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Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter

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Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter

JAMES G. WILSON*

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I. INTRODUCTION

This article completes a two-part series studying the constitutional jurisprudence of Judges Antonin Scalia, Richard Posner, Robert Bork, Frank Easterbrook, and Ralph Winter Jr., five conservative academics appointed by President Reagan to the United States Court of Appeals. Judge Scalia has recently been appointed to the Supreme Court of the United States.¹ In a previous article, published in the last issue of the *University of Miami Law Review*, I evaluated these five jurists' constitutional scholarship by contrasting their views with those of Edmund Burke, the originator of political conservative theory.² That article tested Burke's wariness of political abstractions and his hatred of tyranny against those five jurists' theoretical works, and concluded that, of the five men's philosophies, Posner's commitment to wealth maximization and Bork's positivism were the most dangerous forms of constitutional jurisprudence.³ Easterbrook's commitment to law and economics was not as relentless. Neither Winter nor Scalia has ever presented a grand theory of constitutional law.

To dramatize the gulf between Burke and these men, I first summarized Burke's views and then applied Burke's arguments to issues studied by each of the five scholar judges. Judge Bork concluded that, as a jurist, he only had a moral obligation to enforce the majority's will as reflected in existing law. I argued that such positivism differed from Burke's theory of a mixed government, which was in part premised upon fear of the majority.⁴ Posner's economic theories led him to justify slavery as economically efficient. Distrustful of economics, Burke would have castigated both Posner's methodology and conclusion; for Burke, slavery was the paradigm of tyranny.⁵ Easterbrook's rejection of applying justice in adjudication clashed with Burke's observation that all political questions are moral questions.⁶ Scalia's

1. The Senate confirmed Judge Scalia's appointment in September 1986.

2. See Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 40 U. MIAMI L. REV. 913 (1986).

3. *Id.* at 973-75.

4. *Id.* at 946-49.

5. *Id.* at 957.

6. *Id.* at 960.

attack on affirmative action—ranking the theoretical right that decision-makers totally ignore race above the historical plight of the blacks—ranked theory above history and context.⁷ Winter's attack on wealth redistribution was also abstract.⁸ And above all, the five scholar judges' general complaint that the Supreme Court has acted "illegitimately"—a complaint that contains the implication that illegitimate decisions can and should be overruled—placed their theorizing above the Supreme Court's history. They were not being sufficiently deferential to institutions, values, and traditions which they, like the rest of us, cannot completely understand or accept.

This article's primary goal is to analyze these judges' major constitutional opinions so that the reader can make his or her own conclusions, which may range from ecstasy to the sensation that one is walking in the land of the dead. The reader should be aware that my frequent criticisms are not only directed at these jurists' decisions. I also am concerned about the types of arguments the judges have used to justify their holdings. Evaluating modes of argument might seem esoteric to someone unfamiliar with contemporary constitutional jurisprudence. That person should know that these judges have been major participants in the modern debate over the alleged "illegitimacy" of certain forms of constitutional rhetoric and of certain constitutional opinions—notably *Roe v. Wade*,⁹ the abortion rights case. Although these jurists may argue in one case that certain types of arguments should not be used, each relies on those same forms in subsequent opinions. That rhetorical inconsistency may be the greatest normative indictment of their conception of "constitutional legitimacy." If they are willing to employ "changed circumstances" or "substantive due process" to justify some of their holdings, then they cannot excommunicate liberals for "illegitimately" applying the same kinds of arguments in decisions with which they disagree.

The following opinions raise, of course, many other important questions. How "conservative" have these judges been? To put the matter bluntly, President Reagan must be pleased with these men, who, to varying degrees, have made major creative contributions to emerging right-wing jurisprudence. They have aggressively applied traditional conservative judicial techniques: increasing judicial deference to other branches of government and imposing new limits on federal court jurisdiction. Some of them have also discussed such abstract, academic concepts as legitimacy, negative liberties, margin-

7. *Id.* at 965-69.

8. *Id.* at 969-73.

9. 410 U.S. 113 (1973).

ality, and majoritarianism. For better or worse, the average constitutional lawyer must become more familiar with the current academic debate over how to interpret the Constitution, particularly now that Judge Scalia has received the ultimate reward.

Nevertheless, a review of a block of their opinions generates two surprising conclusions, at least to this writer. First, some of the opinions are acceptable by most contemporary "liberal" standards. A few are even generous interpretations of constitutional rights. Second, the Burkean fear of excessive constitutional theorizing has not proven to be a reliable test of which judge would be the least sympathetic to plaintiffs who allege constitutional violations. Despite or perhaps because of their abstractions, Judges Bork and Posner wrote several opinions with which most modern liberals would agree.¹⁰ Judge Easterbrook once again resists easy categorization. Modern liberals will agree with many of Judge Winter's criminal law opinions.¹¹ Judge Scalia, whose academic writings have not been very theoretical, has been the least hospitable to constitutional complaints.

