



The Los Angeles County Bar Association
Appellate Courts Section Presents

Judging the Judge:

A Candid Conversation Between Judge Alex Kozinski and Professors Ronald Collins and David Skover on Appellate Judging and the Politics of Law

Thursday, October 19, 2017

Program - 5:00 PM - 6:30 PM

Ninth Circuit Court of Appeal –Pasadena

1.5 CLE Hours **(INCLUDES 1.5 HRS OF APPELLATE COURTS SPECIALIZATION CREDIT)**



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ABOUT THE CLE PARTICIPANTS

ALEX KOZINSKI is a United States Circuit Judge of the United States Court of Appeals for the Ninth Circuit, where he has served since 1985. He was Chief Judge of that court from November 2007 to December 1, 2014. He received a B.A. degree from U.C.L.A. in 1972. He received a J.D. from UCLA School of Law in 1975. He was a law clerk for Judge Anthony Kennedy of the United States Court of Appeals for the Ninth Circuit from 1975 to 1976. He was a Law clerk to Chief Justice Warren Burger of the Supreme Court of the United States from 1976 to 1977.

RONALD K.L. COLLINS is the Harold S. Shefelman Scholar at the University of Washington Law School. Before coming to the Law School, Collins served as a law clerk to Justice Hans A. Linde on the Oregon Supreme Court, a Supreme Court Fellow under Chief Justice Warren Burger, and a scholar at the Washington, D.C. office of the Newseum's First Amendment Center. Collins has written constitutional briefs that were submitted to the Supreme Court and various other federal and state high courts. In addition to the books that he co-authored with David Skover, he is the editor of *Oliver Wendell Holmes: A Free Speech Reader* (Cambridge University Press, 2010) and co-author with Sam Chaltain of *We Must Not Be Afraid to Be Free* (Oxford University Press, 2011). His last solo book was *Nuanced Absolutism: Floyd Abrams and the First Amendment* (2013). Collins is the book editor of *SCOTUSblog*, and writes a weekly blog (First Amendment News), which appears on the *Concurring Opinions* website.

DAVID M. SKOVER is the Fredric C. Tausend Professor of Law at Seattle University School of Law. He teaches, writes, and lectures in the fields of federal constitutional law, federal jurisdiction, and mass communications theory and the First Amendment. Skover graduated from the Woodrow Wilson School of International and Domestic Affairs at Princeton University. He received his law degree from Yale Law School, where he was an editor of the *Yale Law Journal*. Thereafter, he served as a law clerk for Judge Jon O. Newman at the Federal District Court for the District of Connecticut and the U.S. Court of Appeals for the Second Circuit. In addition to the books that he co-authored with Ronald Collins, he is the co-author with Pierre Schlag of *Tactics of Legal Reasoning* (Carolina Academic Press, 1986).

Together, Collins and Skover have authored *The Death of Discourse* (1996 & 2005), *The Trials of Lenny Bruce: The Fall & Rise of an American Icon* (2002 & 2012), *Mania: The Outraged & Outrageous Lives that Launched a Cultural Revolution* (2013), *On Dissent: Its Meaning in America* (2013), and *When Money Speaks: The McCutcheon Decision, Campaign Finance Laws, and the First Amendment* (2014). They have also authored numerous scholarly articles in various journals including the *Harvard Law Review*, *Stanford Law Review*, *Michigan Law Review*, and the *Supreme Court Review*, among other

publications. The *Trials of Lenny Bruce* (revised & expanded) and *Mania* are available in e-book form from Top Five Books. Their next book is *Robotica: Free Speech & the Discourse of Data* (Cambridge University Press, 2018).

Judging A Book: Kozinski Reviews 'The Judge'

By Judge Alex Kozinski

October 17, 2017, 2:02 PM EDT

So you thought a judge's job is to be fair and impartial? To renounce personal gain? To have no agenda? According to Ronald K.L. Collins and David M. Skover in their new book, "The Judge: 26 Machiavellian Lessons," that's all malarkey. If you believe it, you're a chump. And if you're a judge who believes it, you should quit and make room for someone who will use his power to advantage.

"Power," the authors tell us, is "that ability to make something happen." Like Niccolo Machiavelli, whose 16th century guide to executive power they channel, the authors explain how the modern judge can exploit the opportunities his position and Fortuna bestow upon him. "The ethics of a great judge are *counter-ethics*. They do not bow to law's old pieties, the ones grounded in the myths of justice impartially applied. ... Still, the myth of impartiality lives on and, strangely enough, some judges (the weaker ones) actually take their decisional cues from such pious norms." The ideal judge "appreciate[s] the value of deception."



Judge Alex Kozinski

Collins and Skover give example after example where U.S. Supreme Court justices have (in the authors' view) manipulated the law, lied about history, undermined precedent while pretending to follow it, "cram[med] their opinions with half-truths" and generally pulled the wool over the eyes of their colleagues and the public. The authors speak in glowing terms about justices who achieve their ends through skulduggery and disparage justices who are ineffectual because they're proud, priggish, wedded to precedent or fooled by their own rhetoric. According to Collins and Skover, "a Justice must be hypocritical and strive to appear objective, judicious, and collegial." John Marshall, William J. Brennan Jr., William Rehnquist, Antonin Scalia and (usually) John Roberts make the grade while James Clark McReynolds, Felix Frankfurter, William O. Douglas (except in *Griswold*), Warren E. Burger, and Roberts in *Obergefell* don't. Frankfurter draws particular scorn as "arrogant, combative, spiteful, and manipulative (but not in effective ways)."

The book is organized into 26 chapters, tracking Machiavelli's "The Prince." Each chapter presents a technique the crafty judge can use (or avoid) in pursuing power, all illustrated by Supreme Court cases or incidents. Some are well known, such as Marshall's knight's gambit in *Marbury v. Madison*, while

others are widely overlooked, such as Brennan's stealth overhaul of obscenity law in *Roth v. United States*.

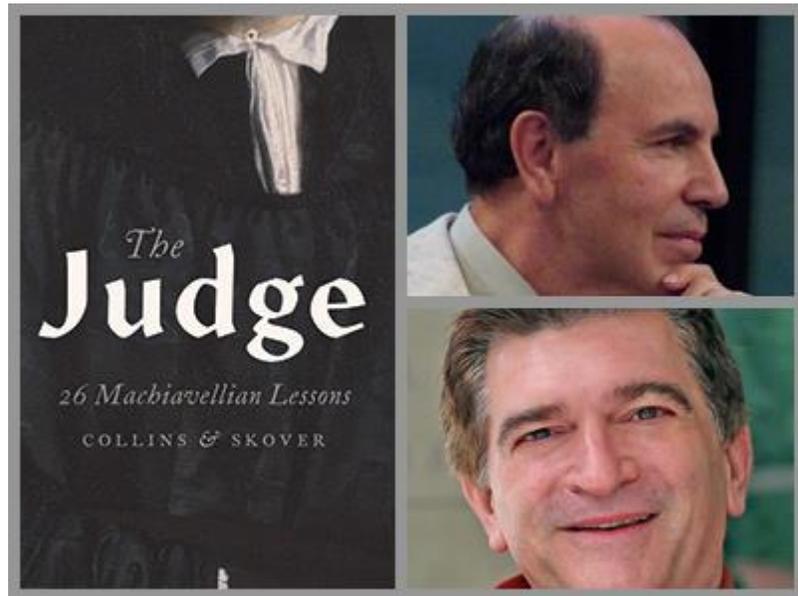
The authors go far beyond judicial opinions because the power-hungry judge must modulate every aspect of his life, from getting confirmed to avoiding impeachment, to playing the media, to picking law clerks who will work tirelessly at "buttressing the Justice's reputation both during and after his or her life."

"Robert Bork was a fool," Collins and Skover tell us. Why? Because he gave straight answers to confirmation questions. What should he have done? "Be scripted, evasive,

polished, repetitive, polite, trite, and also be as engaging as possible" The authors make similar unbridled judgments about other great and not-so-great Supreme Court figures: Rehnquist "epitomized the calculating judge"; "[Oliver Wendell] Holmes [Jr.] mastered metaphors, [Earl] Warren traded in ambiguity, [Hugo] Black sparked passions, and Brennan used adjectives to breathe vigorous life into the law." This makes for lively reading, whether or not you accept the book's judicial realpolitik, such as "a Justice must learn to lie and to cloak his or her will in terms fitting the conscience of colleagues."

One wonders whether the authors believe their own misanthropic rhetoric or whether it's just a device for showcasing their deep knowledge of Supreme Court lore. But you can disregard the Machiavellian vehicle altogether and enjoy the book's tour of the colorful incidents and personalities that have populated the Supreme Court for the past 23 decades. We learn about the many transgressions Marshall committed in orchestrating *Marbury v. Madison*; about the impeachment of Samuel Chase and the near-impeachment of Robert Cooper Grier; about the one shining moment in the otherwise undistinguished career of the longest-serving justice, William ("Wild Bill") Douglas; about how James Iredell's dissent in *Chisholm v. Georgia* led to passage of the Eleventh Amendment; and about why the post-*Brown v. Board of Education* Supreme Court denied cert in *Naim v. Naim*, which challenged the Virginia anti-miscegenation statute it struck down 12 years later in *Loving v. Virginia*. The book is filled with historical gems and this alone makes it a worthwhile read.

But it's the central premise that gives the book its edge. So, do the authors prove that hypocrisy is the key to judicial greatness? Some of the examples Collins and Skover present are hard to dispute. There can be no doubt that Marshall recalibrated checks and balances in favor of the judiciary in *Marbury v. Madison*. No one today holds him to account for disregarding the parties' arguments and breaching judicial ethics in the single-minded pursuit of his objective because "history glorifies monuments and monumental moments, forgetting everything else."



"The Judge: 26 Machiavellian Lessons," by Ronald K.L. Collins and David M. Skover, Oxford University Press, (296 pages).

Nor is there disputing that Wild Bill created the constitutional right to privacy by stitching together “penumbras” and “emanations” (his words) from the Fifth, Fourth and much-ignored Third Amendments. Few constitutional decisions have had greater impact on modern life than *Griswold*, “an exercise in judicial acrobatics” that fundamentally changed the relationship between the individual and the government, redefined the concept of personal autonomy and provided the foundation for the rights to abortion and same-sex marriage. Conversely, Burger clearly passed up much personal glory by assigning the opinion in *Roe v. Wade* to Harry Blackmun rather than himself. And Bob Bork would very likely have become Justice Bork had he lost 50 pounds, shaved his beard and talked like a used car salesman rather than a professor.

Whether the authors’ central thesis is the full truth or only a small facet of it, readers will have to decide for themselves. But Collins and Skover, perhaps unwittingly, lay the groundwork for a sequel. While purporting to speak the unvarnished truth about the Supreme Court, they do play favorites. Marshall, Brennan and Douglas, who are among the most blatant practitioners of judicial power politics, are described in glowing — almost loving — terms. This is likely because the authors agree with *Marbury*, *Roth* and *Griswold*. But Scalia’s opinion in *Heller*, which at least has a textual anchor in the Second Amendment, is described as “misguided” and a “snow job[,]” and Scalia himself as “guileful” and “scheming.” It seems authors, like judges, use artful language to manipulate their readers. Perhaps Collins and Skover’s next book will be “The Author” followed in short order by “The Professor.” After that, can the Amazon mini-series be far behind?

Alex Kozinski is a U.S. circuit judge for the Ninth Circuit. He was nominated by President Ronald Reagan and confirmed by the Senate in 1985. He served as chief judge from 2007 to 2014.

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CONTINUING LEGAL EDUCATION MATERIALS

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“Judging the Judge: A Candid Conversation Between Judge
Kozinski & Professors Collins & Skover”

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INTRODUCTORY NOTE

What follows are materials designed to invite you to think about the relationship between law and politics. True, this subject has been discussed often in recent years. And it was also a topic that much informed the thoughts of the Legal Realists, who responded to the formalism of the late 19th and early 20th centuries. The formalists held that cases could and should be decided by application of disinterested principles – “neutral principles” as Professor Herbert Wechsler (1909-2000) tagged them. Wechsler introduced the concept in his seminal 1959 article entitled “Toward Neutral Principles of Constitutional Law,” which was approvingly echoed by then Professor Robert Bork in his 1971 *Indiana Law Journal* article (set out below).

