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WHY THE REAGAN ADMINISTRATION RESISTS RADICAL TRANSFORMATION OF THE CONSTITUTION*

Gary C. Leedes**

I. THE ATTACK UPON A CONSERVATIVE CONSTITUTION

In explaining the Declaration of Independence, Thomas Jefferson stated that he did not intend to cite "new principles, or new arguments, never before thought of." The conservative Founding Fathers were not dreamers proposing a "new and theoretical system, not backed up by centuries of experience." They did not seek to transform the world economically or politically; their objective was to restore personal liberties "within a context of communal stability." Such a view found ready acceptance because Americans in the colonies were used to a rule-centered legal system that changed slowly and incrementally. The common law, a stabilizing force, facilitated capitalism and expressed ethical beliefs about good and proper order among practical, right-minded men. The idea of unchanging principle, or "natural law was rooted deep in the minds of those Puritan communities who had fled from England . . . in order to escape royal despotism."

Communal stability was undermined during the 17th century, when "professional administrators," who were vested with extremely broad discretionary powers, ignored the theoretical "contractual re-

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1. C. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 25 (1942) (citing 7 THE WRITINGS OF THOMAS JEFFERSON 304 (ed. 1869)).
4. C. ROSSITER, supra note 2, at 230.
The guarantees of the common law\textsuperscript{9} became more secure after Sir Francis Bacon, who defended the royal prerogative, was impeached in 1621 at the behest of Parliament.\textsuperscript{10} Thereafter, the English monarchs were forced to share their sovereign power with the representatives of increasing classes of people. Crudely put, the sovereign's jurisdiction was limited.

The next few decades saw tremendous upheaval in England's system of rule. In 1641, Parliament presented the king with a Grand Remonstrance reciting many grievances,\textsuperscript{11} but his refusal to compromise made civil war inevitable. Charles I was beheaded in 1649. During most of the interregnum, representative government was ineffectual, but the Restoration of 1660 revitalized and increased Parliament's political clout.\textsuperscript{12} Charles II learned to manage Parliament rather than to engage in imprudent political opposition. However, his successor, James II, united the propertied class against him\textsuperscript{13} after his obstinacy and his autocratic methods ensured his downfall.

In the Glorious Revolution of 1688, a combination of Whigs and Tories, the latter previously loyal to the monarchy, succeeded in driving James II from England,\textsuperscript{14} and replacing him with William and Mary.\textsuperscript{15} The powers of William and Mary were limited by a Bill of Rights,\textsuperscript{16} and judges were assured of their "office[s] during good behaviour at fixed salaries. . . ."\textsuperscript{17} Subsequently, the "divine right of kings," formerly an accepted justification for dictatorial rule, became a discredited political theory.

In view of the preceding historical survey one may understand the influence of John Locke on the colonists. He had justified the Glorious Revolution on the basis of natural law, and his political theory, although abstract and unspecific, is clearly a contractarian theory.
with religious roots. 18 “In his [Locke’s] thought every individual conveys to society as a whole his right of executing the law of nature; all other natural rights he retains.” 19 John Locke’s argument, carried to its logical extreme, posits a right of revolution against a king or a Parliament. 20 Americans exercised this natural right in 1776.

More generally, Americans drew their ideas about natural rights from the confluence of three main streams of thought. 21 The political ideas were largely those of the Puritan Revolution (although there were several different republican conceptions that comprised Puritan political thought). 22 The legal justification was drawn largely from the “seventeenth-century contests between the English courts and the crown.” 23 Moreover, some of the Founders were influenced by some Enlightenment thinking—that which was not too radical for the relatively conservative American land-owners and merchants to accept. 24

Although the Founders claimed the natural rights were based on principles of higher law, the rights recognized by courts in America were often based on reasonable inferences drawn from customs, tradi-

19. T. Plucknett, supra note 7, at 63.
21. American leaders had immersed themselves in the literature of politics and government. Their understanding of the great works of earlier ages—even the Roman and Attic classicists, to name a few: Cicero, Herodotus, Thucydid, Polybius and Plutarch—was influenced by their Christian world view of natural law. The Hebraic and Christian traditions were very much alive. All political thinkers assumed the existence and applicability of the “Laws of Nature and of Nature’s God.” What emerged from this study was an amalgam of thoughts as the Puritans’ social contract conceptions competed with many other republican political ideas, all of which had roots in the liberating ideas of the Reformation, the writings of John Calvin, Samuel Rutherford, and the English libertarians. Algernon Sidney, Coke, Lord Bolingbroke, Thomas Gordon, John Trenchard, and James Harrington among others. Missing from the list of English authorities—respected in America—were the Levellers and Diggers who were far too radical for the conservative Americans.
22. The republican conceptions of James Harrington are emphasized, updated, and summarized by Professor Frank Michaelman, who reviewed the recent literature that emphasizes somewhat egalitarian conceptions of republican ideals that are said to prefigure the Marxist critique of abstract legal rights. See Michaelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 36-49 (1986). Forrest McDonald makes some important distinctions between puritanical republicanism, which emphasizes morality, an agrarian variety of puritanical republicanism that emphasized socio-political arrangements, and oppositionist ideology, which was rooted in the writings of the 17th century commonwealthmen, especially Harrington and Sydney. F. McDonald, Novus Ordo Seclorum 70-96 (1985).
24. Few Americans, if any, wanted to destroy the existing social order.
tions, and legal precedent—unlike the visionaries among the French revolutionaries who, generally, stressed philosophical abstractions and speculation. The Founders tried to understand the relationships between the particular laws of their states and the permanently relevant principles. The Founders were also practical; they did not confuse liberty with license. They believed that the "decay of a people's morals signaled the end of liberty and happiness."  

Though the Founders were devoted to liberty, the Articles of Confederation failed to prevent state legislatures from impairing vested property rights and liberties. The weakness of the national government and the ineffectual checks on faction-ridden state legislatures undermined the reasonable expectations of citizens, who felt betrayed. The problem of limiting the powers of majorities without making the government too weak to perform its duties was solved, to the greatest degree practicable, by the allocations of power in the United States Constitution.

So then, "[t]he idea of a written constitution [did] not arise in a historical and cultural vacuum."  To understand the Founders' conception of its purposes, "legal interpreters must take seriously the contractarian moral idea ... for the republican ideals and concepts of the abortive Puritan Revolution, which never took root in Britain, received in America a remarkable opportunity of self-conscious political elaboration."  More specifically, Americans recognized that civic virtue is the character trait that makes a large nation's population qualified to engage in the experiment of self-government.

A nation founded on the proposition that the members of the political community are directed by a sense of right and wrong needs coercive laws to punish individuals whose actions are deemed morally obnoxious. Laws imply "a normative direction to citizens."  J.S. Mill's idea that the government should not regulate morality and should not punish perpetrators of "victimless" crimes was not acceptable to the Founders whose notions of the common good were fused with their notions of civic virtue.

Even though they desired law to secure and maintain civic virtue, the Founders were prudent enough to delegate power in fragments, and not all sovereign powers were surrendered by the people. Limited

25. A. Soboul, supra note 6, at 5-7.
27. D. Richards, supra note 18, at 54.
28. Id. at 55.
29. J. Finnis, supra note 18, at 283.
powers were granted to the national government, but the police powers were reserved for the states. However, the limits and scope of the police powers and the precise definitions of the people's rights and duties are not always apparent in the Constitution. Obviously, the Constitution is an outline, not a self-executing law; interpretation is required. Even this statement, however, has to be qualified since the document does not directly address every legal question presented to a court.

The current debate over the proper method for interpreting the Constitution heats up when radicals argue with each other and with conservatives over reserved rights, fundamental rights, and the Court's method of identifying these rights. What is the nature of a right? Which rights are reserved? Which ones are fundamental? And how does a court of law answer these questions?

Although many answers are possible, conservatives believe that judges—duty bound to obey the law—should use legal reasoning to maintain the system's continuity, equilibrium, and coherence. Unfortunately, however, a new generation of radical critics are engaged in the "politics of . . . disrupting whatever understandings happen to be settled." The radicals' contempt for the concept of consistently applied stable law has affected the courts by changing the judges' perception of their role.

Harvard Law School Professor Duncan Kennedy, who advocates a reconceptualization of the Constitution, writes, "I see myself as a focus of political energy for change in an egalitarian, communitarian, decentralized, democratic socialist direction. . . ." This fuzzy approach is not rule guided. Kennedy is admittedly willing to ignore legal constraints, manipulate precedent, distort facts, and juggle principles in order to further his social agenda. Basically Kennedy describes the model judge as an existentialist whose role is to alter the law as rapidly as he can—after he decides how it should be manipulated or rewritten in accordance with Kennedy's socialistic world view.

The radicals' vision of social justice is often contemptuous of

30. The Framers' intent has to be pieced together from pamphlets, newspaper articles, broadsides, almanacs, sermons, orations, and numerous other sources.
31. J. FINNIS, supra note 18, at 275-76.
34. Id.
American traditions that place a high value on the free enterprise system, the integrity of the family, the sanctity of life, and the rule of law. Their politics of disruption is intentionally causing confusion. Four Supreme Court Justices, perhaps confused by the plethora of commentaries published by these radicals, nihilists, and neo-Marxists, signed a dissenting opinion suggesting the exercise of police power must be “morally neutral.” Many conservatives, therefore, recognize an urgent need to restore, as the nation’s basic norm, the written Constitution, as illuminated by the Founders’ known intentions. On the other hand, radical scholars, who lack coherent theories of constitutional interpretation, regard the Framers’ intent as a mystifying element that is used by the ruling class to preserve an unjust, oppressive regime.

II. A PLASTIC CONSTITUTION

“This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” So begins the second paragraph of article VI of the United States Constitution.