Burke probably would have been amused to see that the application of his anti-theory to other theorists' jurisprudence failed to explain their subsequent behavior. After all, abstract theory can enhance as well as threaten constitutional rights. These two articles thus demonstrate the elusive relationship of constitutional theory to constitutional doctrine. Nobody can perfectly predict how a person will decide cases after reaching the bench. Even the most fanatical scholar, proudly committed to an elegantly consistent jurisprudence, will probably feel the pressures of litigants, colleagues, and precedent once he or she dons a robe. For a variety of reasons, only a few of which might ever be articulated, that scholar may reluctantly leave in the study some personal constitutional beliefs, such as everyone should get an equal share of the nation's assets, or children should starve if their parents cannot compete successfully in the marketplace.¹² The scholar is no longer solely a follower of Marx or of Nozick, but is now also an American judge who must interpret the Constitution. Now that he or she actually has power, the academic judge should reconsider how general political theory determines judicial interpretation, which in turn might prevent or limit the constitutionalization of that judge's previously held substantive political beliefs.

10. See *infra* notes 67-72, 191-98, 282-87 and accompanying text.

11. See *infra* note 35 and accompanying text.

12. Professor Dworkin recently argued that even his ideal judge, Hercules, would not judicially impose his conception of justice without considering fairness, integrity, and existing community values. R. DWORKIN, *LAW'S EMPIRE* 249 (1986).

At times, scholars such as Bork and Posner, who have created elaborate constitutional structures, may need to deviate more from their theoretical writings than such relatively pragmatic academics as Judge Scalia. Furthermore, all these conservative judges may be less willing to impose their own substantive political ideologies because they had previously criticized many Supreme Court Justices for improperly constitutionalizing personal political preferences. Finally, it is one thing to write about these problems; it is another to be immediately responsible to both the litigants and society.

As jurists, these men have been very conscious of their limited power. Some of them have frequently written dicta suggesting how they would decide a case if they were on the Supreme Court or if the case was one of first impression. The rule of law may have limited influence on Supreme Court Justices, but it clearly exists in the lower courts.¹³

Because these judges' power is so much less than that of the Justices, we have completed an ironic circle. We should evaluate these judges as nominees for the Supreme Court by refocusing on the Burkean fear of ideology as well as their opinions. A Supreme Court Justice has far more discretion to implement his or her theory of law than a judge on the court of appeals. Consequently, liberals may find Judge Scalia, who did not write very abstractly, more acceptable than Judges Bork and Posner, even though Scalia has written the most disturbing judicial opinions.

How can liberals account for their agreement with many of these judges' decisions? Karl Llewellyn concluded from his study of thousands of appellate cases that the immense judicial discretion to define rights and obligations in the "leeways" of precedent is stabilized by fifteen factors, the most important of which is the "American appellate judicial tradition."¹⁴ The other factors, expressed in Llewellyn's inimitable prose, range from the Hegelian—"The General Period-Style and Its Promise"—to the prosaically procedural—"A Frozen Record from Below."¹⁵ This article will not be able to explain why these judges sometimes altered their views. But it will attempt to demonstrate that such shifts continue to occur in the ways Llewellyn described, even among extremely able, thoughtful men who have previously pondered questions similar to those they now must resolve as jurists.

Perhaps this slight moderating, centralizing shift is encapsulated

13. *Id.* at 47.

14. K. LLEWELLYN, *THE COMMON LAW TRADITION* 19 (1960).

15. *Id.*

in the phrase "the rule of law." That phrase, of course, has a complex intellectual history.¹⁶ We can avoid becoming entangled in that major jurisprudential debate by once again turning to Llewellyn, who described the appellate process as the rule of law and men, instead of the rule of laws and not men: "[T]he formula 'of laws and not' is inherently false, the formula 'by the Law,' rightly understood, can, when provided with the right rules, right techniques, and right officers, come close to being accurate."¹⁷ Thus, aside from any contemporary value this article has in analyzing conservative jurisprudence and in studying current and possible future Supreme Court Justices, it is also an empirical inquiry into the impact "the rule of law" may have on the United States Court of Appeals.

These particular five judges provide very good test cases of how judicial power does and does not temper prior beliefs, because the five men spent many years prior to their appointments exploring constitutional jurisprudence. Unlike most lawyers, who primarily articulate their client's position, these scholars have frequently and forcefully presented their own views on constitutional law.

The main point of this article is not to prove that the "rule of law" exists. I made that proposition in part to provoke some of my liberal academic colleagues to recognize that some of these scholars' decisions are acceptable. Some of those liberals may reply that the following cases actually prove that no changes occurred in these judges' jurisprudence from the time they were academics; or that any changes were for other reasons; or that the changes were for the worse. Critical legal scholars may observe that any convergence demonstrates that the gap between existing liberal and conservative theory is a small one.

There is a final reason to study these opinions. Although the five judges tend to think about the law in the same way, they do not present a monolithic front. They sometimes disagree over major constitutional issues. These disputes may reflect the split within the right between traditionalism and libertarianism. Judges Bork, Scalia, and Easterbrook are more deferential to the state and to history than Judges Posner and Winter, who are strongly attracted to the libertarian values of the marketplace. Before he became a judge,

16. For instance, Ronald Dworkin has recently made the following definition of the "rule of law" a central premise of his jurisprudence: "Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified." R. DWORKIN, *supra* note 12, at 93.