It is a fact: no judge admits to being a “judicial activist.” No jurist confesses to deciding cases by the light of his or her predilections. No one in robes would ever plead guilty to setting aside the law in furtherance of some desired result. This is obvious . . . but it is also the sign of a shameless lie.

The excerpts from *The Judge: 26 Machiavellian Lessons* (2017) test the steel of those conservative and liberal appellate judges who claim allegiance to “neutral principles” or to some form of objective decision-making. Taking the debate to the next provocative level, it argues that those who truly hold to such “principles” are fools who are vulnerable to exploitation by “Machiavellian” jurists whose aim is to maximize personal and institutional power.

By way of a conceptual (as opposed to *realist*) counter, there is the argument presented by Robert Bork in defense of “neutral principles” . . . as he understood those “principles.” That argument, or a variation of it, finds modern expression in the jurisprudence of the late Justice Antonin Scalia and in that of Justice Clarence Thomas, among others. While Bork and Scalia had their own “originalist differences” [see *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc)], they nonetheless agreed on the need for some impartial norm by which to decide cases.

Thus the clash between realism and formalism. In this contest, who is the victor? The answer tendered in *The Judge* is that the winner is the one who practices realism in the guise of formalism, the one who aims to maximize judicial power under the pretense of being ever faithful to *The Law*. This is what *really* unites conservative and liberal appellate Justices. True?

Of course, much of this discourse is directed to appellate judges, particularly Supreme Court Justices. But even on that count, it is a lesson that an experienced appellate lawyer should know and put to his or her own advantage. Think of it as *playing to prejudices*. Yes, this strikes some as unduly sinister. Fair enough. But ask yourself: Is this how the world of

appellate law often works? Or to couch it in Machiavellian terms: *Others will tell you what the law should be, but I will tell you what it is.*

THE JUDGE

26 Machiavellian Lessons

by

Ronald K.L. Collins

&

David M. Skover

(Oxford University Press, 2017)



Richard Posner: “I pay very little attention to legal rules, statutes or constitutional provisions,” Judge Posner said. “A case is just a dispute. The first thing you do is ask yourself – forget about the law – what is a sensible resolution of this dispute?”

The next thing, he added, was to see if a recent Supreme Court precedent or some other legal obstacle stood in the way of ruling in favor of that sensible resolution. “And the answer is that’s actually rarely the case,” he explained. “When you have a Supreme Court case or something similar, they’re often extremely easy to get around.”

Adam Liptak, “An Exit Interview with Richard Posner, Judicial Provocateur,”
New York Times, 11 September 2017.

PROLOGUE

HYPOCRISY. Few defend it, though many practice it. No one admits to it, not even when vowing to tell the whole truth and nothing but the truth. The hypocrite extols objectivity; he feigns detachment. In the process, something is concealed, but it must appear otherwise. If one is to master the art of hypocrisy, one must categorically repudiate it. The greatest hypocrite in the law, then, is the judge who values the appearance of virtue more than its actuality. He thus pretends to be true to the law. By that measure, hypocrisy is a word well suited to the calling of a judge¹ . . . or we should say, a special kind of Judge.

This all may sound sinister, or even evil. Hypocrisy seems especially immoral when associated with judging, which should be aligned with justice. Our aim, however, is not to praise the deeds of demons, but rather to highlight the virtues of realism – a new and vibrant realism, a modern-day legal realism fit for our times. That raw realism is acutely mindful of the *necessity of deception*² and how the pretense of principled objectivity bows to that necessity. After all, honesty and integrity have their costs; they can often deprive us of our desires; they may also force us to compromise when we are reluctant to do so.

In the struggle between confrontation and compromise, pretense provides a tactical alternative. Label it hypocrisy, or rationalization, or whatever, it is a lie in the service of some cause, whether praiseworthy or not. Tellingly, hypocrisy thrives in the most principled of contexts where the bar of integrity is set very high. Where it is low, as in aberrant political times, hypocrisy may yield an even greater bounty. The judge who insists on fidelity to elevated notions of law and who sanctimoniously demands it of others typically trades in hypocrisy. The same is true of the more cautious jurist who from time to time steals from the till of his or her own professed objectivity. Given that, to condemn such hypocrisy is to condemn much of modern appellate judging. Hence, we invite you to see our jurisprudential world for what it is, and then judge it for what it is. In several ways our tract is meant to help you, our readers, do just that.

How you judge our lessons – which are non-partisan and which can serve honorable purposes – will depend on how honest you are about the role of hypocrisy in our system of jurisprudence. As you will see, it has become ever more difficult in American society to tether judge-proclaimed law to its revered moorings. And when that occurs, hypocrisy hurries to the scene to demand its due, sometimes by those with the best of intentions.

Thus we begin. Hypocrisy helps one to navigate the necessities of judging, the various ones we discuss in our 26 chapters. It might be understood as a sort of virtue in the service of avarice, of that all-too-human desire to acquire power or glory or both. Such avarice, if you will, need not be viewed as either a virtue or a vice,³ but rather as a way of how people tend to be – or at least that

much is often said to be the case. If the lessons we offer are to be useful and effective, then a Justice must learn to be unjust, at least sometimes, if only because the measure of the law derives not from the ideal but from the real. Ours, after all, is not the City of God.

So step into the light of a new sun. Behold what your eyes rarely see. For you have little to lose save the lies that shackle you, the ones that have been told to you as truths. Open your minds and free yourselves from the manacles of myths. Only then should you judge *The Judge*.



Law is political.

That is the common refrain of our times. It is the calling cry of conservatives disgusted with liberal “result-oriented” judicial decision-making, and of liberals who rail against “unprincipled” conservative decision-making. Fueled by hypocrisy, the charge goes back and forth as the ideological conflicts escalate. Neither side tires in this test of wills.

No one vying for appellate judicial office dares defend the term *activist*. No, everyone is a moderate, a centrist, someone who interprets the law but never makes it. For decades, the debate over “judicial activism” has raged on. Whatever the political stripes, the charge is always the same: Judge-made law has become politicized. With relentless frequency, conservatives and liberals accuse the other of “politicizing” the courts so as to produce the results each side wants. In this ideological war zone, hackneyed phrases – “originalism,” “textualism,” “neutral principles,” the “living Constitution,” and so forth – are hurled about like rhetorical daggers. As the hostility continues, judges often remain unaffected as they invoke one or another self-serving theory to reach the results they want. The ideological war of words persists. And the key word in that war is this: *political*.

It is difficult to deny: “In many important cases, the predispositions of the judges play a significant role in determining the nature of people’s legal rights.”⁴ The momentous constitutional cases of our times, we are told, “have to be political.”⁵ That charge takes on added strength with each passing year: “Judges are inevitably political actors, and hence their decisions are ultimately based on their ideological convictions. Sure, judges hide behind the law, and they purport to be speaking for it, but we shouldn’t be fooled.”⁶ Thus, the judicial art is little more than a disguise to conceal the real nature of the enterprise.⁷ Judges are like “political actors” or “politicians wearing robes.”⁸

Some argue that the “Constitution has become a wholly malleable document that compels no particular result.”⁹ And what of objective decision-making grounded in the rule of the law as written? “This is nonsense and has always been,” declares one of the most distinguished constitutional scholars of our times; the Supreme Court, he adds, consists of nine individuals “who inevitably base their decisions on their own values, views, and prejudices.”¹⁰ Others say that today’s judges are unable to “articulate legal principles that clearly transcend politics.”¹¹ Hoping to exploit that reality, more and more appellate litigators have come to appreciate that the federal “courts are a sort of untapped resource for pursuing [one side or another’s political] agenda.”¹²

The virtues characteristically associated with judging – impartiality, dispassion, and an abiding commitment to the letter of the law – too often yield to the vices associated with ideological impulses. An obstinate faith in one’s own convictions often rules. That faith, of course, is bolstered by hypocrisy. Some judges cram their opinions with half-truths that would have made the great Greek sophists blush. Many a so-called objective theory of decision-making is little but fertile soil for the seeds of a lie striving to bloom. Indeed, those who advance such theories know this; they know the lie. That judges do not believe wholeheartedly in their constitutional creed – as evidenced by the way they can breach it with abandon – does not stop them from demanding of others that they honor that creed. Label it a noble pretext or a necessary screen, it all leads to a lesson in hypocrisy: Objectivity is a mask behind which to hide one’s predilections and prejudices. Regardless of whether this is philosophically true, it is nonetheless perceived as the truth of our times.

The temptation to violate the touted virtues of jurisprudential objectivity and dispassionate impartiality is all the greater given the many opportunities for judges to become political actors. Such opportunities arise from the ever-expanding involvement of the courts in a wide swatch of issues that are fiercely political in nature. Over the years the Supreme Court has, in its own special ways, interjected itself into many controversial ideological clashes. There is scarcely a politically fraught dispute that is free of judicial oversight. In this way among others, politics has become law and law has become politicized.

Even those clad in black robes speak the words “politics” and “judging” in the same judicial breath. For example, one noted federal jurist conceded that “judging in America is unquestionably steeped in politics.”¹³ Making much the same point, a widely respected sitting federal appellate judge was equally blunt: “[V]iewed realistically, the Supreme Court, at least most of the time, when it is deciding constitutional cases is a political organ.”¹⁴ Echoing the same sentiment, Judge Richard Posner unabashedly declared in 2016: “the Supreme Court is not an ordinary court but a political court, or more precisely a politicized court, which is to say a court strongly influenced in making its decisions by the political beliefs of the judges.”¹⁵ The public perception of the Supreme Court is consistent with that view, or so a sitting Supreme Court Justice has declared: “More and more people think that what’s important to us is *political*,” and the public see the Justices as “nine junior varsity politicians. That’s what they think.”¹⁶ As for the partisan character of America’s high Court, an important study highlighted “the profound role of party polarization on today’s Court” and concluded that it is “likely” to be “enduring.”¹⁷

Given that, can we escape the consequential truth of our times – that law has become ever more political? The immense gap between law, as it has been traditionally portrayed, and what it truly is or has become, invites a reconsideration (or reconfiguration) of law and the necessities to which it must now yield.



Supreme Court Justices are not as political as their counterparts in the other two branches of the national government. After all, they don’t run for office; they are not beholden to campaign contributors and lobbyists; and they tend to speak in more measured tones (though there are

exceptions) than members of Congress or Executive officials. Still, and with increasing frequency, the matter is more one of degree than of kind. For example, studies by social scientists point time and again to the partisan drift of Supreme Court decision-making.¹⁸ Not surprisingly, the charge is that the Constitution is cleverly invoked to justify results that comport more with the partisan policy calls of lawmakers than with detached jurisprudential calls. But there is more: Even in statutory cases (especially those involving “hot-button issues”¹⁹), the line between judicial detachment and judicial prejudice can be easily crossed. Thus, there are similarities and differences between ordinary “politics” and “judicial politics.”

In all of this, context can be determinative, changing circumstances might be dispositive, and interpersonal relations may be decisive. Hence, the 26 lessons that follow must be adjusted to the situation at hand, with due respect paid to the dictates of chance. Some of these lessons will work most of the time and others not; still others will work part of the time if tailored to meet the demands of a given case. Accordingly, a special kind of jurist is required to effectuate the lessons provided here.²⁰

The modern Judge embraces the new realist modes and orders in bold ways. For that judge, law is more prerogative than principle. If that is the measure, then the goal of the judicial art is to maximize power, minimize dependence, and reduce risk. This insight counsels that the realist judge need not be modest, at least not in understanding his or her calling. And it is that awareness, skillfully executed, that enables a judge to rise above the din and claim his or her due, like a fearless Cesare Borgia²¹ or a foxlike Don Vito Corleone. This is a lesson, one of many, drawn from *The Prince*²² by Niccolò Machiavelli – lessons aptly adapted, to be sure.

Those judges are greatest who understand the advantages of replacing the old virtues of judging (rooted in neutrality) with the new virtues of judging (grounded in hypocrisy). They appreciate the value of deception. They understand that the finger of the law does not always point in one direction. What the law is invariably depends on many variables susceptible to many interpretations. Therein lies a treasure trove of opportunity for the judge willing and able to seize it. To alter the metaphor, the law is there to bend to his will. Of course, hypocrisy is the handmaiden that makes this possible.