If judges differ with the imperatives of the written Constitution, they may not, as Duncan Kennedy otherwise contends, “go quite unhesitatingly for a ‘nonlegal’ approach.” Quite the contrary: article VI, clause 3 provides that all members of the legislature and all executive and judicial officers including those of the United States Supreme Court “shall be bound by Oath or Affirmation, to support this Constitution.” The Framers were aware that the Constitution and “the Rule of Law [do] not guarantee every aspect of the common good,” but each judge has the duty “of ‘ensuring the unbroken continuance of law’” as he preserves the tradition of the legal idea captured by the text.

During the ratification process, the Constitution’s opponents were apprehensive about the uncertain breadth of the Constitution; they were particularly concerned about the powers delegated to the

37. U.S. CONST. art. VI, cl. 2.
38. Kennedy, supra note 33, at 528.
39. U.S. CONST. art. VI, cl. 3.
40. J. FINNIS, supra note 18, at 274.
national government, including the federal courts. Their worst fears have been realized. Federal courts in the twentieth century often cite the due process concept to transform the meaning of text allocating powers to Congress and the state legislatures. In modern parlance, "due process of law" refers not merely to procedural regularities, as it did in the 18th century; the due process clauses now have the potential to nullify laws that foster community morality and civic virtue.

By linguistic sleight of hand, a judge who is intellectually committed to values other than the supremacy of the Constitution can improperly reconstruct, beyond recognition, the intended meaning of the written Constitution. The Founders were forewarned that the "discretion of a Judge . . . is the law of tyrants; it is always unknown, different in different men; it . . . depends on . . . temper [and] passion . . . ." On the other hand, James Madison, who at first opposed a Bill of Rights, later agreed that it puts a "'legal check . . . into the hands of the judiciary' " which can be used by judges to secure an individual's rights. Despite the ambivalence of some, and the misgivings of others, article III describes a judicial power that, as interpreted by judges, has made the Supreme Court "the most extraordinarily powerful court of law the world has ever known."

An early example of judicial power occurred in 1803 when, in *Marbury v. Madison,* the Court held that an act of Congress was repugnant to article III, section 2 of the Constitution. Furthermore, in dicta, later endorsed by specific holdings, the Court asserted its power to issue decrees that require the obedience of the President of the United States. Chief Justice John Marshall, in *Marbury,* had to explain why the Supreme Court, and not the legislature or the chief executive, had the final word in cases involving interpretation of the Constitution. Marshall explained that the oath requires judges to decide cases according to the text's genuine meaning. His explanation is somewhat circular, but the Court's assertion that it is empowered by

43. There is a measure of truth in Lord Bacon's maxim: "That is the best law, which trusts the least to the discretion of a Judge, and he is the best Judge, who trusts least to himself." W. Phillips, Review of Lysander Spooner's *Essay on the Unconstitutionality of Slavery* 17 (reprint 1969).
44. *Id.*
46. A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of the Nation* 1 (2d ed. 1986).
47. 5 U.S. (1 Cranch) 137 (1803).
article III to perform a checking function comports with the separation of powers doctrine—so long as judges act as impartial arbiters.

We expect judges to reduce general legal principles to the size required by the concrete case before the court without putting a partisan spin on the relevant legal materials. The Constitution itself fosters this view by providing that federal judges “shall hold their Offices during good Behaviour.”49 The art of judging takes skill, but interpretations of the Constitution, according to Marshall, are merely by-products of case by case adjudication.50 Like the common law, the body of case law that interprets the Constitution grows by means of incremental modifications that do not transmute foundational norms.

Of course, a reader's understanding of the written text is altered when the relevant legal principles are applied in unprecedented circumstances. In hard cases, drawing out the latent meaning of the text is not a prohibited method of interpretation. Indeed the public expects the judge to be responsible for “the . . . renewal of a coherent body of principled rules.”51 If however, the judge intentionally misconstrues the intended meaning of the text, the judge violates the “good Behaviour” requirement of article III.

Radical critics of our legal system urge judicial courts to “work toward a genuine reconstruction of society.”52 Their idea of social justice, however, is a concept broader than formal justice.53 Indeed, social justice is a generality that carries the judge to a stratospheric level of abstraction. Radicals manipulate this abstraction in ways designed to reconstitute conventional morality. In the service of social justice, Kennedy advocates an approach that encourages partisan judges to treat the Constitution like plastic which can be bent out of shape in order to subvert the Founders' original understandings.54 This innovative professor alleges that respected methods of adjudication are unrealistic and outmoded because they perpetuate a corrupt and oppressive status quo.55 Radicals like Kennedy allege that the

50. Alexander Hamilton had written earlier that the judiciary “may truly be said to have neither FORCE nor WILL, but merely judgment.” THE FEDERALIST No. 78, at 504 (A. Hamilton) (Modern Library ed. 1937).
51. A. BICKEL, supra note 46, at 25.
54. Kennedy, supra note 33, at 526.
55. To be sure, the techniques employed routinely in the judicial process introduce a certain narrowness of perspective that impedes court induced change, but the Founders and Chief
power structure is “an instrument of the de facto ruling class” that exploits politically and economically powerless groups.56

Ultimately these same radicals who promote social justice offer their “muddled views and proposals”57 as a substitute for existing constitutional rules. Therefore, conscientious jurists, both liberals and conservatives, have correctly described the radicals’ notions of justice and fairness as “intellectually incoherent and morally bankrupt.”58

III. THE RULE OF LAW VIRTUES

A judge cannot decide a hard case, which falls between the gaps in the law, merely by studying law books.59 Moreover, certain ineffable norms guide the interpreter who tries to discern what is left unsaid by a text. Therefore, the “logical” techniques of exclusion, subsumption, derogation, and non-contradiction are not sufficient for hard cases.60 In short, legal science has not developed surefire syllogisms that completely eliminate discretion.61

Certain techniques intrinsic to the art of judging work reasonably well to prevent judicial runaways from taking the law into their own

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Justice Marshall believed that needed social reforms were primarily the responsibility of the people’s representatives, not courts. Normally, Marshall’s Court did not interfere with the legislatures’ functions. On the other hand, if state action clearly violated the basic law, his Court stood firm.

59. Some judicial discretion is inevitable because the extent to which an established principle governs the pending case depends not only on the selection and characterization of the relevant facts, the nature of the relief sought by the plaintiff, and the number of conflicting rules involved, but also on the nature and weight of the principle in question.
60. For an accessible introduction, see Paulson, Book Review, 48 U. CHI. L. REV. 802 (1981) (reviewing HARRIS, LAW AND LEGAL SCIENCE (1979)).
61. Oliver Wendell Holmes, Jr., a dominant figure in American jurisprudence, criticized the “fallacy of the logical form,” which was a mode of legal reasoning suggesting that every narrow case ruling is fore-ordained by a preexisting rule and that there were no gaps in the law. Taken to a silly extreme, this view implies that syllogistic logic dictates each case ruling regardless of the absurd consequences that would follow. Holmes argued that deductive logic does not always suffice for those trying to predict the outcome of a case. But Holmes was not an opponent of generalization or of the deductive method or of a predictable legal system. He was not motivated by any irrational contempt for logical inference. He did believe that it was necessary for the judge to maintain continuity with the past, and he could not abide judges who injected their own political agenda into the development of constitutional law. See generally, M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 15-18, 59-75 (1976).
hands. Many canons of judicial restraint are designed to encourage the judge to defer to the judgments made by politically accountable officials. These include the following: the doctrine of clear mistake; the canon that cases should not be decided on constitutional grounds when other grounds upon which to base the decision are present; the doctrine of abstention, which requires a court to decline the exercise of jurisdiction; and the political question doctrine, which requires total deference if no judicially manageable legal standards exist. Although these prudential standards involve a range of discretionary options, they reduce opportunities for judges to impose unacceptable radical change.

Other constraints, called "rule of law virtues," structure the case law. For example, a court has the "argumentative burden" to justify its departure from precedent. Normally, like cases should be decided alike unless the judge can conscientiously justify the different result by citing an overriding reason that outweighs the requirements of formal justice.

Although it is difficult to determine which cases are "alike," judges frequently conceal the difficulty. But the judge who makes a habit of manipulating precedent loses the confidence of the legal profession. Indeed, a court is severely criticized if it has two inconsistent lines of cases because lawyers cannot properly advise their clients if the likely outcome of adjudication is unpredictable. In short, courts are expected to make decisions that do not frustrate retroactively the reasonable expectations of persons who rely on the legal system to protect their established rights.

Justice would be delayed if the judge had to re-invent the wheel.

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62. See K. Llewellyn, The Common Law Tradition (1960). Although Karl Llewellyn was once a leader of the so-called skeptical school of American legal realists, even he believed courts do employ a responsible, intelligible method of decision making. Conversely, he believed that judges may not ignore the assumed purpose of a constitutional provision or a statute by manipulating the techniques of adjudication and interpretation in order to decide cases as they please. Id. at 374.


65. Moore, supra note 63, at 316.

66. "When a judge decides a case he does so not as a single individual standing in olympian isolation, but as a member of a professional community which is itself the bearer of a specific intellectual and moral tradition." Kronman, supra note 58, at 483.

67. Schauer, supra note 64, at 596.

68. Duncan Kennedy demonstrates how judges can manipulate precedent to make the case at hand seem analogous both to precedent and the judge's vision of the Good Society. See Kennedy, supra note 33.

RESISTING TRANSFORMATION

each time a routine case is filed. The demand for efficient judicial administration puts pressure on the judge to "let what has been settled remain so." Therefore, stare decisis stabilizes the law.

At the same time legalistic rigidity, regardless of consequences, obviously is not a rule of law virtue. Judges are not forever locked into the maintenance of a destabilizing line of cases. Therefore, in the truly exceptional case, deviation from previous decisions is sometimes condoned. For example, if the Supreme Court departs from precedent and overrules Roe v. Wade, the Justices should be able to describe how Roe makes it practically impossible for legislatures to control abortion on demand. Moreover, the Court will have no difficulty explaining how the overruling of Roe v. Wade restores the Constitution's original meaning.

