded is the judge that the precedent is erroneous? How important is it that the precedent be reviewed? What will the effect be? I would suspect that Justice Brennan and Marshall considered all these factors and decided that the cases upholding the death penalty are the type of precedents they should vote to overrule. That does not mean they would overrule every type of precedent just because they disagree with the decision. It means that after evaluating, weighing, and balancing all the relevant factors, they have come to what they believe to be the appropriate judgment as to a particular precedent or line of cases.

We should attempt to arrive at a set of factors which should generally apply when determining which precedent we overrule and which we do not. While the application of those factors would not be precise and would contain elements of subjectivity, we would at least have a rational and orderly intellectual process to follow. But even if we do not succeed, the system currently is working reasonably well.

I wish there were an absolute answer to this and other legal questions. There simply is not. The alternatives to the system I and most others endorse is to either overrule precedent willy-nilly, as Mr. Cooper suggests, or never to overrule it, as others might suggest. I do not think either liberals or conservatives can accept those responses. Therefore, we will probably continue to muddle along, as we have with considerable success for the past two hundred years, recognizing that precedent should be overruled only in limited circumstances and that, whatever the criteria we apply, the burden on those who would change our understanding of the Constitution is far from a light one.

COOPER: Or we overrule precedent when we want to, and
basically that, I think, is the essential test we have been offered. And I rest my case.

QUESTION: Concerning various constitutional debates that are touching us today, like abortion and affirmative action, should the Supreme Court opt not to decide and thus allow a greater amount of freedom of choice to each state to decide these issues?

EASTERBROOK: Yes. The reason is exactly the reason that Judge Reinhardt and Professor Neuborne of the last panel gave. That is, when it is possible to describe a constitutional issue as being open-ended, as not having a right answer, as being difficult to pin down, as having a range of admissible answers, you have given a reason why the Court cannot demand to have a single absolute answer and be obeyed. You have in other words defeated the argument for judicial review in *Marbury v. Madison*.² *Marbury* was based on the proposition that there were right answers. When you deny Chief Justice Marshall's premise in *Marbury*, you have denied the power of judges to have the last word.

² 5 U.S. (1 Cranch) 137 (1803).