As a matter of practice and theory, what does it mean to declare that the nation’s high Court is often political? The question gives rise to bold answers in *The Judge*. We propose to explain anew law and the judicial art, much as Niccolò Machiavelli explained power and the ruling art in *The Prince*.²³ Perhaps because of lack of foresight or lack of courage, no one has carefully studied a course of judicial decision-making premised on stratagems that flow from the merger of law and judicial politics. Seen in that light, the old vice of hypocrisy stands to become a central component of the new virtue of judging. In this regard, it has been said that “*The Prince* . . . can open doors that we may not have known were there.”²⁴ It is just such doors that we have set out to open.

Anyone very familiar with the workings of the Supreme Court will recognize many of the stratagems or maxims (i.e., moves and counter moves) set forth in our 26 lessons. By no means

does this book exhaust the range of possible tactics. Nevertheless, these are among the most vital strategic lessons that famous American jurists have sometimes practiced – jurists from Chief Justice John Marshall’s time to Chief Justice John Roberts’ time. Mindful of these lessons, general rules of judicial behavior for certain jurists can be deduced.²⁵ Properly understood, those stratagems reveal how some judges maximize judicial power while minimizing risk, and how others might likewise do so in a more methodical, informed, and calculating manner. The converse is also true: Those who disregard these lessons on judicial behavior stand to find themselves on the losing side of significant cases or controversies that come before them.



*He dares to do what has never been done before,
and he is willing to risk infamy to do so.*²⁶

Power. It is that ability to make something happen. It is linked to one’s will and combined with one’s ability to be effective in promoting some objective. Judge or politician, priest or philosopher, all seek power of one kind or another. For those who think otherwise, consider this: “The feeling of having no power over people and events is generally unbearable to us – when we feel helpless we feel miserable.”²⁷ Such human emotions are not foreign to the men and women who wear robes and wield power by judicial mandates. In fact, it would be strange if the will of judges cut against the grain of their all-too-human nature.

How best to amass power and to preserve and perpetuate it depends very much on the context, as Machiavelli well knew. In that world of contingencies, a judge stands to lose much unless he or she avoids falling prey to an unkind fate. Moreover, an appetite for power can never ignore the demands of prudence.²⁸ Such virtues, about which more will be said later, are key to a judge who aims to seize the greatest measure of power possible. Hence, the laws of power are the very ones that an extraordinary judge must honor and always uphold.

Still, power is not a word typically associated with judging and the judicial branch. Its domain is elsewhere – in the more overtly political spheres. Or so goes the traditional tale. In the tripartite American constitutional scheme of things, the judiciary is said to be the least powerful, and thus the least dangerous branch. It was said long ago by Alexander Hamilton in *Federalist* No. 78 that the judiciary “may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”²⁹ Clearly, there is truth there, and it is counsel of which a prudent judge should consider. That said, Hamilton’s account of the constitutional order must be understood in tandem with the constitutional handiwork of his *Federalist* friend, John Marshall. Even in his own day, Hamilton was sympathetic to Marshall’s campaign to expand the powers of Article III judges. Despite the opaqueness of the judicial powers set forth in Article III, “John Marshall remedied that deficiency, and many of the Supreme Court decisions he handed down were based on concepts articulated by Hamilton.”³⁰ Yet even were one to remain firmly fixed on *Federalist* No. 78’s depiction of the judiciary, that vision is considerably different from what today passes for the power of Supreme Court Justices – a power so great as to proclaim who shall be the President of the United States.³¹ For such reasons, and others, it has rightly been observed that the “least dangerous branch of the

American government is the most extraordinarily powerful court of law the world has ever known.”³²

If power is the capacity to impose one’s will, then how is that capacity related to the art of judging? First and foremost, the answer has to do with what is called *judicial interpretation*. What does the law mean? The power to answer that question in an official way and have it enforced is a power of great moment. Think of it: At some point the interpretive power is the power to *make* the law.³³ The landmark ruling in *Brown v. Board of Education*³⁴ is but one example of that principle at work in the American judicial system, given the more than plausible claim that the Court’s opinion ran contrary to many of the declared intentions of the drafters of the Fourteenth Amendment to the Constitution.³⁵ This interpretive power is even more spectacular when one considers that it is, in the *final* analysis, the province of the judiciary³⁶ and can only be politically overridden by the cumbersome process of a constitutional amendment.

A cautionary note: Just how one’s will is imposed (for lack of a better word) is complex. For example, it may be through the ruling in an isolated case (e.g., a government subsidized healthcare case); or through the doctrine developed in a category of cases (e.g., racial discrimination cases); or even through a broader and immensely more difficult objective of reshaping public policy in a meaningful and enduring way (e.g., abortion cases).³⁷ In all of these respects, it must be remembered that politics blend differently in a judicial beaker than in an executive or legislative one. Part of the delicate mix in the context of judicial politics is knowing how best to have one’s decisions honored (to the extent it is reasonably possible) by the power brokers in the other branches of government. In more Machiavellian terms, this is but another way of endeavoring to diminish “the domain of contingency”³⁸ and thereby render a judge less vulnerable to vagaries of chance. By exercising the virtues of calculated innovation, the modern judge better positions himself to realize his objectives.

If the judicial power is emboldened by modern judicial review, then the ability to interpret the law is itself a power base. It is from that base that a careful judge can be most effective in gradually translating his or her will into law. If judges already do that whenever they interpret laws, whether constitutional or statutory ones, then they can be said to be acting faithfully to the laws as *they understand them*, either as they are or should be. This insight energizes the power principle in the judicial context. In the various chapters that follow, we venture to explain how this is so as a jurisprudential and tactical matter.



There are, to be sure, differences between the advice given in our work and that offered by the fifteenth century Florentine philosopher in his ingenious book. For one thing, Machiavelli’s world and work were more overtly political (and thus brutal) in any number of ways. His was a treacherous time dominated by corrupt papal figures, dukes, countesses, wealthy families, war lords, madmen, and foreign kings, all vying for political power. In such combative and dangerously duplicitous scenarios, physical force of the most savage kind (the “way of beasts”) was sometimes required. Mindful of those considerations, Machiavelli sought to counsel one who wielded power

- and in so doing, be the beneficiary of his advice. In several notable ways, he was an insider in that world. Our jurisprudential context and our mission are different - we are not insiders in the judicial world (though we both served in it for a brief time years ago as aides to a state supreme court justice, a federal appellate judge, and to the Chief Justice of the United States). We expect no favor of any judge or justice. We seek no appointment to any office owing to what we have written.³⁹ And, of course, we would never counsel violent force. In these and others ways, our mission is a much more modest one, a more civil one adapted to the demands of its own particular context.

Our modesty notwithstanding, some will be quick to judge our realist tract before taking the time needed to piece together the puzzles of our thinking. Most assuredly, those who preach the lofty ideal of judicial detachment will vigorously disparage our explicit lessons. If so, their counterfeit gospels will only buttress the truth of our realist claims. After all, there is no faith in a cause that is so sound as to admit its own folly.

Let us be clear: We do not countenance reckless bravado; we condemn it. Why? Because appearances matter; because a judge must seem judicious; because to look otherwise will prove ruinous to any judge who seeks to improve his or her lot. Moreover, there are certain moves taken by judges that are so imprudent as to be beyond the effectual powers of the judicial domain. Sometimes, "passive virtues"⁴⁰ can serve one well, even if one betrays them as circumstances require. Thus understood, the reality of circumstances, and not some fixed principle, constrains or emboldens power. Precisely because of the importance of circumstances, principle will occasionally need to be cast aside in the name of perception, the kind of perception that can either ruin a judge's reputation or enhance it.

The extraordinary Judge - the one who possesses the virtues of prudence and prowess - knows all too well that the acquisition, use, and maintenance of judicial power demand time, skill, and a long view of things. That judge is cautious, not impetuous. Patience, indirection, and an appreciation of the subtle are strong suits. Like the Roman god Janus, the Judge looks back in time to learn from the lessons of the past while always looking forward to chart each move in a path to power. Yes, the Judge is his or her own ruler, but is also one who knows the limits of power well enough not to squander it when little is to be gained and much lost.



*Machiavelli was among the most honest . . . of men.*⁴¹

Why this book? And what are the lessons to be learned from it? Here are a few preliminary answers.

First, one aim of the book is to test the certainty of the convictions of those who hold that law is politics. What follows might be seen as an attempt (by way of constructive provocations) to prompt readers to consider seriously the theoretical and real-world consequences of their view of things. That is, what would it mean if the law-as-politics maxim were truly unbound?⁴²

Second, *The Judge* frees the lessons of *The Prince* from the confines of other spheres and introduces them into a domain where their effectual truths may play out. It is curious that Machiavellian principles have not received much explicit and extended attention in the judicial context. Perhaps the explanation inheres in the belief that the rules of politics are inapplicable to the judicial craft. But as appellate law becomes ever more politicized, the old ideas are vulnerable to attack and susceptible to reconsideration in light of the workings of the modern realist world.⁴³ Such reconsideration is long overdue. Just where such new thinking will lead is yet another question *The Judge* invites its readers to ponder.

Third, our disclosure of the stratagems of judicial power may have the effect of educating judges on how best to practice their judicial art, both in defensive and offensive ways in the circumstances in which they find themselves.⁴⁴ Armed with such information, lesser judges may recognize such tactics and thereby counter them as best they can. Then again, they might attempt to employ such lessons in the service of their own power ambitions. All of this reveals one of the key issues raised in *The Judge*: how does one most effectively use information? This is what Machiavelli understood as powers “well used” or “badly used.”⁴⁵

Fourth, the revelations made in *The Judge* might also be said to democratize knowledge about judging for the benefit of the general public; the information provided might thus enable lay people to see judicial power politics in a truer light.⁴⁶ The sinister moves of the consciously deceitful should be exposed. Here too, and more importantly so, a question arises: What are the consequences, probable or conjectural, of exposing such judging for what it really is?

Fifth, while lessons of the kind set forth in this book may point to the path of cynicism, they need not necessarily do so. Once one truly understands the status quo in appellate judging and the machinations by which it often operates, one can expose it and refuse to participate in it.⁴⁷ Such an act of withdrawal would be akin to a move away from Machiavelli’s realism and towards Rousseau’s idealism.⁴⁸ This move, however, raises an important question related to some of those just asked: What would it mean to remove the necessity of deception from the art of appellate judging? Think about it; think hard.

Finally, should the prior answers prove unsatisfactory in whole or in part, an even bolder reply remains: Principled moderation is useless to the wise. Carefully applied, Power is the principle that ought to guide a judge of more than ordinary skill. How to win and wield that power is the more obvious subject of this discourse on modern judging. If you would have it otherwise, obey the advice of Saint Augustine – never lie.⁴⁹



What follows is the product of decades of considerable reflection on, and research related to, law, judicial politics, and political philosophy. While Machiavelli’s *Prince* provides some of the conceptual template for our project, and while an understanding of that work and its author informs parts of what we write, *The Judge* does not purport to be a commentary on or an interpretation of *The Prince*. Hence, the philosophical differences among the likes of Quentin

Skinner,⁵⁰ J. G. A. Pocock,⁵¹ Leo Strauss,⁵² and Philip Bobbitt,⁵³ among others, on Machiavelli's true intent (cynical or humanist, realist or relativist, patriotic or despotic, republican or royalist, tough-minded or diabolically-minded, etc.) need not be discussed here. Nor is it our intention to evaluate the merits of Machiavelli's mission in his own times.⁵⁴ It is suitable enough for our unorthodox tract that people understand Machiavelli's *Prince* as Francis Bacon⁵⁵ and countless others may have, namely, as a collection of cunning maxims in the service of power, loosely defined.

As you will soon discern, many of our lessons pivot on the grand achievements of great judges, informed as they might have been by lessons learned from the failings of mediocre ones. Of course, when we use this or that example of judges or cases, we do not mean to say that any intent we assign to them was actually there. It might have been, but then again, it might not. Hence, we use such examples to support our lessons. It is important to remember this as you read the many examples set out in our book.

The deck now cleared, we can proceed more directly. Be ready for what follows. For in it you will read what ought not to be written . . . or so you will be led to believe. You will read what ought not to be urged . . . or so the purveyors of judicial restraint will say. You will read what ought not to be trusted . . . or so the masters of deceit will want you to think. And you will read what ought not to be acted upon . . . or so the righteous will advise you.⁵⁶ If such warnings worry you, then spare yourself. Put down this book now. If, however, you are reluctant to surrender to the untested counsel of others, then read on. That said, proceed with this assurance: Our lessons may serve some well.