On the other hand, the relatively infrequent "hard case" should not become the foundation for a radical theory of law. Judges unduly preoccupied by consequentialist considerations ultimately undermine and destroy rights. Excessive use of ad hoc balancing tests is fatal to the concept of law. Although some norms of justice require abandonment of rule of law virtues in particular cases, the reasonable judge makes the effort to integrate the novel case ruling into the network of constitutional law.

Extremists, who are looking to circumvent law, often decide cases according to the contra-constitutional formula of Duncan Kennedy whose model judge follows this approach:

As I work to manipulate the [relevant legal materials] . . . in the direction of . . . [the way I want the case to be decided], I have a strong feeling that I am acting in the world, remaking it to fit my intentions. If I manage to restate the law so that it plausibly requires my preferred outcome, I will see this as my accomplishment.

In other words, Kennedy's nonlegal approach is designed to permit courts to use the law as an instrument to further the judge's secret political agenda.

Some judges have apparently decided that the creeds of European philosophers are superior to the "parochial" or "bourgeois" or

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70. Moore, supra note 63, at 318.
74. Roe v. Wade is a classic example of this practice.
75. Kennedy, supra note 33, at 557.
“hypocritical” vision of the Framers. The judge often claims that he cannot accurately discern the Framers’ intent. This palliative argument is preposterous when, for example, Immanuel Kant is the judge’s guru. Kant, who died in 1804, wrote his “Critique of Pure Reason” before the Constitution was ratified. Yet an opinion based on Kant’s categorical imperative, or his vision of human dignity, implies that the judge has the ability to understand and elaborate upon Kant, but not James Madison.

If a judge does not understand the ideas of justice cherished by the Founders, he probably lacks the intellectual ability to understand the ideas of justice implicit in Kant’s moral philosophy. A judge, who is not a professional philosopher specializing in Kant, will depend on commentaries by post-Hegelian idealists, phenomenologists, or deconstructionists. This dependence brings into play semiotics, semiology, Levi-Strauss’s modernistic structuralism, and the deconstructionist critiques of Derrida and other post-modernists. Having gone this far, the judge will need to decide whether the hermeneutic perspective of either Jürgen Habermas, Paul Ricoeur, or Hans Gadamer captures the process of genuine interpretation. On the other hand, the reasonable judge who adheres to the rules of law and the Founders’ intent will not get lost in the wilderness of historicism, cultural relativism, dialectical reasoning, linguistic theory, and bunk.

If the judge is reasonably intelligent, he will be able to discern the meaning of the text in the routine case. When the meaning is unclear, a textual leap of faith is unnecessary because the Framers’ general intent is usually illuminating. The Framers’ intent is still an important reference point for contemporary judges. In Marshall’s words, the Constitution’s “provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers.”

The Founders, it cannot be gainsaid, professed the importance of rule of law virtues that constrain judicial discretion. The problems presented by the threat of judicial tyranny have not disappeared, and have been the subject of the great debate over the failed nomination of Judge Robert H. Bork.

76. See, e.g., Brennan, Constitutional Adjudication and the Death Penalty: A View From the Court, 100 HARV. L. REV. 313, 323-24 (1986).
A. Methods of Constitutional Interpretation

"There is probably more debate today than ever before about the duties of judges, and indeed about the freedom of judges, in deciding constitutional cases." The majority of theoretical law review articles "assign to judges not the task of defining values found in the Constitution but the task of creating new values and hence new rights for individuals against the majority." Many scholars urge judges to use—as sources of law—materials not found within the four corners of the Constitution.

Some reliance on non-textual sources of law is inevitable when judges determine which rights are inchoate in the Constitution. On the other hand, Judge Robert H. Bork writes,

Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights . . .

. . . [W]here the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy.

Academic specialists in constitutional law reply that "the original meaning of the document as drafted by the founders is unknowable or irrelevant and that constitutional decision-making should be based on a judge's understanding of certain fundamental principles of moral philosophy." Moreover, they assert that the Founders realized that their ideas of justice were primitive; supposedly they designed a living constitution, which adapts to changed perceptions of justice. The Court is singled out as the engine of change when legislative majorities fall short of the academics' ideal republic.

Critics of traditional jurisprudence further allege that constitu-

79. Id. at 384.
80. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 8, 10 (1971).
tionalists like Bork cannot demonstrate that their approach furthers a legitimate scheme of human association. The formal method of legal analysis required by the rule of law virtues are said to explode "into too many contradictory implications." A radical Harvard law professor, Roberto Unger, is developing "a program for the reconstruction of the state and the rest of the large-scale institutional structure of society" as a new jurisprudence designed to replace the formal methods. The question remains whether judges should be in the vanguard of a radical political movement. John Ely points out that the judiciary is no better, and may be worse, than the more politically accountable officials in giving expression to emerging ideas of progress. Ely also points out that in a pluralistic nation, few, if any, shared values are shared except at the highest levels of generality.

David A. J. Richards, an anti-Bork law professor who holds a doctorate in philosophy, demurs, stating that "it does not follow that because there exists disagreement about how the premises apply in concrete cases, these disagreements may not be reasonably adjudicated." Richards, however, has not yet demonstrated why these questions should be decided in court rather than by the political process. It is blowing smoke to suggest that results produced by the courts are unjust when Richard’s dynamic standard of justice is based on his self-conscious reflection on past republican experiments and theories, which he has synthesized with inferences drawn from the collected works of Kant, Rousseau, J.S. Mill, and John Rawls. The question presented by Richard’s thesis is whether judges are equipped to fathom, master, and apply the meld of ideas produced by his academic approach to government.

The law schools do not train lawyers and judges to be moral phi-
philosophers, and studies disclose very clearly that the "judges' attitudes on important social and political issues do not reflect those of the population at large." This last fact should be a cause for concern in a nation where the people are sovereign and the officials are public servants. But Richards regards the majority's understanding of many traditional American values, such as disapproval of homosexual activity, as intolerant and immoral "forms of prejudice that treats persons not as persons but as stereotypes ... that ... degrade moral personality." His theory presupposes that judges, when compared to the voters, have the intellectual acumen and honesty to acquire the capacity for "cultivating self-reflective argument, in assessing conflicting views, and in this way ... [can] cultivate[e] a more encompassing and flexible moral impartiality." Indeed, Richards believes that judges have a unique opportunity to reconstruct the Framers' intent in ways that "may best define the community's sense of what its traditions now mean or should mean." Nihilists make a different argument when they call for "opportunistic judicial authoritarianism." They do not believe in shared values, or in shared standards of rationality. Many scholarly nihilists view the indeterminateness of the Constitution's due process clauses as opportunities that can further their unconventional social theories which reflect their hatred of traditional values. These scholars are not constrained by principles shaped by English and American history. Other professors, who are not nihilists, but are enamored with insights drawn from the works of philosophy, say "history is what we make of it." Unfortunately, the Supreme Court has succumbed to this thinking. The Constitution, I submit, is often merely invoked by the Court as a cover to justify results reached on other grounds. To the extent judicial activism or judicial restraint—in the service of the judge's own political agenda—is making the entire legal system incoherent, the judges are unwittingly giving credence to the radicals' critique of law.

The Solicitor General of the United States, Charles Fried, himself a former professor, is vexed by the "notion that legal rules and

90. Id.
91. Richards, supra note 87, at 319.
92. Id. at 327.
95. But see Stick supra note 84, passim.
doctrines cannot control particular cases or even coerce our judgment and that such rules are a sham, merely invoked after the fact to justify [case rulings] reached on other grounds." 97 Indeed, many other judges and scholars do not buy into the relativistic nightmare that the Constitution's meaning is in the eye of the beholder—especially if the "progressive" beholder does not respect the Founders' ideas of justice.

In July of 1985, Attorney General Meese vigorously joined the debate, which reached fever pitch during the confirmation hearings of Judge Robert Bork. The Attorney General urged the Court to adopt, and be guided by, a "jurisprudence of original intention." This conception was immediately attacked by some notables who used language bordering on the contemptuous. None other than Supreme Court Justice William Brennan defensively declared that Meese's call for a return to a more traditional jurisprudence was simply "arrogance cloaked as humility." 98 Justice Brennan received support from Justice Stevens who also ridiculed the idea that Supreme Court justices were constrained by the Constitution's text and the Founders' original intentions. 99

B. The Position of Attorney General Edwin Meese III

Attorney General Meese does not believe judges should twist the Constitution as if it were clay in a potter's hands. In the first of several controversial speeches, he stated,

The judges, the Founders believed, would not fail to regard the Constitution as "fundamental law" and would "regulate their decisions" by it. As the "faithful guardians of the Constitution," the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution. 100

Meese alleges that the Court is producing a "jurisprudence of idiosyncracy..." 101 which is "neither simply liberal nor simply conservative; neither simply activist nor simply restrained; neither simply principled nor simply partisan." 102 Instead, the Court's cases disclose that

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98. The Great Debate, supra note 81, at v.
99. Id. at 27-30.
100. The Great Debate, supra note 81, at 1.
101. Id. at 3.
102. Id.
undisciplined justices "continued to roam at large." His critique singled out three important areas of law: federalism, criminal procedure, and religious freedom.

Concerning federalism, the Court has made a shambles of the tenth amendment's reservation of powers for the states. Meese cites *Garcia v. San Antonio Metropolitan Transit Authority,* which gives Congress the green light when federal lawmakers want to impair the ability of states to perform significant, legitimate functions. In *Garcia* the Court refused to invalidate a law that interferes with the ability of local government to structure and operate public services. But the Framers did not want the states to be mere puppets of the national government. Federalists and antifederalists alike assumed that most governmental functions would be performed by the states. Yet Meese demonstrates that the Court displayed "a disregard for the Framers' intention that state and local governments be a buffer against the centralizing tendencies of the national Leviathan."