Thus it is, our prologue to the judicial principles of power. Behold the new day, and welcome it. The dawn of *The Judge* has arrived.

NOTES

¹ Unless otherwise indicated, our references to judges and the law that they create are directed to American judges – specifically, appellate judges, and even more specifically to Justices of the U.S. Supreme Court. Furthermore, our references to law typically address constitutional law – that is, the supreme law of the United States as given meaning by jurists, typically Supreme Court Justices. Furthermore, certain controversial areas of existing law are far more likely than others to present the kind of circumstances described in this book.

² See, e.g., Ruth W. Grant, *Hypocrisy and Integrity: Machiavelli, Rousseau and the Ethics of Politics* (Chicago, IL: University of Chicago Press, 1997), pp. 18-19.

³ See Leo Paul de Alvarez, *The Machiavellian Enterprise: A Commentary on the Prince* (Dekalb, IL: Northern Illinois University Press, 2008), pp. 75-77.

⁴ Cass Sunstein, “If Judges Aren’t Politicians, What Are They?,” *Bloomberg Business*, 7 January 2013. Of course, the matter becomes more complex once one begins to look into voting patterns along a topical spectrum of cases combined with the group dynamics of federal circuit judges and Supreme Court Justices.

⁵ Burt Neuborne, SCOTUSblog on Camera, Part 1 (Winter 2015), at <http://www.scotusblog.com/media/scotusblog-on-camera-burt-neuborne-complete/>.

⁶ Cass Sunstein, “Moneyball for Judges,” *The New Republic*, 10 April 2013.

⁷ Richard Nelly, “The 9 Justices Are Legislators,” *Newsday*, 15 July 1987, p. 73 (statement by a then-sitting Justice of the West Virginia high court).

⁸ Mark Tushnet, “Following the Rules Laid Down,” *Harvard Law Review* 96: 781, 784 (1983).

⁹ Leslie Bender, “The Takings Clause: Principles or Politics?,” *Buffalo Law Review* 34: 735, 811-12 (1986).

¹⁰ Erwin Chemerinsky, *The Case Against the Supreme Court* (New York, NY: Viking, 2014), p. 10.

¹¹ Lincoln Caplan, “Why the Law Gets No Respect,” *Washington Post*, 20 September 1987, sec. C, p. 2 (Sunday ed.).

¹² Robert Barnes, “Round 2 for Obamacare Before the High Court,” *Washington Post*, 4 March 2015, sec. A, p. 3 (quoting Elizabeth B. Wydra, chief counsel for the Constitutional Accountability Center).

¹³ Patricia Wald, “Some Thoughts on Judging as Gleaned from One Hundred Years of the *Harvard Law Review* and Other Great Books,” *Harvard Law Review* 100: 887, 888 (1987).

¹⁴ Richard Posner, “Foreword: A Political Court,” *Harvard Law Review* 119: 31, 34 (2005).

¹⁵ Richard Posner, “The Supreme Court is a Political Court ~ Republicans’ actions are Proof,” *Washington Post*, 10 March 2016.

¹⁶ Jessica Gresko, “Breyer: Court Isn’t ‘9 Junior-Varsity Politicians,’” *Boston.com*, 13 September 2010 (Associated Press story quoting Justice Stephen Breyer).

¹⁷ Neal Devins and Lawrence Baum, “Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court,” SSRN, 2 May 2014, p. 3 (“Today’s partisan split, while unprecedented, is likely enduring. The very political changes that underlie today’s split suggest that, for the foreseeable future, a five-member Democratic Court will reach sets of decisions that are quite different from those of a five-member Republican Court. For this very reason, presidential elections matter more than ever before in defining Court decision-making.”).

¹⁸ See, e.g., Devins and Baum, “Split Definitive.”

¹⁹ See, e.g., *King v. Burwell*, 135 S. Ct. 2480 (2015) and *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

²⁰ Consider Alan Ryan, *On Machiavelli: The Search for Glory* (New York, NY: Liveright, 2011), pp. 76, 77, 78 (“[O]ne could be forgiven for thinking after a quick reading that being a Machiavellian hero is an exhausting and unprofitable activity Is the task hopeless? How well [one does] in a risky political enterprise . . . very much [depends on one’s] style, temperament, [and] characteristic mode of operation [and how they all suit] the conditions [of the time] [S]ometimes the schemes of a cautious man will come adrift because the situation demands boldness, [then again,] sometimes the cautious man will succeed where the bold one does not.”). This is not to concede that the Machiavellian effort is a Sisyphean one, but rather to emphasize the need to readjust one’s calculations from time to time, duly mindful of the role of chance.

²¹ The Borgia reference here, and the line of argument drawn from it, might be understood in non-conventional ways, much as Machiavelli’s message was non-conventional. See Clifford Orwin, “The Riddle of Cesare Borgia & the Legacy of Machiavelli’s *Prince*,” in Timothy Fuller, editor, *Machiavelli’s Legacy: The Prince After Five Hundred Years* (Philadelphia, PA: University of Pennsylvania Press, 2015), pp. 156, 157-158, 159, 162-163, 166, 170. See also Ryan, *On Machiavelli*, pp. 63-67.

²² Beyond the counsel contained in *The Prince*, we have also benefitted greatly from the parallel lessons set forth in Robert Greene, *The 48 Laws of Power* (New York, NY: Penguin, 1998).

²³ Of course, Machiavelli wrote other works on ruling, most notably his *Discourses on the First Decade of Livy*. The relationship between *The Prince* and the *Discourses* has been the subject of much scholarly attention. See, e.g., de Alvarez, *The Machiavellian Enterprise*, pp. vii-ix; Niccolò Machiavelli, *The Discourses* (New York, NY: Penguin, 1974) (trans. Leslie Walker, with introduction by Bernard Crick), pp. 13-69; Alissa Ardito, *Machiavelli and the Modern State: The Prince, the Discourses on Livy, and the Extended Territorial Republic* (New York, NY: Cambridge University Press, 2015), pp. 12-28. Since our enterprise is not a derivative one, such considerations, however important, need not constrain us.

²⁴ Christopher S. Celenza, *Machiavelli: A Portrait* (Cambridge, MA: Harvard University Press, 2015), pp. 65-66.

²⁵ See Felix Gilbert, *Machiavelli and Guicciardini: Politics and History in Sixteenth Century Florence* (New York, NY: W.W. Norton & Co., 1984), p. 168.

²⁶ DeAlvarez, *The Machiavellian Enterprise*, p. 79.

²⁷ Greene, *The 48 Laws of Power*, p. xvii.

²⁸ See Sebastian de Grazia, *Machiavelli in Hell* (Princeton, NJ: Princeton University Press, 1989), p. 257. See also *ibid.*, p. 256 (“Men’s desires and appetites are not only insatiable and wrongly directed, they are also deceptive. They distort vision, reason, and belief.”).

²⁹ Jacob E. Cooke, ed., *The Federalist* (Middletown, CN: Wesleyan University Press, 1961), p. 523 (Alexander Hamilton). See also David F. Epstein, *The Political Theory of The Federalist* (Chicago, IL: University of Chicago Press, 1984), p. 191 (commenting on the passage quoted in the text).

- ³⁰ Ron Chernow, *Alexander Hamilton* (New York, NY: Penguin Books, 2004), p. 648.
- ³¹ See *Bush v. Gore*, 531 U.S. 98 (2000). For commentary, see Bruce Ackerman, ed., *Bush v. Gore: The Question of Legitimacy* (New Haven, CT: Yale University Press, 2002), pp. 129-228 (discussing political question aspect of ruling).
- ³² Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York, NY: Bobbs-Merrill Co., 1962), p. 1
- ³³ “Judges interpret words. And words do not bind the interpreters; rather the interpreters give meaning to the words. The meaning of words is not the same as the ‘intent’ of the writers. Often writers have no pertinent intent or have several intents. When they have an intent it does not control, because words are mere instruments for conveying thoughts to others. The critical people are the users, not the writers, of words.” Frank Easterbrook, “Legal Interpretation and the Power of the Judiciary,” *Harvard Journal of Law and Public Policy* 7: 87 (1984).
- ³⁴ 347 U.S. 483 (1954).
- ³⁵ See Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, MA: Harvard University Press, 1977), pp. 126-133, 243-245, 342, 348. See also Herbert Wechsler, “Toward Neutral Principles of Constitutional Law,” *Harvard Law Review* 73: 1, 31-34 (1959) (arguing that *Brown* cannot be reconciled with principled adjudication).
- ³⁶ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and *Cooper v. Aaron*, 358 U.S. 1 (1958).
- ³⁷ Consider Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, IL: University Of Chicago Press, 2nd ed., 2008) pp. 173-268 (re abortion politics, arguing that it is extremely difficult to generate significant reforms through litigation because, as the author maintains, American courts are ineffective and relatively weak). We will say more about this later in our book.
- ³⁸ J.G.A. Pocock, *The Machiavellian Moment* (Princeton, NJ: Princeton University Press, 1975), p. 165.
- ³⁹ In this regard, consider de Alvarez, *The Machiavellian Enterprise*, pp. 4-5 (discussing who is “the true addressee” of *The Prince*).
- ⁴⁰ See Alexander Bickel, “Foreword: The Passive Virtues,” *Harvard Law Review* 75: 40 (1961).
- ⁴¹ Miles J. Unger, *Machiavelli: A Biography* (New York, NY: Simon & Schuster, 2011), p. 238.
- ⁴² See de Alvarez, *The Machiavellian Enterprise*, pp. 78-79 (discussing why Machiavelli brings “indecent things to light”).
- ⁴³ Several political scientists (of whose ideas we will say more later) have been attentive to some of the concerns discussed in *The Judge*. See, e.g., Walter F. Murphy, *Elements of Judicial Strategy* (Chicago, IL: University of Chicago Press, 1964), and Laurence Baum, *Judges and Their Audiences* (Princeton, NJ: Princeton University Press, 2006).
- ⁴⁴ For example, how a judge or justice votes may be influenced by such factors as the ideological makeup of his or her colleagues. See Cass R. Sunstein, Lisa Michelle Ellman, and David Schkade, “Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation,” *Virginia Law Review* 90: 301, 305 (2004).
- ⁴⁵ Niccolò Machiavelli, *The Prince*, trans. Harvey C. Mansfield (Chicago, IL: University of Chicago Press, 2nd ed., 1998), pp. 37-38 (Ch. VIII).
- ⁴⁶ Consider de Alvarez, *The Machiavellian Enterprise*, pp. 88-90 (discussing Machiavelli’s “openness”).

⁴⁷ See James Miller, *Rousseau: Dreamer of Democracy* (New Haven, CT: Yale University Press, 1964), p. 68 (quoting Rousseau re Machiavelli: “While pretending to give lessons to Kings, [Machiavelli] gave great ones to the people.”).

⁴⁸ See Grant, *Hypocrisy and Integrity*, pp. 4-5.

⁴⁹ See St. Augustine, “Against Lying,” in Roy J. Deferrari, ed., *Saint Augustine: Treatises on Various Subjects* (New York, NY: Fathers of the Church, Inc., 1952), pp. 125-179.

⁵⁰ See Quentin Skinner, *Machiavelli* (New York, NY: Hill & Wang, 1981).

⁵¹ See Pocock, *The Machiavellian Moment*.

⁵² See Leo Strauss, *Thoughts on Machiavelli* (Glencoe, IL: The Free Press, 1958) and Harvey C. Mansfield, “Strauss on *The Prince*,” *Review of Politics*, 75: 659 (2013). See also Harvey C. Mansfield, Jr. and J.G.A. Pocock, “An Exchange on Strauss’s Machiavelli,” *Political Theory* (November, 1975) 3: 372-405.

⁵³ See Philip Bobbitt, *The Garments of Court and Palace: Machiavelli and the World That He Made* (New York, NY: Atlantic Monthly Press, 2013).

⁵⁴ For a thoughtful and informed critique of Machiavelli and his mission, see Unger, *Machiavelli: A Biography*, pp. 215-245. See also Ardito, *Machiavelli and the Modern State*.

⁵⁵ See John Robertson, ed., *The Philosophical Works of Francis Bacon* (New York, NY: Routledge & Sons, 1905), p. 570 (re epigraph quote to this book).

⁵⁶ Consider in this regard Robert M. Adams, “The Rise, Proliferation, and Degradation of Machiavellism: An Outline,” in Machiavelli, *The Prince*, p. 273 (“The entire works of Machiavelli were placed on the Index of Prohibited Books, compiled by the Holy Inquisition of Rome. This act resulted from the decrees of the Council of Trent.”).

THE ARGUMENT FOR “NEUTRAL PRINCIPLES” FOR A “PRINCIPLED JURIST”

Contrast what you have just read with Judge Robert Bork’s famous (or infamous) article on neutral principles. That article is antithetical to the lessons set out in THE JUDGE.

In considering Bork’s case for the application of neutral principles, bear in mind that the application of those principles would run counter to such rulings as *Shelley v. Kraemer*, *Brown v. Board*, *Griswold v. Connecticut*, *Miranda v. Arizona*, *Mapp v. Ohio*, *Brandenburg v. Ohio*, *Roe v. Wade*, *Reed v. Reed*, *Lawrence v. Texas*, and *Obergefell v. Hodges*.

Bear in mind also that Judge Bork’s defense of his “neutral principles” theory cost him a seat on the Supreme Court.

Finally, whether Judge Bork was right or wrong on the merits, was it prudent of him to defend such principles during his confirmation hearings? Moreover, if seated, would it have been wise to take exception to cases such as *Brown*, *Griswold*, *Reed*, *Lawrence* and *Obergefell*?

NEUTRAL PRINCIPLES AND SOME FIRST AMENDMENT PROBLEMS

47 *Indiana Law Journal* 1 (1971) (footnotes omitted)

by Robert H. Bork

A persistently disturbing aspect of constitutional law is its lack of theory, a lack that is manifest not merely in the work of the courts but in the public, professional and even scholarly discussion of the topic. The result, of course, is that courts are without effective criteria and, therefore we have come to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes. In the present state of affairs that expectation is inevitable, but it is nevertheless deplorable.

The remarks that follow do not, of course, offer a general theory of constitutional law. They are more properly viewed as ranging shots, an attempt to establish the necessity for theory and to take the argument of how constitutional doctrine should be evolved by courts a step or two farther. The first section centers upon the implications of Professor Wechsler’s concept of “neutral principles,” and the second attempts to apply those implications to some important and much-debated problems in the interpretation of the first amendment. The style is informal since these remarks were originally lectures and I have not thought it worthwhile to convert these speculations and arguments into a heavily researched, balanced and thorough presentation, for that would result in a book.

The Supreme Court & The Demand for Principle

The subject of the lengthy and often acrimonious debate about the proper role of the Supreme Court under the Constitution is one that preoccupies many people these days: when is authority legitimate? I find it convenient to discuss that question in the context of the Warren Court and its works simply because the Warren Court posed the issue in acute form. The issue did not disappear along with the era of the Warren Court majorities, however. It arises when any court either exercises or declines to exercise the power to invalidate any act of another branch of government. The Supreme Court is a major power center, and we must ask when its power should be used and when it should be withheld.

Our starting place, inevitably, is Professor Herbert Wechsler's argument that the Court must not be merely a "naked power organ," which means that its decisions must be controlled by principle. "A principled decision," according to Wechsler, "is one that rests on reasons with respect to all the issues in a case, reasons that in their generality and their neutrality transcend any immediate result that is involved."

Wechsler chose the term "neutral principles" to capulate his argument, though he recognizes that the legal principle to be applied is itself never neutral because it embodies a choice of one value rather than another. Wechsler asked for the neutral application of principles, which is a requirement, as Professor Louis L. Jaffe puts it, that the judge "sincerely believe in the principle upon which he purports to rest his decision." "The judge," says Jaffe, "must believe in the validity of the reasons given for the decision at least in the sense that he is prepared to apply them to a later case which he cannot honestly distinguish." He must not, that is, decide lawlessly. But is the demand for neutrality in judges merely another value choice, one that is no more principled than any other? I think not, but to prove it we must rehearse fundamentals. This is familiar terrain but important and still debated.

The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic. The anomaly is dissipated, however, by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests. This model we may for convenience, though perhaps not with total accuracy, call "Madisonian."

A Madisonian system is not completely democratic, if by "democratic" we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for no better reason that they are majorities. We need not pause here to examine the philosophical underpinnings of that assumption since it is a "given" in our society; nor need we worry that "majority" is a term of art meaning often no more than the shifting combinations of minorities that add up to temporary majorities in the legislature. That majorities are so constituted is inevitable. In any case, one

essential premise of the Madisonian model is majoritarianism. The model has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.

Some see the model as containing an inherent, perhaps an insoluble, dilemma. Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor the minority can be trusted to define the freedom of the other. This dilemma is resolved in constitutional theory, and in popular understanding, by the Supreme Court's power to define both majority and minority freedom through the interpretation of the Constitution. Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.

But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority.

This argument is central to the issue of legitimate authority because the Supreme Court's power to govern rests upon popular acceptance of this model. Evidence that this is, in fact, the basis of the Court's power is to be gleaned everywhere in our culture. We need not canvass here such things as high school civics texts and newspaper commentary, for the most telling evidence may be found in the *U.S. Reports*. The Supreme Court regularly insists that its results, and most particularly its controversial results, do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises tells you what it thinks its customers demand.

This is, I think, the ultimate reason the Court must be principled. If it does not have and rigorously adhere to a valid and consistent theory of majority and minority freedoms based upon the Constitution, judicial supremacy, given the axioms of our system, is, precisely to that extent, illegitimate. The root of its illegitimacy is that it opens a chasm between the reality of the Court's performance and the constitutional and popular assumptions that give it power.

I do not mean to rest the argument entirely upon the popular understanding of the Court's function. Even if society generally should ultimately perceive what the Court is in fact doing and, having seen, prove content to have major policies determined by the unguided discretion of judges rather than by elected representatives, a principled judge would, I believe, continue to consider

himself bound by an obligation to the document and to the structure of government that it prescribes. At least he would be bound so long as any litigant existed who demanded such adherence of him. I do not understand how, on any other theory of judicial obligation, the Court could, as it does now, protect voting rights if a large majority of the relevant constituency were willing to see some groups or individuals deprived of such rights. But even if I am wrong in that, at the very least an honest judge would owe it to the body politic to cease invoking the authority of the Constitution and to make explicit the imposition of his own will, for only then would we know whether the society understood enough of what is taking place to be said to have consented.

Judge J. Skelly Wright, in an argument resting on different premises, has severely criticized the advocates of principle. He defends the value choosing role of the Warren Court, setting that Court in opposition to something he refers to as the "scholarly tradition," which criticizes that Court for its lack of principle.' A perceptive reader, sensitive to nuance, may suspect that the Judge is rather out of sympathy with that tradition from such hints as his reference to "self-appointed scholastic mandarins."

The "mandarins" of the academy anger the Judge because they engage in "haughty derision of the Court's powers of analysis and reasoning." Yet, curiously enough, Judge Wright makes no attempt to refute the charge but rather seems to adopt the technique of confession and avoidance. He seems to be arguing that a Court engaged in choosing fundamental values for society cannot be expected to produce principled decisions at the same time. Decisions first, principles later. One wonders, however, how the Court or the rest of us are to know that the decisions are correct or what they portend for the future if they are not accompanied by the principles that explain and justify them. And it would not be amiss to point out that quite often the principles required of the Warren Court's decisions never did put in an appearance. But Judge Wright's main point appears to be that value choice is the most important function of the Supreme Court, so that if we must take one or the other, and apparently we must, we should prefer a process of selecting values to one of constructing and articulating principles. His argument, I believe, boils down to a syllogism.

- I. The Supreme Court should "protect our constitutional rights and liberties."
- II. The Supreme Court must "make fundamental value choices" in order to "protect our constitutional rights and liberties."
- III. Therefore the Supreme Court should "make fundamental value choices."

Therefore, the Supreme Court Should "Make Fundamental Value Choices"

The argument displays an all too common confusion. If we have constitutional rights and liberties already, rights and liberties specified by the Constitution," the Court need make no fundamental value choices in order to protect them, and it certainly need not have difficulty enunciating principles. If, on the other hand, "constitutional rights and liberties" are not in some real sense specified by the Constitution but are the rights and liberties the Court chooses, on the basis of its own values, to give to us, then the conclusion was contained entirely in the major premise, and the Judge's syllogism is no more than an assertion of what it purported to prove.

If I am correct so far, no argument that is both coherent and respectable can be made supporting a Supreme Court that "chooses fundamental values" because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society. The man who understands the issues and nevertheless insists upon the rightness of the Warren Court's performance ought also, if he is candid, to admit that he is prepared to sacrifice democratic process to his own moral views. He claims for the Supreme Court an institutionalized role as perpetrator of limited *coups d'état*.

Such a man occupies an impossible philosophic position. What can he say, for instance, of a Court that does not share his politics or his morality? I can think of nothing except the assertion that he will ignore the Court whenever he can get away with it and overthrow it if he can. In his view the Court has no legitimacy, and there is no reason any of us should obey it. And, this being the case, the advocate of a value-choosing Court must answer another difficult question. Why should the Court, a committee of nine lawyers, be the sole agent of change? The man who prefers results to processes has no reason to say that the Court is more legitimate than any other institution. If the Court will not listen, why not argue the case to some other group, say the Joint Chiefs of Staff, a body with rather better means for implementing its decisions?

We are driven to the conclusion that a legitimate Court must be controlled by principles exterior to the will of the Justices. As my colleague, Professor Alexander Bickel, puts it, "The process of the coherent, analytically warranted, principled declaration of general norms alone justifies the Court's function" Recognition of the need for principle is only the first step, but once that step is taken much more follows. Logic has a life of its own, and devotion to principle requires that we follow where logic leads.

Professor Bickel identifies Justice Frankfurter as the leading judicial proponent of principle but concedes that even Frankfurter never found a "rigorous general accord between judicial supremacy and democratic theory." Judge Wright responds, "The leading commentators of the scholarly tradition have tried ever since to succeed where the Justice failed." As Judge Wright quite accurately suggests, the commentators have so far had no better luck than the Justice.

On reason, I think, is clear. We have not carried the idea of neutrality far enough. We have been talking about neutrality in the application of principles. If judges are to avoid imposing their own values upon the rest of us, however they must be neutral as well in the definition and the derivation of principles.

It is easy enough to meet the requirement of neutral application by stating a principle so narrowly that no embarrassment need arise in applying it to all cases it subsumes, a tactic often urged by proponents of "judicial restraint." But that solves very little. It certainly does not protect the judge from the intrusion of his own values. The problem may be illustrated by *Griswold v. Connecticut*, in many ways a typical decision of the Warren Court. *Griswold* struck down Connecticut's statute making it a crime, even for married couples, to use contraceptive devices. If we take the principle

of the decision to be a statement that government may not interfere with any acts done in private, we need not even ask about the principle's dubious origin for we know at once that the Court will not apply it neutrally. The Court, we may confidently predict, is not going to throw constitutional protection around heroin use or sexual acts with a consenting minor. We can gain the possibility of neutral application by reframing the principle as a statement that government may not prohibit the use of contraceptives by married couples, but that is not enough. The question of neutral definition arises: Why does the principle extend only to married couples? Why, out of all forms of sexual behavior, only to the use of contraceptives? Why, out of all forms of behavior, only to sex? The question of neutral derivation also arises: What justifies any limitation upon legislatures in this area? What is the origin of any principle one may state?

To put the matter another way, if a neutral judge must demonstrate why principle X applies to cases A and B but not to case C (which is, I believe, the requirement laid down by Professors Wechsler and Jaffe), he must, by the same token, also explain why the principle is defined as X rather than as X minus, which would cover A but not cases B and C, or as X plus, which would cover all cases, A, B and C. Similarly, he must explain why X is a proper principle of limitation on majority power at all. Why should he not choose non-X? If he may not choose lawlessly between cases in applying principle X, he may certainly not choose lawlessly in defining X or in choosing X, for principles are after all only organizations of cases into groups. To choose the principle and define it is to decide the cases.

It follows that the choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. The case just mentioned illustrates the point. The *Griswold* decision has been acclaimed by legal scholars as a major advance in constitutional law, a salutary demonstration of the Court's ability to protect fundamental human values. I regret to have to disagree, and my regret is all the more sincere because I once took the same position and did so in print. In extenuation I can only say that at the time I thought, quite erroneously, that new basic rights could be derived logically by finding and extrapolating a more general principle of individual autonomy underlying the particular guarantees of the Bill of Rights.