Since the Constitution was ratified under the belief, sedulously propagated on all sides, that the tenth amendment should prevent unwarranted centralization, *Garcia* departs "from long-settled constitutional values." The Court has given Congress a blank check that, if cashed, can obliterate the independence of fifty states. Although *Garcia* is couched in the language of judicial restraint, the Court's decision has the effect, as intended, of reallocating political power, and that power is now placed within the confines of the D.C. Beltway. The Court knows full well what the Framers intended. But the Court has abdicated its previously asserted jurisdiction to maintain the balance between rival claims of the states and the Congress.

The Court also goes to the other extreme and resorts to unprincipled judicial activism as a means to interfere with orderly state government. The primary responsibility for administering criminal justice rested with the state courts until the Supreme Court reallocated power by devising a doctrine of selective incorporation. For example, the Court insists that the fourteenth amendment incorporates guarantees secured by some provisions of the first, fourth, fifth, sixth, eighth, and ninth amendments.
As a result, many obviously guilty criminals have the upper hand in state court prosecutions. For example, reliable evidence indicating guilt is excluded if acquired in a search by officers who should know they are violating the fourth amendment's prohibition of warrantless or unreasonable searches. The Court has imposed the same strict standards on the local constable which the fourth amendment imposes on the Federal Bureau of Investigation. Obviously, "[p]olice officers cannot apprehend the enemies of society while carrying [the Supreme Court's case reports] in one hand and the Emily Post's latest edition on Etiquette in the other." Unlike F.B.I. agents, the Local constabulary is not adequately staffed with trained lawyers who know the technicalities which make the fourth amendment a difficult subject to master. Thus, the criminal often goes free when the constable blunders. Although the Court has dramatically reduced the exclusionary rule's scope in recent years, the doctrine of selective incorporation has dealt a "politically violent and constitutionally suspect" blow to the principle of federalism which is a basic underpinning of the Constitution.

Justice Brennan's separate opinion in Ohio ex rel. Eaton v. Price set forth what came to be the doctrinal foundation of the Warren Court's criminal procedure revolution. This doctrine, simply put, is that the Court selects certain guarantees that are said to be "in" the fourteenth amendment, while it rejects others that are said to be "out." Curiously, the Court has never disclosed the rationale behind its selectivity. Judge Henry Friendly, who was more sensitive to the values of federalism, noted with typical understatement that "it does seem extraordinary that a theory going to the very nature of our Constitution and having such profound effects for all of us should be carrying the day without ever having been explicated in a majority opinion of the Court."

Another commentator notes that "however handy or beneficial the 'selective incorporation' theory has been as an instrument of legal
change, there seems to be no clear constitutional rationale for it."\textsuperscript{115} Indeed, Justice Harlan stated that the doctrine of selective incorporation championed by the Court has no coherent constitutional foundation.\textsuperscript{116} Professor Henkin, after a careful study of the Framers' intent, notes that "[s]elective incorporation finds no support in the language of the [fourteenth] amendment, or in the history of its adoption."\textsuperscript{117} Professor Lino A. Graglia is more blunt:

[C]onstitutional law has become a fraud, a cover for a system of government by the majority vote of a nine-person committee of lawyers, unelected and holding office for life. The desirability of this form of government should be the central question in any realistic discussion of judicial review today.\textsuperscript{118}

Equally disturbing are cases dealing with the religion clauses of the Constitution. On this subject, Meese criticized \textit{Wallace v. Jaffee}\textsuperscript{119} by noting that an Alabama statute "failed to pass muster"\textsuperscript{120} because it violated the establishment clause of the first amendment. Indeed, Alabama was prevented from authorizing a moment of silence for "meditation" or "voluntary prayer" after the Court concluded that the state intended to reintroduce and endorse prayers into the public schools.

The historical data relied on by the Court in the decision included a hotly contested interpretation of a letter written by Thomas Jefferson. Jefferson's letter notwithstanding, the Founders who believed in religious toleration did not intend to build a wall of separation that exalts secularism to the point where states cannot accommodate those who want a moment of silence during which all those compelled to attend classes may, if they choose, pray quietly together. Dissenting Justice Rehnquist stated, "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history."\textsuperscript{121} As the present Chief Justice also wrote, "There is simply no historical foundation for the proposition that the

\begin{itemize}
\item \textsuperscript{115} F. Graham, \textit{The Self-Inflicted Wound} 44 (1970).
\item \textsuperscript{117} Henkin, supra note 116, at 77.
\item \textsuperscript{119} 472 U.S. 38 (1985).
\item \textsuperscript{120} \textit{The Great Debate}, supra note 81, at 7.
\item \textsuperscript{121} 472 U.S. at 92 (Rehnquist, J., dissenting).
\end{itemize}
Framers intended to build the 'wall of separation,' "122 which requires state and local governments to be neutral in political contests between religion and irreligion.123

Meese believes it is "bizarre" for the state to stay neutral in cases involving prayer in public facilities.124 He writes that the first amendment's religion clauses function "to prohibit religious tyranny, not to undermine religion generally."125 His views are consistent with those of the Founders according to Robert L. Cord who finds no evidence indicating that the establishment clause limited the states' powers to deal with separation of church and state issues.126 Nevertheless, the doctrine of selective incorporation enables the Court to use the establishment clause as a limit on state power. Thus, once again, the Court's selectively inconsistent judicial activism threatens to make mush of the Framers' core values.

Wallace v. Jaffree is applauded by the professors who do not respect the authoritativeness of the original understanding. Indeed, Professor Perry argues that the original understanding of the text is no longer authoritative.127 He states, however, that the Framers' intention can be cited to disguise a judicial decision based on moral philosophy. Perry's views, to the extent that they are covertly adopted by the Court, enable the Justices to change the meaning of the establishment clause. Yet since radical change is the political objective of those total secularists who "believe that constitutional interpretation [by judges] must express a free response to contemporary conditions, mores, and temperaments,"128 the Framers' intent is cited selectively and fraudulently.

Meese believes that a conscientious attempt to restore candor is necessary. He respects John Marshall's admonition that "the Constitution is a limitation on judicial power as well as executive and legislative."129 Any other notion of judging is "totally at odds with the logic of our Constitution and its commitment to the rule of law."130 He scolds judges who substitute elastic words for the words of the Consti-

122. Id. at 106.
123. Id. at 98.
125. Id.
128. Fried, supra note 97, at 755. Solicitor General Fried was criticizing this school of thought.
129. The Great Debate, supra note 81, at 10.
130. Id.
tution. Similarly, Justice Black wrote, "One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning." 131

It is unusual for the Justices to respond to criticisms by making speeches and writing articles that serve to defend their decisions. Meese's criticisms of the Court, however, jarred Justice Brennan, who has tried to rally political support for his revisionary and elasticized interpretations of the Constitution.

C. Justice Brennan's Response

Taking the offensive against Attorney General Meese, Justice Brennan states,

There are those who find legitimacy in fidelity to what they call "the intentions of the Framers." In most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. 132

The Attorney General, of course, never said that the justices have a duty to discern "exactly" what the Framers thought about the specific questions of law presented in hard cases, and he knows better than to suggest that Justices who are not trained historians "can gauge accurately the intent of the Framers" 133 in every case. Meese knows that the customs and practices of those living during the ratification process are useful guides for discerning the concerns that may be ascribed to the Founders. Indeed, the concerns which made amendments to the Constitution necessary limit the scope of the general principles that may be ascribed to the Framers.

One need not be a trained historian, for example, to realize that the concerns that led to the fourteenth amendment do not encompass

132. The Great Debate, supra note 81, at 14 (emphasis added).
133. Id.
a right to abortion on demand.\textsuperscript{134} The fourteenth amendment reads in part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law."\textsuperscript{135} Obviously, the idea of racial equality, which led to the fourteenth amendment, does not justify a case ruling\textsuperscript{136} that authorizes one and one half million abortions a year.

Yet Justice Brennan offers the following excuse for many of the Court's decisions:

All too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality. Indeed, it is far from clear whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the states.\textsuperscript{137}

With all due respect, the problem of figuring out what all the relevant actors generally intended is not difficult when the question is whether the due process clause requires the invalidation of rational laws that are designed to protect the potential of human life.

Alexander Bickel was a scholar who carefully studied the original understanding of those who debated the scope of the fourteenth amendment.\textsuperscript{138} Although Bickel himself believed that history rarely gives specific answers to specific present problems,\textsuperscript{139} he did not believe that history could be ignored when it shed light on a specific issue before the Court. He wrote, "The Court is to reason, not feel, to explain and justify principles itpronounces to the last possible rational decimal point. It may not itself generate values, out of the stomach, but must seek to relate them—at least analogically—to judgments of history and moral philosophy."\textsuperscript{140} Bickel, whose review of the historical record of the fourteenth amendment was relied on by the Court in \textit{Brown v. Board of Education}, thought it "astonishing"\textsuperscript{141}

\textsuperscript{134} In Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169 (1986), Chief Justice Burger, referring to the Court's opinion, noted that it undermines the rejection of "the idea of abortion on demand." \textit{Id.} at 2190.
\textsuperscript{135} U.S. CONST. amend. XIV, § 1.
\textsuperscript{136} Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{137} \textit{The Great Debate}, \textit{supra} note 81, at 14-15.
\textsuperscript{139} A. BICKEL, \textit{supra} note 46, at 102.
\textsuperscript{140} A. BICKEL, \textit{The Morality of Consent} 26 (1975).
\textsuperscript{141} \textit{Id.} at 28.
that only two Justices dissented from the Court's abortion rights decision in *Roe v. Wade*.