The Court's *Griswold* opinion, by Justice Douglas, and the array of concurring opinions, by Justices Goldberg, White and Harlan, all failed to justify the derivation of any principle used to strike down the Connecticut anti-contraceptive statute or to define the scope of the principle. Justice Douglas, to whose opinion I must confine myself, began by pointing out that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Nothing is exceptional there. In the case Justice Douglas cited, *NAACP v. Alabama*, the State was held unable to force disclosure of membership lists because of the chilling effect upon the rights of assembly and political action of the NAACP's members. The penumbra was created solely to preserve a value central to the first amendment, applied in this case through

the fourteenth amendment. It had no life of its own as a right independent of the value specified by the first amendment.

But Justice Douglas then performed a miracle of transubstantiation. He called the first amendment's penumbra a protection of "privacy" and then asserted that other amendments create "zones of privacy."¹⁹ He had no better reason to use the word "privacy" than that the individual is free within these zones, free to act in public as well as in private. None of these penumbral zones—from the first, third, fourth or fifth amendments, all of which he cited, along with the ninth—covered the case before him. One more leap was required. Justice Douglas asserted that these various "zones of privacy" created an independent right of privacy,¹⁹ a right not lying within the penumbra of any specific amendment. He did not disclose, however, how a series of specified rights combined to create a new and unspecified right.

The *Griswold* opinion fails every test of neutrality. The derivation of the principle was utterly specious, and so was its definition. In fact, we are left with no idea of what the principle really forbids. Derivation and definition are interrelated here. Justice Douglas called the amendments and their penumbras "zones of privacy," though of course they are not that at all. They protect both private and public behavior and so would more properly be labeled "zones of freedom." If we follow Justice Douglas in his next step, these zones would then add up to an independent right of freedom, which is to say, a general constitutional right to be free of legal coercion, a manifest impossibility in any imaginable society.

Griswold, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it. We are left with no idea of the sweep of the right of privacy and hence no notion of the "cases to which it may or may not be applied in the future. The truth is that the Court could not reach its result in *Griswold* through principle. The reason is obvious. Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure. Compare the facts in *Griswold* with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical.

In *Griswold* a husband and wife assert that they wish to have sexual relations without fear of unwanted children. The law impairs their sexual gratifications. The State can assert, and at one stage in that litigation did assert, that the majority finds the use of contraceptives immoral. Knowledge that it takes place and that the State makes no effort to inhibit it causes the majority anguish, impairs their gratifications.

The electrical company asserts that it wishes to produce electricity at low cost in order to reach a wide market and make profits. Its customer asserts that he wants a lower cost so that prices can be held low. The smoke pollution regulation impairs his and the company's stockholders' economic

gratifications. The State can assert not only that the majority prefer clean air to lower prices, but also that the absence of the regulation impairs the majority's physical and aesthetic gratifications.

Neither case is covered specifically or by obvious implication in the Constitution. Unless we can distinguish forms of gratification, the only course for a principled Court is to let the majority have its way in both cases. It is clear that the Court cannot make the necessary distinction. There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another." Why is sexual gratification more worthy than moral gratification? Why is sexual gratification nobler than economic gratification? There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy. The issue of the community's moral and ethical values, the issue of the degree of pain an activity causes, are matters concluded by the passage and enforcement of the laws in question. The judiciary has no role to play other than that of applying the statutes in a fair and impartial manner.

One of my colleagues refers to this conclusion, not without sarcasm, as the "Equal Gratification Clause." The phrase is apt, and I accept it, though not the sarcasm. Equality of human gratifications, where the document does not impose a hierarchy, is an essential part of constitutional doctrine because of the necessity that judges be principled. To be perfectly clear on the subject, I repeat that the principle is not applicable to legislatures. Legislation requires value choice and cannot be principled in the sense under discussion. Courts must accept any value choice the legislature offers.

The argument so far also indicates that most of substantive equal protection is also improper. The modern Court, we need hardly be reminded, used the equal protection clause the way the old Court used the due process clause. The only change was in the values chosen for protection and the frequency with which the Court struck down laws.

The equal protection clause has two legitimate meanings. It can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause. The bare concept of equality provides no guide for courts. All law discriminates and thereby creates inequality. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of "fairness" or to what it regards as "fundamental" interests in order to demand equality in some cases but not in others, thus choosing values and producing a line of cases as improper and as intellectually empty as *Griswold v. Connecticut*. Any casebook lists them, and the differing results cannot be explained on any ground other than the Court's preferences for particular values: *Skinner v. Oklahoma*" (a forbidden inequality exists when a state undertakes to sterilize robbers but not embezzlers) ; *Kotch v. Board of River PortPilot Commissioners* (no right to equality is infringed when a state grants pilots'

licenses only to persons related by blood to existing pilots and denies licenses to persons otherwise as well qualified); *Goesaert v. Cleary* (a state does not deny equality when it refuses to license women as bartenders unless they are the wives or daughters of male owners of licensed liquor establishments); *Railway Express Agency v. New York* (a city may forbid truck owners to sell advertising space on their trucks as a distracting hazard to traffic safety though it permits owners to advertise their own business in that way); *Shapiro v. Thompson*³⁰ (a state denies equality if it pays welfare only to persons who have resided in the state for one year) ; *Levy v. Louisiana*³¹ (a state may not limit actions for a parent's wrongful death to legitimate children and deny it to illegitimate children). The list could be extended, but the point is that the cases cannot be reconciled on any basis other than the Justices' personal beliefs about what interests or gratifications ought to be protected.

Professor Wechsler notes that Justice Frankfurter expressed "disquietude that the line is often very thin between the cases in which the Court felt compelled to abstain from adjudication because of their 'political' nature, and the cases that so frequently arise in applying the concepts of 'liberty' and 'equality'." The line is not very thin; it is nonexistent. There is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is required. These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions.

We may now be in a position to discuss certain of the problems of legitimacy raised by Professor Wechsler. Central to his worries was the Supreme Court's decision in *Brown v. Board of Education*. Wechsler said he had great difficulty framing a neutral principle to support the Brown decision, though he thoroughly approved of its result on moral and political grounds. It has long been obvious that the case does not rest upon the grounds advanced in Chief Justice Warren's opinion, the especially harmful effects of enforced school segregation upon black children. That much, as Wechsler and others point out, is made plain by the per curiam decisions that followed outlawing segregated public beaches, public golf courses and the like. The principle in operation may be that government may not employ race as a classification. But the genesis of the principle is unclear. Wechsler states that his problem with the segregation cases is not that:

History does not confirm that an agreed purpose of the fourteenth amendment was to forbid separate schools or that there is important evidence that many thought the contrary; the words are general and leave room for expanding content as time passes and conditions change.

The words are general but surely that would not permit us to escape the framers' intent if it were clear. If the legislative history revealed a consensus about segregation in schooling and all the other relations in life, I do not see how the Court could escape the choices revealed and substitute its own, even though the words are general and conditions have changed. It is the fact that history does not reveal detailed choices concerning such matters that permits, indeed requires, resort to other modes of interpretation.

Wechsler notes that *Brown* has to do with freedom to associate and freedom not to associate, and he thinks that a principle must be found that solves the following dilemma:

[I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension. . . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases."

It is extremely unlikely that Professor Wechsler ever will be able to write that opinion to his own satisfaction. He has framed the issue in insoluble terms by calling it a "conflict between human claims of high dimension," which is to say that it requires a judicial choice between rival gratifications in order to find a fundamental human right. So viewed it is the same case as *Griswold v. Connecticut* and not susceptible of principled resolution.

A resolution that seems to me more plausible is supported rather than troubled by the need for neutrality. A court required to decide *Brown* would perceive two crucial facts about the history of the fourteenth amendment. First, the men who put the amendment in the Constitution intended that the Supreme Court should secure against government action some large measure of racial equality. That is certainly the core meaning of the amendment. Second, those same men were not agreed about what the concept of racial equality requires. Many or most of them had not even thought the matter through. Almost certainly, even individuals among them held such views as that blacks were entitled to purchase property from any willing seller but not to attend integrated schools, or that they were entitled to serve on juries but not to intermarry with whites, or that they were entitled to equal physical facilities but that the facilities should be separate, and so on through the endless anomalies and inconsistencies with which moral positions so frequently abound. The Court cannot conceivably know how these long-dead men would have resolved these issues had they considered, debated and voted on each of them. Perhaps it was precisely because they could not resolve them that they took refuge in the majestic and ambiguous formula: the equal protection of the laws.

But one thing the Court does know: it was intended to enforce a core idea of black equality against governmental discrimination. And the Court, because it must be neutral, cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that applies to all cases. For the same reason, the Court cannot decide that physical equality is important but psychological equality is not. Thus, the no-state-enforced-discrimination rule of *Brown* must overturn and replace the separate-but-equal doctrine of *Plessy v. Ferguson*. The same result might be reached on an alternative ground. If the Court found that it was incapable as an institution of policing the issue of the physical equality of

separate facilities, the variables being insufficiently comparable and the cases too many, it might fashion a no-segregation rule as the only feasible means of assuring even physical equality.

In either case, the value choice (or, perhaps more accurately, the value impulse) of the fourteenth amendment is fleshed out and made into a legal rule-not by moral precept, not by a determination that claims for association prevail over claims for separation as a general matter, still less by consideration of psychological test results, but on purely juridical grounds.

I doubt, however, that it is possible to find neutral principles capable of supporting some of the other decisions that trouble Professor Wechsler. An example is *Shelley v. Kraemer*, which held that the fourteenth amendment forbids state court enforcement of a private, racially restrictive covenant. Although the amendment speaks only of denials of equal protection of the laws by the state, Chief Justice Vinson's opinion said that judicial enforcement of a private person's discriminatory choice constituted the requisite state action. The decision was, of course, not neutral in that the Court was most clearly not prepared to apply the principle to cases it could not honestly distinguish. Any dispute between private persons about absolutely any aspect of life can be brought to a court by one of the parties; and, if race is involved, the rule of *Shelley* would require the court to deny the freedom of any individual to discriminate in the conduct of any part of his affairs simply because the contrary result would be state enforcement of discrimination. The principle would apply not merely to the cases hypothesized by Professor Wechsler ~ the inability of the state to effectuate a will that draws a racial line or to vindicate the privacy of property against a trespasser excluded because of the homeowner's racial preferences ~ but to any situation in which the person claiming freedom in any relationship had a racial motivation.

That much is the common objection to *Shelley v. Kraemer*, but the trouble with the decision goes deeper. Professor Louis Henkin has suggested that we view the case as correctly decided, accept the principle that must necessarily underline it if it is respectable law and proceed to apply that principle:

Generally, the equal protection clause precludes state enforcement of private discrimination. There is, however, a small area of liberty favored by the Constitution even over claims to equality. Rights of liberty and property, of privacy and voluntary association, must be balanced in close cases, against the right not to have the state enforce discrimination against the victim. In the few instances in which the right to discriminate is protected or preferred by the Constitution, the state may enforce it.

This attempt to rehabilitate *Shelley* by applying its principle honestly demonstrates rather clearly why neutrality in the application of principle is not enough. Professor Henkin's proposal fails the test of the neutral derivation of principle. It converts an amendment whose text and history clearly show it to be aimed only at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion. The judge's power to govern does not become more legitimate if he is constrained to apply his principle to all cases but is free to make up his own principles. Matters are only made worse by Professor Henkin's suggestion that

the judge introduce a small number of exceptions for cases where liberty is more important than equality, for now even the possibility of neutrality in the application of principle is lost. The judge cannot find in the fourteenth amendment or its history any choices between equality and freedom in private affairs. The judge, if he were to undertake this task, would be choosing, as in *Griswold v. Connecticut*, between competing gratifications without constitutional guidance. Indeed, Professor Henkin's description of the process shows that the task he would assign is legislative:

The balance may be struck differently at different times, reflecting differences in prevailing philosophy and the continuing movement from laissez-faire government toward welfare and meliorism. The changes in prevailing philosophy themselves may sum up the judgment of judges as to how the conscience of our society weighs the competing needs and claims of liberty and equality in time and context ~ the adequacy of progress toward equality as a result of social and economic forces, the effect of lack of progress on the life of the Negro and, perhaps, on the image of the United States, and the role of official state forces in advancing or retarding this progress.