I suspect that Justice Brennan himself knows that the Framers of the fourteenth amendment did not share all his ideas of justice, which is why he adopts this fallback position: "Those who would restrict claims of right to the values of 1789 [or 1868] specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance."1

Any argument that judges have a superior vision of social progress "seems to labor under an extremely unrealistic, rose-colored view." Professor Graglia has nothing but contempt for Justice Brennan's idea of the Court's competence, role, and function.

[U]nder those judicial robes there are only lawyers, not persons selected for the job because of unusual depth or breadth of learning, or exceptional ethical, political, or historical insight. . . . [F]ar from necessarily possessing expertise in any substantive area of human knowledge, our judges typically rejected post-graduate education in favor of going to law school. The study and practice of law has many advantages, including the acquisition of great skill in the manipulation of words, but few would recommend it as a means of inculcating habits of ethical fastidiousness or devotion to candor. No person knowledgeable as to the making of lawyers or the practice of law can possibly believe that it is from among lawyers that we should select our ethical leaders or that to the lawyers selected we may safely grant governmental authority with no restriction other than they are to apply traditional standards of rights, political and ethical norms.

Aside from Graglia's plausible skepticism about the ability of lawyers to resolve the pressing social issue of the day on the basis of moral philosophy, popular sovereignty—absent provisions in the Constitution to the contrary—authorizes majority rule.

Justice Brennan, however, states, "Faith in democracy is one thing, blind faith quite another." This statement, although true, is misleading. For example, it is hard to believe that the Framers of the ninth, tenth, or fourteenth amendments intended to protect a ho-

144. Graglia, *supra* note 118, at 446.
145. *Id.* at 446-47.
147. U.S. CONST. amends. IX, X, XIV.
homosexual's act of sodomy.

Nevertheless, Justice Brennan, who opposes laws prohibiting homosexual sodomy,\textsuperscript{148} insists:

Each generation has the choice to overrule or add to the fundamental principles enunciated by the . . . Framers. . . .

[T]he ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time.\textsuperscript{149}

The homosexual issue is just an example of Justice Brennan's penchant for reading his own personal values into the Constitution. The Framers of the Bill of Rights were alert to the dangers of such excessive emphasis upon rights in general. \textit{The Federalist} asserts that "'liberty may be endangered by the abuses of liberty, as well as by the abuses of power.'"\textsuperscript{150} Yet Justice Brennan writes, side-stepping the admonition, "Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized."\textsuperscript{151}

Human dignity is a concept that has, in the abstract, the allegiance of nearly everybody, but Justice Brennan manipulates this concept to invent new rights. He admits that his conception of human dignity is the product of an "evolution of our concepts,"\textsuperscript{152} adding:

I do not mean to suggest that we have in the last quarter century achieved a comprehensive definition of the constitutional ideal of human dignity. We are still striving toward that goal, and doubtless it will be an eternal quest. For if the interaction of [myself] and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve.\textsuperscript{153}

Brennan insists that "we [the Court] are the last word on the meaning of the Constitution [that embodies my vision of evolving dignity]."\textsuperscript{154}

\textsuperscript{148} Justice Brennan joined in the dissenting opinions of Justices Blackmun and Stevens in Bowers v. Hardwick, 106 S. Ct. 2841, 2848-59 (1986). The dissenters would have invalidated a Georgia Law criminalizing sodomy. \textit{Id.}

\textsuperscript{149} \textit{The Great Debate, supra} note 81, at 17.

\textsuperscript{150} Clor, \textit{Judicial Statesmanship and Constitutional Interpretation}, 26 S. Tex. L.J. 397, 424 (1985) (citing \textit{The Federalist} No. 63, at 423 (J. Madison) (P. Ford ed. 1898)).

\textsuperscript{151} \textit{The Great Debate, supra} note 81, at 18.

\textsuperscript{152} \textit{Id.} at 19.

\textsuperscript{153} \textit{Id.} at 23.

\textsuperscript{154} \textit{Id.} at 24.
In a recent lecture, he explained how his vision of evolving human dignity justifies his view that capital punishment is cruel and unusual, and thus prohibited by the eighth and fourteenth amendments. He concedes that in 1971, "I was the only one [of the Justices] who had come to believe that capital punishment was under all circumstances prohibited by the eighth amendment." He has now convinced other justices to believe that "[t]he most vile murder does not . . . release the State from constitutional restraints on the destruction of human dignity."

Justice Brennan knows that the Framers of the eighth amendment "did not regard capital punishment as impermissible, because it was common practice at the time the Bill of Rights was ratified." Moreover, the fifth amendment specifically contemplates "capital . . . crime[s]" and the taking of life. Nevertheless, the Justice argues—as if he actually knows the Framers' subjective mental state—that the Framers deliberately used the words "cruel and unusual punishment" to allow for a "progressive interpretation." In his words, although the standard "cruel and unusual" remains the same, "its applicability must change as the basic mores of society change." One problem with Justice Brennan's argument is that he has not produced evidence indicating that the basic mores of society have changed. His argument boils down to this: I have a better understanding than those who disagree with me about basic societal mores because the public's evolving standards of human dignity have been retarded by outmoded traditions. Yet he frequently claims that he does not advocate amendment of the Constitution "by judicial fiat, guided by reference to little more than [my] own personal views."

Perhaps Justice Brennan thinks he has cultivated civilized insights which eliminate the desire for retribution after a vile murder, but he has not successfully explained how his insights are consistent with the traditions and conscience of the American people—in 1791, in 1868, or in 1987. Yet this is the Justice who declares time and again that Attorney General Meese is arrogant because he advocates a jurisprudence of original intentions.

156. Id. at 321.
157. THE GREAT DEBATE, supra note 81, at 24.
159. U.S. CONST. amend V.
160. Brennan, supra note 155, at 326.
161. Id. at 327 (emphasis in original).
162. Id. at 320.
Until Brennan explains more cogently how the nation’s evolving standards of human dignity have changed, unbeknownst to most of the state legislatures, courts, and Supreme Court Justices, his view will continue to appear eccentric. On the other hand, because he has been remarkably successful convincing some of his colleagues that he has the better reasoned argument, he has helped make the Supreme Court a top-priority national concern.

D. The Attorney General’s Reply

Attorney General Meese, replying to Justice Brennan’s claim that the Framers’ intent is dimmed by the mists of time, explained that “[t]he period surrounding the creation of the Constitution is not a . . . mythical realm. The young America of the 1780’s and 90’s was . . . alive with pamphlets, newspapers, and books chronicling and commenting upon the great issues of the day.” In short, “One can talk intelligently about a founding generation . . . [and] [t]heir intention was to write a document not just for their times but for posterity.”

Meese concedes that the “Constitution is not a legislative code bound to the time in which it was written. Neither, however, is it a mirror that simply reflects the thoughts and ideas of those who stand before it.” Therefore, while the Framers knew they could not predict how all foreseeable disputes would be resolved under the Constitution, they made its meaning clear enough that, with some effort, it can be known. Meese writes,

James Madison said, 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 consistent and stable government. . . .” Jefferson was even more explicit in his personal correspondence. [He wrote]: “On every question of construction [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find], what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it was passed.”

Madison opposed the tendency of the judge who thinks he is an “ingenious theorist” who designs “a Constitution planned in his closet or in

163. THE GREAT DEBATE, supra note 81, at 31-33.
164. Id. at 33.
165. Id.
166. Id. at 34.
167. Id. at 36.
his imagination." Yet that is what many judges are doing—urged on by radicals who do not respect the rule of preexisting law.

Henry Monaghan, trying to hold back the radical tide, stresses the following points: (1) original intent is "a way of thinking about constitutional 'meaning' that follows from the basic concepts" that make judicial review a legitimate undertaking for courts, and (2) many of those scholars and judges who oppose restricting judges to the text and Framers' intent view those restrictions as an impediment to their political goals. Monaghan has Professor Michael Perry in mind as an example. Perry writes, that "in the end the answers the Court gives are (most often) its own, and not the framers'. And that is as it should be: the framers, after all, were not gods, but, like us, merely human beings." As an antidote to this call for freewheeling jurisprudence, Meese cites Chief Justice John Marshall who wrote that "the 'principles' of the Constitution 'are deemed fundamental and permanent,' and, except for formal amendment, 'unchangeable.'"

V. THE PHILOSOPHER KINGS

Justice Brennan frequently takes the law into his own hands when he is convinced that his vision of human dignity is superior to previously decided precedent. The professors who support Justice Brennan's artificially accelerated social change are opposed to the Attorney General's rule-centered jurisprudence, which places limits on judicial innovation. These scholars have little political clout, but their law review articles often influence the direction of the law.

A widely acclaimed article written by Paul Brest summarizes the views of several influential authors who are regularly cited in Supreme Court opinions. Brest, however, does not pose as simply a disinterested commentator above the fray; he openly uses his analysis to advocate "a genuine reconstitution of society" by courts.

Brest comments on the Supreme Court cases that recognize unprecedented rights of privacy. In Griswold v. Connecticut, for example, the Court held that married couples may use contraceptives in

173. Id. at 1109.
174. 381 U.S. 479 (1965).
the privacy of their own bedroom, notwithstanding a statutory prohibition. The right generally identified in *Griswold* was marital privacy, but in *Eisenstadt v. Baird* the Court held that the fundamental right of contraceptive measures identified in *Griswold* is not limited to married couples: The Court's opinion proclaimed "the right of the individual, married or single, to... [decide] whether to bear or beget a child." \(^{176}\)

The *Eisenstadt* dictum about the right to bear and beget a child was covertly planted in order to fabricate a woman's "right" to choose whether or not to have an abortion. \(^{177}\) Recently, in *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court—for all practical purposes—made abortion on demand a fundamental right. After *Thornburgh*, if a pregnant woman finds a pro-choice physician (or a pro-choice "family planning" agency finds one for her), the physician may perform an abortion, even during the third trimester. In my opinion, *Thornburgh* opens the door for post-viability abortions, notwithstanding state law to the contrary, whenever the physician believes that a late pregnancy will increase medical risks that endanger the patient's physical, psychological, or emotional health. Medical risks include any transient anxiety caused by the prospect of an unwanted child, and the physician's judgment is final. The state thus may not influence medical judgment in abortion cases.