In short, after considering everything a legislator might consider, the judge is to write a detailed code of private race relations. Starting with an attempt to justify *Shelley* on grounds of neutral principle, the argument rather curiously arrives at a position in which neutrality in the derivation, definition and application of principle is impossible and the wrong institution is governing society.

The argument thus far claims that, cases of race discrimination aside, it is always a mistake for the Court to try to construct substantive individual rights under the due process or the equal protection clause. Such rights cannot be constructed without comparing the worth of individual gratifications, and that comparison cannot be principled. Unfortunately, the rhetoric of constitutional adjudication is increasingly a rhetoric about "fundamental" rights that inhere in humans. That focus does more than lead the Court to construct new rights without adequate guidance from constitutional materials. It also distorts the scope and definition of rights that have claim to protection.

There appear to be two proper methods of deriving rights from the Constitution. The first is to take from the document rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules. We may call these specified rights. The second method derives rights from governmental processes established by the Constitution. These are secondary or derived individual rights. This latter category is extraordinarily important. This method of derivation is essential to the interpretation of the first amendment, to voting rights, to criminal procedure and to much else.

Secondary or derivative rights are not possessed by the individual because the Constitution has made a value choice about individuals. Neither are they possessed because the Supreme Court thinks them fundamental to all humans. Rather, these rights are located in the individual for the sake of a governmental process that the Constitution outlines and that the Court should preserve. They are given to the individual because his enjoyment of them will lead him to defend them in court and thereby preserve the governmental process from legislative or executive deformation.

The distinction between rights that are inherent and rights that are derived from some other value is one that our society worked out long ago with respect to the economic market place, and precisely the same distinction holds and will prove an aid to clear thought with respect to the political market place. A right is a form of property, and our thinking about the category of constitutional property might usefully follow the progress of thought about economic property. We now regard it as thoroughly old hat, passé and in fact downright tiresome to hear rhetoric about an inherent right to economic freedom or to economic property. We no longer believe that economic rights inhere in the individual because he is an individual. The modern intellectual argues the proper location and definition of property rights according to judgments of utility—the capacity of such rights to forward some other value. We may, for example, wish to maximize the total wealth of society and define property rights in a way we think will advance that goal by making the economic process run more efficiently. As it is with economic property rights, so it should be with constitutional rights relating to governmental processes.

The derivation of rights from governmental processes is not an easy task, and I do not suggest that a shift in focus will make anything approaching a mechanical jurisprudence possible. I do suggest that, for the reasons already argued, no guidance whatever is available to a court that approaches, say, voting rights or criminal procedures through the concept of substantive equality.

The state legislative reapportionment cases were unsatisfactory precisely because the Court attempted to apply a substantive equal protection approach. Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument. The principle of one man, one vote was not neutrally derived: it runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formulas. The principle was not neutrally defined: it presumably rests upon some theory of equal weight for all votes, and yet we have no explanation of why it does not call into question other devices that defeat the principle, such as the executive veto, the committee system, the filibuster, the requirement on some issues of two-thirds majorities and the practice.

To approach these cases as involving rights derived from the requirements of our form of government is, of course, to say that they involve guarantee clause claims. Justice Frankfurter opposed the Court's consideration of reapportionment precisely on the ground that the "case involves all the elements that have made the Guarantee Clause cases non-justiciable," and was a "Guarantee Clause claim masquerading under a different label." Of course, his characterization was accurate, but the same could be said of many voting rights cases he was willing to decide. The guarantee clause, along with the provisions and structure of the Constitution and our political history, at least provides some guidance for a Court. The concept of the primary right of the individual in this area provides none. Whether one chooses to use the guarantee of a republican form of government of article IV, § 4 as a peg or to proceed directly to considerations of constitutional structure and political practice probably makes little difference. Madison's writing on the republican form of government specified by the guarantee clause suggests that

representative democracy may properly take many forms, so long as the forms do not become "aristocratic or monarchical." That is certainly less easily translated into the rigid one person, one vote requirement, which rests on a concept of the right of the individual to equality, than into the requirement expressed by Justice Stewart in *Lucas v. Forty-Fourth General Assembly* that a legislative apportionment need only be rational and "must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State." The latter is a standard derived from the requirements of a democratic process rather than from the rights of individuals. The topic of governmental processes and the rights that may be derived from them is so large that it is best left at this point. It has been raised only as a reminder that there is a legitimate mode of deriving and defining constitutional rights, however difficult intellectually that is available to replace the present unsatisfactory focus.

At the outset I warned that I did not offer a complete theory of constitutional interpretation. My concern has been to attack a few points that may be regarded as salient in order to clear the way for such a theory. I turn next to a suggestion of what neutrality, the decision of cases according to principle, may mean for certain first amendment problems.

Some First Amendment Problems: The Search for Theory

The law has settled upon no tenable, internally consistent theory of the scope of the constitutional guarantee of free speech. Nor have many such theories been urged upon the courts by lawyers or academics. Professor Harry Kalven, Jr., one whose work is informed by a search for theory, has expressed wonder that we should feel the need for theory in the area of free speech when we tolerate inconsistencies in other areas of the law so calmly. He answers himself:

If my puzzle as to the First Amendment is not a true puzzle, it can only be for the congenial reason that free speech is so close to the heart of democratic organization that if we do not have an appropriate theory for our law here, we feel we really do not understand the society in which we live.

Kalven is certainly correct in assigning the first amendment a central place in our society, and he is also right in attributing that centrality to the importance of speech to democratic organization. Since I share this common ground with Professor Kalven, I find it interesting that my conclusions differ so widely from his.

I am led by the logic of the requirement that judges be principled to the following suggestions. Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law.

I am, of course, aware that this theory departs drastically from existing Court-made law, from the views of most academic specialists in the field and that it may strike a chill into the hearts of some civil libertarians. But I would insist at the outset that constitutional law, viewed as the set of rules a judge may properly derive from the document and its history, is not an expression of our political sympathies or of our judgments about what expediency and prudence require. When decision making is principled it has nothing to say about the speech we like or the speech we hate; it has a great deal to say about how far democratic discretion can govern without endangering the basis of democratic government. Nothing in my argument goes to the question of what laws should be enacted. I like the freedoms of the individual as well as most, and I would be appalled by many statutes that I am compelled to think would be constitutional if enacted. But I am also persuaded that my generally libertarian commitments have nothing to do with the behavior proper to the Supreme Court.

In framing a theory of free speech the first obstacle is the insistence of many very intelligent people that the "first amendment is an absolute." Devotees of this position insist, with a literal respect they do not accord other parts of the Constitution, that the Framers commanded complete freedom of expression without governmental regulation of any kind. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech. . . ." Those who take that as an absolute must be reading "speech" to mean any form of verbal communication and "freedom" to mean total absence of governmental restraint.

Any such reading is, of course, impossible. Since it purports to be an absolute position we are entitled to test it with extreme hypotheticals. Is Congress forbidden to prohibit incitement to mutiny aboard a naval vessel engaged in action against an enemy, to prohibit shouted harangues from the visitors' gallery during its own deliberations or to provide any rules for decorum in federal courtrooms? Are the states forbidden, by the incorporation of the first amendment in the fourteenth, to punish the shouting of obscenities in the streets?

No one, not the most obsessed absolutist, takes any such position, but if one does not, the absolute position is abandoned, revealed as a play on words. Government cannot function if anyone can say anything anywhere at any time. And so we quickly come to the conclusion that lines must be drawn, differentiations made. Nor does that in any way involve us in a conflict with the wording of the first amendment. Laymen may perhaps be forgiven for thinking that the literal words of the amendment command complete absence of governmental inhibition upon verbal activity, but what can one say of lawyers who believe any such thing? Anyone skilled in reading language should know that the words are not necessarily absolute. "Freedom of speech" may very well be a term referring to a defined or assumed scope of liberty, and it may be this area of liberty that is not to be "abridged."

If we turn to history, we discover that our suspicions about the wording are correct, except that matters are even worse. The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject. Professor Leonard Levy's work, *Legacy of Suppression*,⁷ demonstrates that the men who adopted the first amendment did not display a

strong libertarian stance with respect to speech. Any such position would have been strikingly at odds with the American political tradition. Our forefathers were men accustomed to drawing a line, to us often invisible, between freedom and licentiousness. In colonial times and during and after the Revolution they displayed a determination to punish speech thought dangerous to government, much of it expression that we would think harmless and well within the bounds of legitimate discourse. Jeffersonians, threatened by the Federalist Sedition Act of 1798, undertook the first American elaboration of a libertarian position in an effort to stay out of jail. Professor Walter Berns offers evidence that even then the position was not widely held. When Jefferson came to power it developed that he read the first amendment only to limit Congress and he believed suppression to be a proper function of the state governments. He appears to have instigated state prosecutions against Federalists for seditious libel. But these later developments do not tell us what the men who adopted the first amendment intended, and their discussions tell us very little either. The disagreements that certainly existed were not debated and resolved. The first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended. One reason, as Levy shows, is that the Anti-Federalists complained of the absence of a Bill of Rights less because they cared for individual freedoms than as a tactic to defeat the Constitution. The Federalists promised to submit one in order to get the Constitution ratified. The Bill of Rights was then drafted by Federalists, who had opposed it from the beginning; the Anti-Federalists, who were really more interested in preserving the rights of state governments against federal power, had by that time lost interest in the subject.

We are, then, forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or to its history. But we are not without materials for building. The first amendment indicates that there is something special about speech. We would know that much even without a first amendment, for the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment. Further guidance can be gained from the fact that we are looking for a theory fit for enforcement by judges. The principles we seek must, therefore, be neutral in all three meanings of the word: they must be neutrally derived, defined and applied.

The law of free speech we know today grows out of the Supreme Court decisions following World War I - *Schenck v. United States*, *Abrams v. United States*, *Gitlow v. New York*, *Whitney v. California* - not out of the majority positions but rather from the opinions, mostly dissents or concurrences that were really dissents, of Justices Holmes and Brandeis. Professor Kalven remarks upon "the almost uncanny power" of these dissents. And it is uncanny, for they have prevailed despite the considerable handicap of being deficient in logic and analysis as well as in history. The great Smith Act cases of the 1950's, *Dennis v. United States*, as modified by *Yates v. United States*, and, more recently, in 1969, *Brandenburg v. Ohio* (voiding the Ohio criminal syndicalism statute), mark the triumph of Holmes and Brandeis. And other cases, culminating perhaps in a modified version of *Roth v. United States*, have pushed the protections of the first amendment outward from political speech all the way to the fields of literature, entertainment and what can only be called

pornography. Because my concern is general theory I shall not attempt a comprehensive survey of the cases nor engage in theological disputation over current doctrinal niceties. I intend to take the position: that the law should have been built on Justice Sanford's majority opinions in *Gitlow* and *Whitney*. These days such an argument has at least the charm of complete novelty, but I think it has other merits as well.

Let us begin the general discussion of first amendment theory with consideration of a passage from Justice Brandeis' concurring opinion in the latter case. His *Whitney* concurrence was Brandeis' first attempt to articulate a comprehensive theory of the constitutional protection of speech, and in that attempt he laid down premises that seem to me correct. But those premises seem also to lead to conclusions that Justice Brandeis would have disowned. As a starting point Brandeis went to fundamentals and attempted to answer the question why speech is protected at all from governmental regulation. If we overlook his highly romanticized version of history and ignore merely rhetorical flourishes, we shall find Brandeis quite provocative.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. The belief that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine. ... They recognized the risks to which all human institutions are subject. But they knew. . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

We begin to see why the dissents of Brandeis and Holmes possessed the power to which Professor Kalven referred. They were rhetoricians of extraordinary potency, and their rhetoric retains the power, almost half a century later, to swamp analysis, to persuade, almost to command assent.

But there is structure beneath the rhetoric, and Brandeis is asserting, though he attributes it all to the Founding Fathers, that there are four benefits to be derived from speech. These are:

1. The development of the faculties of the individual;
2. The happiness to be derived from engaging in the activity;
3. The provision of a safety valve for society; and,
4. The discovery and spread of political truth.

We may accept these claims as true and as satisfactorily inclusive. When we come to analyze these benefits, however, we discover that in terms of constitutional law they are very different things.

The first two benefits-development of individual faculties and the achievement of pleasure-are or may be found, for both speaker and hearer, in all varieties of speech, from political discourse to shop talk to salacious literature. But the important point is that these benefits do not distinguish speech from any other human activity. An individual may develop his faculties or derive pleasure from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors. Speech with only the first two benefits can be preferred to other activities only by ranking forms of personal gratification. These functions or benefits of speech are, therefore, to the principled judge, indistinguishable from the functions or benefits of all other human activity. He cannot, on neutral grounds, choose to protect speech that has only these functions more than he protects any other claimed freedom.