The Court subsequently resolved an allegedly related issue: whether the Constitution provides persons with a fundamental right to have intimate associations—a euphemism for the right of a homosexual to engage in consensual sodomy. By a narrow one vote margin, the Court upheld the Georgia statute that prohibited sodomy. \(^{180}\) Justice Blackmun, the author of *Roe v. Wade*, trying to use law as a medium for social change, supported the homosexual's claim that Georgia's law "involves an unconstitutional intrusion into his privacy and his right of intimate association." \(^{181}\)

The Court's category of nonconstitutional privacy rights is evidently open ended. Brest writes,

The judges and scholars who support judicial intervention usually

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175. 405 U.S. 438 (1972).
176. *Id.* at 453.
181. *Id.* at 2849 (Blackmun, J., dissenting). Justice Brennan, along with Justice Marshall and Stevens, joined in Justice Blackmun's dissenting opinion.
Resisting Transformation

Resist the transformation of variously described in terms of privacy, procreational choice, sexual autonomy, lifestyle choices, and intimate association—are not specified by the text or original history of the Constitution. They argue that the judiciary is nonetheless authorized, if not duty-bound, to protect individuals against government interference with these rights, which can be discovered in conventional morality or derived through the methods of philosophy and adjudication.\footnote{182}{Brest, supra note 172, at 1064 (emphasis added).}

Professor Brest cites the works of Alexander Bickel who suggested that judges have a unique opportunity to protect values not written explicitly into the text of the Constitution. Bickel wrote,

Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the \textit{enduring values} of a society. . .

. . .[Courts can] appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry. . . .\footnote{183}{Brest, supra note 172 at 1066 (quoting A. BICKEL, supra note 46, at 25-26) (emphasis added)).}

Scholars who take an expansive view of the Court's ability to identify fundamental rights think that Bickel relied too much on tradition and enduring principles. They agree that Bickel pointed them in the right direction, but did not go far enough.\footnote{184}{D. RICHARDS, supra note 18, at 11.} However, Bickel made it clear that the Court's identification of rights "must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed."\footnote{185}{A. BICKEL, supra note 46, at 236 (quoting with approval, Sweezy v. New Hampshire, 354 U.S. 234, 276 (1957) (Frankfurter, J., concurring)).} Moreover, the judge's idea of progress must not be one foreclosed by the Constitution.

Although Professor Brest criticizes Bickel for his tentativeness, some of Bickel's ideas are intellectually powerful premises for a more radical theory of social transformation. But Bickel's own ambivalent philosophy of law was influenced by Justices Brandeis, Cardozo, Frankfurter, and Harlan. These judges, some politically liberal and some conservative, were not existentialists; they were constrained by the Constitution's limitations and the cake of custom. They admitted, of course, that the Court had the responsibility of rendering judgments when a litigant claimed his rights were violated. But they did so with trepidation because neither they, nor Bickel, ever successfully
identified reliable, objective sources of law from which an extraconstitu-
tutional judgment was to be drawn.\textsuperscript{186}

Bickel respected jurists who were committed to the rule of law and the premises of popular sovereignty. He did not respect jurists who invented a "rights theory" that was deduced solely from abstrac-
tions like human dignity or equal concern and respect—abstractions
that generate radical changes. The judges that Bickel admired did not
pretend that they developed a superior theory of moral progress. For
example, Justice Harlan did not look kindly upon the law challenged
in \textit{Griswold}, which prohibited the use of contraceptives by married
couples. But he concurred in the \textit{Griswold} Court's judgment presum-
ably because the challenged statute unquestionably interfered with a
relationship traditionally fostered by most states.\textsuperscript{187} \textit{Griswold} opened
the door for the fusion of morality with law.

Brest's article discusses the work of Professor Harry Wellington
who writes, "Judicial reasoning . . . must be concerned with conven-
tional morality, for it is there that society's set of moral principles and
ideals are located."\textsuperscript{188} To discern society's conventional morality,
judges should "become sensitive to it, experience widely, read exten-
sively, and ruminate, reflect, and analyze situations that seem to call
moral obligations into play."\textsuperscript{189} Wellington believes that the Court
has the ability to convert a principle of conventional morality into "a
legal one by connecting it with the body of constitutional law."\textsuperscript{190}

Wellington believes societal consensus supports the Court's deci-
sion protecting marital privacy in the bedroom. However, he argues
that conventional morality does not condone sexual intercourse
among unmarried couples. Moreover, he does not think that abor-
tions on demand are constitutionally protected. Brest therefore con-
cludes that Wellington's "source of values for constitutional
adjudication is conventional morality elucidated by intuitionistic
reasoning."\textsuperscript{191}

Other scholars who rely on consensus theories reach different re-
results than Wellington. Many jurists, like Justice Brennan, have no
problem in finding a consensus that supports the abolition of capital

\textsuperscript{186} A. Bickel, \textit{The Supreme Court and The Idea of Progress} 34 (1978).
\textsuperscript{188} Brest, \textit{supra} note 172, at 1068 (quoting Wellington, \textit{Common Law Rules and Constitu-
tional Double Standards: Some Notes on Adjudication}, 83 Yale L.J. 221, 244 (1973)).
\textsuperscript{189} \textit{Id.} at 1069 (quoting Wellington, \textit{supra} note 188, at 246).
\textsuperscript{190} \textit{Id.} at 1070 (quoting Wellington, \textit{supra} note 188, at 284).
\textsuperscript{191} \textit{Id.} at 1071.
punishment, even though most of the states have laws providing for the death penalty. In short, consensus-based rationalizations can be improperly used by delinquent judges to manipulate the law. This risk is intolerable to interpretivists, like Judge Bork, but the radicals, instead of criticizing manipulation, make use of this shabby technique in order to undermine traditional values.

Professor Michael Perry condones far more judicial activism than Wellington. Perry's dream court invokes "society's moral ideals" even if an enduring consensus has not developed. Thus Perry believes the abortion case was easy and correctly decided. He also thinks many laws prohibiting homosexual sodomy are unconstitutional.

In many privacy cases involving sexual conduct, Perry maintains that the Constitution's text does not rule out "any answer a majority of the Court is likely to want to give." Therefore, a judge may speculate about the aspirations of contemporary Americans, without regard for America's tradition and any enduring consensus. He argues that judicial activism need not wait on the American people, but that it can "stimulate, provoke, and participate in the polity's incessant search for a better way of living."

Perry dismisses traditional conceptions of democratic theory because the text does not indicate which conceptions are axiomatic. He explains ingeniously that the areas of politics controlled by majorities depend on the Court's interpretations of the Constitution, as illuminated by the best philosophical opinions. His favorite philosophers are not those who find the Burkean tradition resonant. Perry's own dialectical mode of thought gives little weight to the Framer's intent. After all, they are dead.

Perry dismisses arguments based on separation of powers constraints as just another variation of the argument based on the Framers' intent and democratic theory. Therefore, an activist Court has a free hand to decide whether its decisions violate limits imposed by a separation of powers doctrine. In other words, if the anachronistic

192. Id. at 1072 (citing Perry, Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases, 71 NW. U. L. REV. 417, 431-32 (1977)).
193. Perry, supra note 192, at 449.
195. Id. at 570-71.
196. Id. at 575.
197. Id. at 576.
198. Id. at 586-87.
separation of powers technicality interferes with the Court’s quest for more moral progress than legislatures can bear, the Court should act as the prophets of old and condemn the backsliding. In a nutshell, Perry believes that the judge’s own informed conscience and the Constitution are virtually congruent normative constraints.

Perry does not say why anyone who disagrees with the Court’s conscientious aspirations would feel morally obligated to obey its decrees. In Judge Bork’s words, “Not only is moral philosophy wholly inadequate to the task [of interpreting the Constitution] . . . there is no reason for the rest of us, who have our own moral visions, to be governed by the judge’s moral predilections.”

Perry admits, “Political-moral philosophy . . . is in a state of serious disarray . . . [owing to] competing conceptions of justice.” He also admits that “we must understand better than we do the nature of the . . . ways in which we use the past to transcend the past.” Apparently, when Perry’s dream court feels it has a better understanding of moral philosophy, communities will have it forced upon them.

Brest takes notice of Professor’s Karst’s argument that a homosexual relationship, however promiscuous, is a constitutionally protected right because casual encounters may “ripen into durable intimate associations.” Karst defines his proposed freedom of intimate association as “a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship.” He stresses the importance of the “emotions” generated by the “core associational value of intimacy.”

Karst believes homosexuals are peculiarly affected adversely by the majority’s malevolent attitudes towards oral and anal sex. He insists “that the sovereign must keep its hands off an individual’s associational choice . . . [because] moral responsibility lives in the only place it can live, the individual conscience.” Karst, therefore, equates the protection of the Constitution with the lowest common denominator of autonomy, the sexual activities of a person who has

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199. THE GREAT DEBATE, supra note 81, at 45.
200. Perry, supra note 194, at 593.
201. Id. at 596.
203. Brest, supra note 172, at 1073 (citing Karst, supra note 202, at 629).
204. Karst, supra note 202 at 635. “Intimate relationships of homosexual women and men include oral sex as a primary option, and, for homosexual men, anal sex as well.” D. Richards, supra note 18, at 271.
205. Karst, supra note 202, at 685.
206. Id. at 692.
found a like-minded partner. His apologetics for casual sex obviously have had an impact on the Court; his article was cited with approving admiration by the dissenters in *Bowers v. Hardwick*.207

Although society’s official condemnation of homosexual sodomy is unjustly severe when twenty year jail sentences are meted out by juries,208 four Justices assert that the Court may force the legislature to condone homosexual acts that are judged reprehensible by the electorate.209 Clearly Judge Bork agrees that judges should rely on the moral judgments of the electorate rather than on their own intuitions, or Kenneth Karst’s.

Brest discusses Judge Bork’s adherence to the Framers’ intent as a constraint on judicial review—finding it lacking in cogency, and not demonstrably required by the Constitution.210 Bork writes, “Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.”211 Brest, however, is quick to point out that the Founders do not help us decide whether the peoples’ consent refers to their acquiescence to the entire system of government, or the system of activist judicial review that Bork finds objectionable.212

Judge Bork argues, correctly I submit, that “any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges.”213 Judge Bork believes that the social contract is honored by courts only “if the judges interpret the document’s words according to the intentions of those who drafted, proposed, and ratified its provisions.”214 Bork thinks a judge should reach his legal conclusion after he finishes his initial task of finding from the text, structure, and history of the Constitution a premise that “states a core value that the framers intended to protect.”215 The first amendment, for example, plainly protects freedom of speech, but its guarantees can be fixed at various levels of abstraction. Bork uses the Framers’ general intent as an important source of law to determine whether obscenity is among the core values protected by the

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207. 106 S. Ct. 2841, 2854 (1986).
208. Id. at 2847 (Powell, J., concurring).
209. Id. at 2848-59.
211. Id. at 1101 (citing Bork, supra note 80, at 3).
212. Id. at 1102.
213. THE GREAT DEBATE, supra note 81, at 45.
214. Id.
215. Id. at 46.
concept of speech.216

Bork also uses the Framers' intent, among other legal materials, to justify Brown v. Board of Education.217 He writes,

[O]ne thing the Court does know [about the intentions of the Framers of the fourteenth amendment]: It [the equal protection clause] was intended to enforce the core idea of black equality against government discrimination. And the Court, because it must be neutral, cannot . . . write the detailed code the Framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that applies to all cases.218

The general principle of equality for racial minorities, previously enslaved, can be cited by courts as one among many justifications for eliminating state-mandated segregation in public schools—a specific problem not addressed by the Framers.

Brest notes that Bork has not sufficiently eliminated judicial discretion because judges make arbitrary choices among optional levels of generality. For example, Brest asks whether the fourteenth amendment demands equality for blacks, "or a broader principle of 'racial equality' . . . or is it a still broader principle of equality that encompasses discrimination on the basis of gender (or sexual orientation) as well?"219 Bork's answer helps solve the hermeneutic problem. He writes,

Obviously, values and principles can be stated at different levels of abstraction. In stating the value that is to be much protected, the judge must not state it with so much generality that he transforms it. When that happens the judge improperly deprives the democratic majority of its freedom [to choose which laws govern their community]. . . .

. . . .

I think that is wrong and that an intentionalist can do what Brest says he cannot. Let me use Brest's example . . . . Assume for the sake of argument that a judge's study of the evidence shows that both black and general racial equality were clearly intended,

216. Bork, supra note 80, at 20-35. Professor Richards, however, finds "this historical appeal to Puritan understanding unacceptable." D. Richards, supra note 18, at 205. Richard's study of moral philosophy leads him to conclude that the first amendment protects obscenity. "Its point is that the dignity of a free people cannot yield to the state the issues of conscience that are each person's inalienable responsibility to defend and vindicate." Id. at 209.


218. Brest, supra note 172, at 1091 (citing Bork, supra note 80, at 14-15).

219. Id. at 1091.
but that equality on such matters such as sexual orientation was not under discussion.

The intentionalist [judge] may conclude that he can enforce black and racial equality but that he has no guidance at all about any higher level of generality. He has, therefore, no warrant to displace a legislative choice that prohibits certain forms of sexual behavior. That result follows from the principle of acceptance of democratic choice where the Constitution is silent. In short, the problem of levels of generality is solved by choosing no level of generality higher than that which interpretation of the words, structure, and history of the Constitution fairly support.\textsuperscript{220}

Under this method of interpretation, Karst's theory that the equal protection clause protects intimate associations, including those of homosexuals, does not wash.

Bork thinks that \textit{Griswold} was decided incorrectly because, although Connecticut's law interfered with marital privacy, certain issues concerning the marital relationship should be resolved by the people themselves through their duly elected representatives.\textsuperscript{221} One is tempted to quarrel with Bork, because marital privacy is consonant with traditional American values. It is hard to accept the idea that the bedroom privacy of married couples is unprotected by the fourteenth amendment. On the other hand, one must recall how \textit{Griswold} opened the door for judicial opportunists who cite it as analogous precedent, supporting the "fundamental" right of a homosexual to engage in sexual acts with any consenting adult male in his bedroom.

If judges were demonstrably trustworthy enough to supplement their understanding of legally relevant materials with an elaboration of enduring values, not readily identifiable in the Constitution's text, one might welcome prudent judicial activism. For example, the right of a grandmother to live with her grandchildren was not addressed by the Framers, yet the Court in a plausible opinion upheld her right to do so in \textit{Moore v. City of East Cleveland}.\textsuperscript{222} This traditional freedom to choose to live with relatives was characterized correctly as a liberty "deeply rooted in this Nation's history and tradition."\textsuperscript{223} Because \textit{Moore} is inconsistent with the views of Attorney General Meese and Judge Bork, their positions have disadvantages. To understand why they are willing to endure these disadvantages, it is necessary to dis-

\textsuperscript{220} \textit{The Great Debate}, supra note 81, at 47-48.
\textsuperscript{221} \textit{Id.} at 51.
\textsuperscript{222} 431 U.S. 494 (1977).
\textsuperscript{223} \textit{Id.} at 503.
cuss the dissenting opinions in Bowers v. Hardwick.\(^{224}\)

VI. **Bowers v. Hardwick and the Slender Moral Majority**

Michael Hardwick was charged with violating a statute which penalizes "[a] person [who] commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."\(^{225}\) The legal question presented was whether this restriction "infringes upon the fundamental constitutional rights of Michael Hardwick."\(^{226}\)

The court of appeals, after observing that certain decisions "are ... beyond the legitimate reach of a civilized society,"\(^{227}\) held that Mr. Hardwick's "quintessentially private"\(^{228}\) homosexual act is protected by the Constitution. The appellate court cited Griswold v. Connecticut,\(^{229}\) which held that marital privacy is a fundamental right; but Hardwick obviously could not claim the privacy rights that flow from a marital relationship.

The lower court also cited Roe v. Wade,\(^{230}\) which fully protects a woman's (including a mature minor's) reproductive autonomy; but Roe does not address the question of sexual permissiveness. Also cited, as if analogous, was Meyer v. Nebraska,\(^{231}\) which involved the teaching of language in public schools, but which also contains dicta referring to parental rights and other traditionally venerated values. Moore v. City of East Cleveland\(^{232}\) was also cited—as if a grandmother's freedom to live with her grandchildren is a relationship similar, in kind, to a homosexual relationship. In short, bits and pieces from various cases, at best tenuously related, were manipulated in order to construct, by means of the fallacy of vicious abstraction, a constitutional right to be sexually aberrant.

Since Hardwick's sexual liaison occurred in his home, the lower court cited Payton v. New York.\(^{233}\) Under normal circumstances, as Payton held, police officers may not enter a home to make warrantless

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227. Id.
228. Id. at 1212.
229. 381 U.S. 479 (1965).
230. 760 F.2d at 1212-13 (citing 410 U.S. 113 (1973)).
231. Id. at 1211 (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).
232. Id. at 1211, 1212 (citing Moore v. City of East Cleveland, 431 U.S. 494 (1977)).
233. Id. at 1212 (citing Payton v. New York, 445 U.S. 573 (1980)).
arrests. Conversely, Payton made it clear that a police officer with a warrant may legally enter a person’s private residence. Since the police officers who arrested Hardwick complied with the fourth amendment’s procedural safeguards, the lower court obfuscated the issue. The lower court also cited Stanley v. Georgia, which held that reading obscene materials at home is a protected first amendment activity. If carefully read, the Stanley opinion indicates that the state retains its police power, and may prohibit many criminalized activities (e.g., private use of controlled substances) unprotected by the first amendment wherever they occur. Nonetheless, the lower court concluded:

[T]he Supreme Court’s analysis of the right to privacy in Griswold v. Connecticut, . . . Eisenstadt v. Baird, . . . and Stanley v. Georgia, . . . leads us to conclude that the Georgia sodomy statute implicates a fundamental right of Michael Hardwick. The activity he hopes to engage in [homosexual sodomy] . . . lies at the heart of an intimate association beyond the proper reach of state regulation. Such a right is protected by the Ninth Amendment . . . and the notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment.

The ninth amendment, relied on by the lower court, was ratified because the antifederalists feared abuses of power by the federal government. It is turning somersaults with history to suggest that the Founders vested federal courts with the power to invalidate state laws when local moral judgments do not coincide with the judiciary’s vision of social justice. The Framers did not intend the ninth amendment to be used as if it were an empty can, which judges can fill with what they personally regard as legislative trash.

The judgment of the lower court was reversed by the slender margin of one vote. Incredibly, four justices were willing to hold that homosexual activity is a protected association that is beyond reach of state regulation.