The third benefit of speech mentioned by Brandeis ~ its safety valve function ~ is different from the first two. It relates not to the gratification of the individual, at least not directly, but to the welfare of society. The safety valve function raises only issues of expediency or prudence, and, therefore, raises issues to be determined solely by the legislature or, in some cases, by the executive. The legislature may decide not to repress speech advocating the forcible overthrow of the government in some classes of cases because it thinks repression would cause more trouble than it would prevent. Prosecuting attorneys, who must in any event pick and choose among cases, given their limited resources, may similarly decide that some such speech is trivial or that ignoring it would be wisest. But these decisions, involving only the issue of the expedient course, are indistinguishable from thousands of other managerial judgments governments must make daily, though in the extreme case the decision may involve the safety of the society just as surely as a decision whether or not to take a foreign policy stand that risks war. It seems plain that decisions involving only judgments of expediency are for the political branches and not for the judiciary.

This leaves the fourth function of speech ~ the "discovery and spread of political truth." This function of speech, its ability to deal explicitly, specifically and directly with politics and government, is different from any other form of human activity. But the difference exists only with respect to one kind of speech: explicitly and predominantly political speech. This seems to me the only form of speech that a principled judge can prefer to other claimed freedoms. All other forms of speech raise only issues of human gratification and their protection against legislative regulation involves the judge in making decisions of the sort made in *Griswold v. Connecticut*.

It is here that I begin to part company with Professor Kalven. Kalven argues that no society in which seditious libel, the criticism of public officials, is a crime can call itself free and democratic." I agree, even though the framers of the first amendment probably had no clear view of that proposition. Yet they indicated a value when they said that speech in some sense was special and when they wrote a Constitution providing for representative democracy, a form of government that is meaningless without open and vigorous debate about officials and their policies. It is for this reason, the relation of speech to democratic organization, that Professor Alexander Meiklejohn seems correct when he says:

The First Amendment does not protect a "freedom to speak." It protects the freedom of those activities of thought and communication by which we "govern." It is concerned, not with a private right, but with a public power, a governmental responsibility.

But both Kalven and Meiklejohn go further and would extend the protection of the first amendment beyond speech that is explicitly political. Meiklejohn argues that the amendment protects:

Forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express.

He lists four such thoughts and expressions:

1. Education, in all its phases
2. The achievements of philosophy and the sciences. .
3. Literature and the arts. . . . and
4. Public discussions of public issues

Kalven, following a similar line, states: "[T]he invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming." It is an invitation, I wish to suggest, the principled judge must decline. A dialectic progression I take to be a progression by analogy from one case to the next, an indispensable but perilous method of legal reasoning. The length to which analogy is carried defines the principle, but neutral definition requires that, in terms of the rationale in play, those cases within the principle be more like each other than they are like cases left outside. The dialectical progression must have a principled stopping point. I agree that there is an analogy between criticism of official behavior and the publication of a novel like *Ulysses*, for the latter may form attitudes that ultimately affect politics. But it is an analogy, not an identity. Other human activities and 'experiences also form personality, teach and create attitudes just as much as does the novel, but no one would on that account, I take it, suggest that the first amendment strikes down regulations of economic activity, control of entry into a trade, laws about sexual behavior, marriage and the like. Yet these activities, in their capacity to create attitudes that ultimately impinge upon the political process, are more like literature and science than literature and science are like political speech. If the dialectical progression is not to become an analogical stampede, the protection of the first amendment must be cut off when it reaches the outer limits of political speech.

Two types of problems may be supposed to arise with respect to this solution. The first is the difficulty of drawing a line between political and non-political speech. The second is that such a line will leave unprotected much speech that is essential to the life of a civilized community. Neither of these problems seems to me to raise crippling difficulties.

The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative. Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, educational, commercial or literary expressions as such. A novel may have impact upon attitudes that affect politics, but it would not for that reason receive judicial protection. This is not anomalous; I have tried to suggest, since the rationale of the first amendment cannot be the protection of all things or activities that influence political attitudes. Any speech may do that, and we have seen that it is impossible to leave all speech unregulated. Moreover, any conduct may affect political attitudes as much as a novel, and we cannot view the first amendment as a broad denial of the power of government to regulate conduct. The line drawn must, therefore, lie between the explicitly political and all else. Not too much should be made of the undeniable fact that there will be hard cases. Any theory of the first amendment that does not accord absolute protection for all verbal expression, which is to say any theory worth discussing, will require that a spectrum be cut and the location of the cut will always be, arguably, arbitrary. The question is whether the general location of the cut is justified. The existence of close cases is not a reason to refuse to draw a line and so deny majorities the power to govern in areas where their power is legitimate.

The other objection-that the political-nonpolitical distinction will leave much valuable speech without constitutional protection-is no more troublesome. The notion that all valuable types of speech must be protected by the first amendment confuses the constitutionality of laws with their wisdom. Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives. That is hardly a terrible fate. At least a society like ours ought not to think it so.

The practical effect of confining constitutional protection to political speech would probably go no further than to introduce regulation or prohibition of pornography. The Court would be freed of the stultifying obligation to apply its self-inflicted criteria: whether "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." To take only the last criterion, the determination of "social value" cannot be made in a principled way. Anything some people want has, to that degree, social value, but that cannot be the basis for constitutional protection since it would deny regulation of any human activity. The concept of social value necessarily incorporates a judgment about the net effect upon society. There is always the problem .that what some people want some other people do not want, or wish actively to banish. A judgment about social value, whether the judges realize it or not, always involves a comparison of competing values and gratifications as well as competing predictions of the effects of the activity. Determination of "social value" is the same thing as determination of what human interests should be classed as "fundamental" and, therefore, cannot be principled or neutral.

To revert to a previous example, pornography is increasingly seen as a problem of pollution of the moral and aesthetic atmosphere precisely analogous to smoke pollution. A majority of the community may foresee that continued availability of pornography to those who want it will inevitably affect the quality of life for those who do not want it, altering, for example, attitudes toward love and sex, the tone of private and public discourse and views of social institutions such as marriage and the family. Such a majority surely has as much control over the moral and aesthetic environment as it does over the physical, for such matters may even more severely impinge upon their gratifications. That is why, constitutionally, art and pornography are on a par with industry and smoke pollution. As Professor Walter Berns says "[A] thoughtful judge is likely to ask how an artistic judgment that is wholly idiosyncratic can be capable of supporting an objection to the law. The objection, 'I like it,' is sufficiently rebutted by 'we don't.'

We must now return to the core of the first amendment, speech that is explicitly political. I mean by that criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country.

A qualification is required, however. Political speech is not any speech that concerns government and law, for there is a category of such speech that must be excluded. This category consists of speech advocating forcible overthrow of the government or violation of law. The reason becomes clear when we return to Brandeis' discussion of the reasons for according constitutional protection to speech.

A similar analysis suggests that advocacy of law violation does not qualify as political speech any more than advocacy of forcible overthrow of the government. Advocacy of law violation is a call to set aside the results that political speech has produced. The process of the "discovery and spread of political truth" is damaged or destroyed if the outcome is defeated by a minority that makes law enforcement, and hence the putting of political truth into practice, impossible or less effective. There should, therefore, be no constitutional protection for any speech advocating the violation of law. I believe these are the only results that can be reached by a neutral judge who takes his values from the Constitution. If we take Brandeis' description of the benefits and functions of speech as our premise, logic and principle appear to drive us to the conclusion that Sanford rather than Brandeis or Holmes was correct in *Gitlow* and *Whitney*.

Benjamin Gitlow was convicted under New York's criminal anarchy statute which made criminal advocacy of the doctrine that organized government should be overthrown by force, violence or any unlawful means. Gitlow, a member of the Left Wing section of the Socialist party, had arranged the printing and distribution of a "Manifesto" deemed to call for violent action and revolution. "There was," justice Sanford's opinion noted, "no evidence of any effect resulting from the publication and circulation of the Manifesto." Anita Whitney was convicted under California's criminal syndicalism statute, which forbade advocacy of the commission of crime, sabotage, acts of force or violence or terrorism" as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Also made illegal were certain connections with groups

advocating such doctrines. Miss Whitney was convicted of assisting in organizing the Communist Labor Party of California, of being a member of it and of assembling with it." The evidence appears to have been meager, but our current concern is doctrinal.

Justice Sanford's opinions for the majorities in *Gitlow* and *Whitney* held essentially that the Court's function in speech cases was the limited but crucial one of determining whether the legislature had defined a category of forbidden speech which might constitutionally be suppressed." The category might be defined by the nature of the speech and need not be limited in other ways. If the category was defined in a permissible way and the defendant's speech or publication fell within the definition, the Court had, it would appear, no other issues to face in order to uphold the conviction. Questions of the fairness of the trial and the sufficiency of the evidence aside, this would appear to be the correct conclusion. The legislatures had struck at speech not aimed at the discovery and spread of political truth but aimed rather at destroying the premises of our political system and the means by which we define political truth. There is no value that judges can independently give such speech in opposition to a legislative determination.

Justice Holmes' dissent in *Gitlow* and Justice Brandeis' concurrence in *Whitney* insisted the Court must also find that, as Brandeis put it, the "speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent." Neither of them explained why the danger must be "clear and imminent" or, as Holmes had put it in *Schenck*, "clear and present" before a particular instance of speech could be punished. Neither of them made any attempt to answer Justice Sanford's argument on the point:

[T]he immediate danger [created by advocacy of overthrow of the government] is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot, be said .that the state is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency

To his point that proof of the effect of speech is inherently unavailable and yet its impact may be real and dangerous, Sanford might have added that the legislature is not confined to consideration of a single instance of speech or a single speaker. It fashions a rule to dampen thousands of instances of forcible overthrow advocacy. Cumulatively these may have enormous influence, and yet it may well be impossible to show any effect from any single example. The "clear and present danger" requirement, which has had a long and uneven career in our law, is improper not, as many commentators have thought, because it provides a subjective and an inadequate safeguard against

the regulation of speech, but rather because it erects a barrier to legislative rule where none should exist. The speech concerned has no political value within a republican system of government. Whether or not it is prudent to ban advocacy of forcible overthrow and law violation is a different question although. Because the judgment is tactical, implicating the safety of the nation, it resembles very closely the judgment that Congress and the President must make about the expediency of waging war, an issue that the Court has wisely thought not fit for judicial determination.

The legislature and the executive might find it wise to permit some rhetoric about law violation and forcible overthrow. I am certain that they would and that they should. Certain of the factors weighted in' determining the constitutionality of the Smith Act prosecutions in *Dennis* would, for example, make intelligible statutory, though not constitutional, criteria: the high degree of organization of the Communist party, the rigid discipline of its members and the party's ideological affinity to foreign powers." Similar objections apply to the other restrictions Brandeis attempted to impose upon government. I will mention but one more of these restrictions. Justice Brandeis argued that:

Even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious . . . Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state.

It is difficult to see how a constitutional court could properly draw the distinction proposed. Brandeis offered no analysis to show that advocacy of law violation merited protection by the Court. Worse, the criterion he advanced is the importance, in the judge's eyes, of the law whose violation is urged.

Modern law has followed the general line and the spirit of Brandeis and Holmes rather than of Sanford, and it has become increasingly severe in its limitation of legislative power. *Brandenburg, Ohio*, a 1969 per curiam decision by the Supreme Court, struck down the Ohio criminal syndicalism statute because it punished advocacy of violence, the opinion stating:

Whitney [the majority opinion] has been thoroughly discredited by later decisions. . . . These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of

law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

It is certainly true that Justice Sanford's position in *Whitney* and in *Gitlow* has been completely undercut, or rather abandoned, by later cases, but it is not true that his position has been discredited, or even met, on intellectual grounds. Justice Brandeis failed to accomplish that, and later Justices have not mounted a theoretical case comparable to Brandeis'.

* * * *

These remarks are intended to be tentative and exploratory. Yet at this moment I do not see how I can avoid the conclusions stated. The Supreme Court's constitutional role appears to be justified only if the Court applies principles that are neutrally derived, defined and applied. And the requirement of neutrality in turn appears to indicate the results I have sketched here.