Justice Blackmun’s dissenting opinion endorses a principle of law so general that it can be manipulated to reach any result pleasing to him. He argued that this “case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right

234. Id. (citing Stanley v. Georgia, 394 U.S. 557 (1969)).
236. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court held that denial of access to contraceptives to the unmarried violates equal protection of the law. See supra text accompanying notes 175-78.
237. 760 F.2d at 1212.
to be let alone.' "238 Instead of explaining the origin and limits of this general principle, Justice Blackmun resorts to argumentum ad hominem by writing, "Georgia . . . must do more than assert that the choice they have made is an 'abominable crime not fit to be named among Christians.' "239

Justice Blackmun implies that "traditional Judeo-Christian values"240 are a basis for "religious intolerance" and "prejudice."241 His reference to religious objections is a red herring. "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization."242 The Founders' lawbooks "described 'the infamous crime against nature' as an offense of 'deeper malignity' than rape, an . . . act 'the very mention of which is a disgrace to human nature.' "243

Although Justice Blackmun believes personally that the reasons for the common law view of homosexual sodomy (e.g., the Founders' Judeo-Christian world view) have vanished, "and the rule simply persists from blind imitation of the past,"244 his "right to be let alone" principle does not help the Court distinguish between sodomy and other potential privacy rights such as incest, bigamy, prostitution, and adultery.245

Blackmun adopts the position of Karst, whose law review article alludes to loving, caring, intimate associations,246 but Justice Blackmun ignores this organizing principle (which does not bridge the gap between the general "right to be let alone" and the asserted specific rights of homosexual sodomists). Not bothering to distinguish between promiscuous and nonpromiscuous homosexuals, the dissenting justice writes,

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours . . . much of the richness of a relation-

238. 106 S. Ct. at 2848. (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
239. Id. (citing Herring v. State, 119 Ga. 709, 721, 46 S.E. 876, 882 (1904)).
240. Id. at 2854.
241. Id. at 2855.
242. Id. at 2847 (Burger, J., concurring).
243. Id. (Burger, J., concurring) (citing 4 W. BLACKSTONE, COMMENTARIES * 215).
244. Id. at 2848 (Blackmun, J., dissenting) (citing Holmes, The Path of the Law, 10 HARV. L. REV. 457, 469 (1897)).
245. Justice White's opinion for the Court noted how difficult it would be, except by arbitrary fiat, "to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes . . . committed in the home." Id. at 2846.
ship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.\textsuperscript{247}

Citing Karst exemplifies the fallacy of misplaced authority, because the cases taught by the professor, rather than his critical evaluation, are authoritative.

Justice Blackmun cannibalizes precedent. For example, he cites \textit{Wisconsin v. Yoder},\textsuperscript{248} which held that the Amish, because of their sincerely held religious convictions, have a first amendment right to provide vocational education to their adolescent children at home. Blackmun equates \textit{Yoder} with \textit{Bowers v. Hardwick} because the behavior in both cases appears "odd or even erratic"\textsuperscript{249} to the electorate, but there are obviously major differences between the Amish and "gay" communities—differences that are constitutionally significant.\textsuperscript{250} Justice Blackmun sees a "parallel between \textit{Loving [v. Virginia]}\textsuperscript{251} and \textit{[Bowers]},"\textsuperscript{252} but \textit{Loving} invalidated a state law forbidding interracial marriage and, unlike homosexual sodomy, the freedom to choose a spouse of the opposite sex has "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."\textsuperscript{253}

Justice Blackmun ignored many precedents on point. The dissenters did not distinguish \textit{Reynolds v. United States},\textsuperscript{254} which upheld a statute outlawing "odious" polygamy.\textsuperscript{255} For another example, the Court in \textit{Davis v. Beason}\textsuperscript{256} recognized that it lacked power to exempt from criminal law relationships that "tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade women and to debase man."\textsuperscript{257} The \textit{Davis} court, although concerned with protecting an individual's right of conscience, refused to uphold the decision of a person "cohabiting with more than one woman"\textsuperscript{258} because to do so would "shock the moral judgment of the


\textsuperscript{248} 406 U.S. 205 (1972).

\textsuperscript{249} 106 S. Ct. at 2852 (Blackmun, J., dissenting).

\textsuperscript{250} Sodomy was "forbidden by the laws of the original thirteen States" when the Bill of Rights was ratified. \textit{Id.} at 2844. On the other hand, home education was commonplace.

\textsuperscript{251} 388 U.S. 1 (1967).

\textsuperscript{252} 106 S. Ct. at 2854 n.5 (Blackmun, J., dissenting).

\textsuperscript{253} Loving v. Virginia, 388 U.S. 1, 12 (1967) (emphasis added).

\textsuperscript{254} 98 U.S. 145 (1878).

\textsuperscript{255} \textit{Id.} at 164.

\textsuperscript{256} 133 U.S. 333 (1890).

\textsuperscript{257} \textit{Id.} at 341.

\textsuperscript{258} \textit{Id.} at 347.
Justice Blackmun gives little weight to the moral judgment of the community; he observes that in sexual relationships, there might be many "right" choices of intimate sexual activity.\(^{259}\) Since he also thinks that "[r]easonable people may differ about whether particular sexual acts are moral or immoral,"\(^ {260}\) he should have conceded that the question is meat for a state legislature. Yet, Justice Blackmun insists that the legislature must be "morally neutral,"\(^ {261}\) which is a remarkable dilution of the police power. How can an amoral legislature deal with issues pertaining, for example, to the environment, economic justice, euthanasia, or surrogate motherhood? How can a legislature be morally neutral when the police power, whether exercised or not, requires essentially moral judgments? How can the legislature differentiate between immorality and the common good without taking a moral position? How can the Court define moral neutrality without taking a moral position?

Some specialists in constitutional law, who oppose legislation applied to penalize homosexual behavior, disapprove of this unconventional lifestyle, but do not think it is any of the legislature's business. They should vote accordingly. Courts should respect the electorates' essentially moral choice. The dissenting justices distinguish between immorality that occurs in private and that which occurs in public. But the legislature is not required to be naive, just because sexual behavior, odious to the community, occurs in private. Recruitment does not begin in the bedroom, it ends up there. Deterrence of indecent behavior deemed harmful to individuals and the community is a permissible governmental purpose.\(^ {263}\)

Justice Blackmun is hardly morally neutral when he asserts that Mr. Hardwick exercised a fundamental right that "embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"\(^ {264}\) Although, as Justice Blackmun puts it, a homosexual "belongs to himself," his actions affect others who might later regret their decision. The intimate homosexual relationship

\(^{259}\) Id. at 341.

\(^{260}\) Bowers v. Hardwick, 106 S. Ct. at 2851 (Blackmun, J., dissenting).

\(^{261}\) Id. at 2855.

\(^{262}\) Id.

\(^{263}\) The fourteenth amendment does not limit the states' reserved powers to prohibit homosexual sodomy. In fact, when the due process of law clause of the fourteenth amendment was ratified all but five of the states, obviously not morally neutral, had criminal sodomy laws. Id. at 2844-45.

\(^{264}\) Id. at 2851 (Blackmun, J., dissenting) (citing Thornburgh v. Am. College of Obstetricians & Gynecologists, 106 S. Ct. 2169, 2187 n.5 (1986) (Stevens, J., concurring)).
often interferes with other intimate relationships. For example, marriage and other family relationships are adversely affected by homosexual promiscuity.

Justice Blackmun identifies, but does not describe, legislative "moral neutrality," and his dissenting opinion suggests that he lacks insight "to distinguish the moral from the non-moral." Very few modern philosophers do. Indeed, Justice Blackmun becomes somewhat tentative when he writes that "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy." What seems to be his personal view should have nothing to do with his oath not to pretend, while sitting as a justice, that there is a repugnancy between state law and the fourth, ninth, and fourteenth amendments.

Georgia's attorney general did not rest his case solely on moral grounds. But Justice Blackmun rejects the state's argument that homosexual sodomy may have adverse consequences "such as spreading communicable diseases." With an AIDS epidemic described on the front pages everyday, the Court wisely resisted the dissenters' argument, which injects the controversial moral philosophy of J.S. Mill into the fourteenth amendment.

VII. CONCLUSION

The Constitution limits the power of judges who claim to have more civilized insights than the electorate. Therefore, any defensible theory of judicial review must assign to exotic moral philosophy a carefully restricted function because judges, by oath or affirmation, are pledged to support the Constitution.

Some philosophers are more relevant than others. Generally speaking, John Locke is obviously more relevant than the critical legal school of subversive jurisprudence. Critical legal scholars often embellish their dialectical reasoning with slogans about social justice.

266. Id.
267. 106 S. Ct. at 2853 (Blackmun, J., dissenting) (emphasis added).
268. Justice Blackmun cites the ninth amendment, and rejects the argument that the Framers did not include homosexuals' desire for sexual gratification among the rights reserved by the people. Blackmun knows the Framers' intent. As Chief Justice Burger demonstrated, homosexual sodomy had been a statutory crime in England since the time of Henry VIII. Id. at 2847 (Burger, J., concurring). Indeed, "[T]he common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies." Id.
and human dignity, but they lack respect for the Anglo-American concept of law. They attack what they perceive to be the Constitution's illogical and socially unjust imperfections. Critical legal scholars advocate a radical departure from the Framers' intent—allegedly a reified mystification that justifies class domination. Dissenting justices in *Bowers v. Hardwick* should be more aware that emanations from penumbras of Marxist social theory—not the ninth or fourteenth amendments—generate many scholarly articles that confuse legislative moral judgments with the oppression of the ruling class.

The Founders tried to establish a foundation for freedom: They did not intend to liberate mankind from the customs they assessed as good and right; they were not amoral. And they intended the Constitution to be understood by lawyers, judges, and informed citizens—not just by specialists in moral philosophy, who have taken courses in meta-linguistics. The Supreme Court should resist the entreaties of radicals and nihilists who reject a historical objectivity of any sort, and who view the rule of law as nothing more than a construct designed to perpetuate an outmoded vision of justice. John Adams was surely right when he warned his country that "a constitution is a standard, a pillar and a bond when it is understood, approved and beloved. But without this intelligence and attachment, it might as well be a kite or balloon, flying in the air."