17. K. LEWELLYN, *supra* note 14, at 12 n.1.

Easterbrook, however, was also a strong advocate of the use of economics in law. Thus, as a judge, he became somewhat more positivist.

This article shall discuss almost all of these judges' access, first amendment, equal protection, governmental structure, and due process cases. This large group of cases may at times exhaust the reader. But as Llewellyn showed years ago, one can learn much by studying a large block of cases, not just the few most controversial ones. With a few exceptions, this article will not address the constitutional criminal law cases. Incidentally, criminal defendants have frequently lost their cases in front of these five jurists: criminal defendants and/or prisoners won only 11 out of 50 cases.¹⁸ The article shall separately present each judge's opinions. This author stopped using LEXIS and WESTLAW to make general surveys of the judges' opinions as of May 28, 1986, although the article includes a few important cases decided after that date.

II. A STATISTICAL OVERVIEW

One crude way to gain an initial perspective on a judge's constitutional viewpoint is to determine how often that judge has written constitutional opinions favoring criminal defendants, media defendants, and civil plaintiffs.¹⁹ Judges who are sympathetic to these three groups are usually considered "liberal." Even under that admittedly clumsy test, the five judges being studied do not present a consistent front. Because I am primarily interested in what each judge has actually written, I have not included in my survey a complete review of all the other opinions that each of the judges joined. Such an omission has its costs. For example, Judge Scalia joined in an opinion affirming a jury verdict in which the jury decided that the *Washington Post* libeled the head of Mobil Oil.²⁰ He also agreed with Judge Bork's decision validating the Navy discharge of a serviceman for being

18. See *infra* notes 24, 28-29, 32, 34-35 and accompanying text.

19. I have not included in this survey taxpayer protest suits or cases involving litigation fanatics who file multiple lawsuits, because most of those actions are out of the mainstream. For example, few of us would disagree with Judge Scalia's assessing double costs and attorney's fees after a protester appealed a case in which he or his attorney failed to appear at a hearing to resolve claims he had previously lost. *Mathes v. C.I.R.*, 788 F.2d 33 (D.C. Cir. 1986). Such judicial penalties seem reasonable responses to such claims as "30th Issue-IRS Makes War On Citizens." *Id.* at 35.

Judge Winter ruled against a tax protester in *United States v. Carley*, 783 F.2d 341 (2d Cir.), *cert. denied*, 106 S. Ct. 2115 (1986), and a plaintiff who had sued over 250 times in *In re Martin-Trigona*, 737 F.2d 1254 (2d Cir.), *cert. denied*, 105 S. Ct. 191 (1984).

20. *Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir.), *vacated in part*, 763 F.2d 1472 (D.C. Cir. 1985). Judge Scalia joined in the opinion that Judge McKinnon wrote.

homosexual.²¹ On the other hand, Scalia joined Judge Bork's decision upholding the right of an artist to display a poster that falsely represented President Reagan making fun of poor people.²²

Judge Scalia wrote twenty-three opinions that affected those three groups. He ruled against them in twenty cases, and in one case split his decision, primarily at the expense of the media defendant in a libel suit.²³ Civil plaintiffs suing the government lost sixteen out of seventeen cases raising constitutional issues. Prosecutors won three out of four cases.²⁴ Libel plaintiffs won one case,²⁵ and partially prevailed in another.²⁶

Judge Bork wrote opinions in twenty-three cases involving significant constitutional issues. Civil plaintiffs contesting governmental action won six out of twenty-one cases. Judge Bork favored the government in ten out of eleven cases in which he discussed access issues.²⁷ One criminal defendant²⁸ and one prisoner²⁹ each lost his claim. The only libel plaintiff lost his case.³⁰ Bork wrote opinions favoring first amendment plaintiffs in three out of five cases, although he joined Scalia in four decisions unreceptive to first amendment claims.³¹

Already renowned throughout the legal academy as a prolific writer, Judge Posner has enhanced that reputation by producing an

21. *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984). The Supreme Court of the United States recently upheld state sodomy laws. *Bowers v. Hardwick*, 106 S. Ct. 284 (1986).

22. *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893 (D.C. Cir. 1984).

23. *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (Scalia, J., dissenting).

24. Judge Scalia decided four constitutional cases involving criminal defendants or prisoners. He ruled against the defendants in three of those cases. *United States v. Byers*, 740 F.2d 1104 (D.C. Cir.) (fifth and sixth amendments), *cert. denied*, 464 U.S. 1046 (1984); *Chaney v. Heckler*, 718 F.2d 1174 (D.C. Cir. 1983) (eighth amendment); *United States v. Richardson*, 702 F.2d 1079 (D.C. Cir. 1983) (double jeopardy), *rev'd*, 468 U.S. 317 (1984). He upheld a defendant's claim of lack of diversity jurisdiction in *Tavoulaareas v. Comnas*, 720 F.2d 192 (D.C. Cir. 1983).

25. *Tavoulaareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985)

26. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984); *see infra* notes 76-82 and accompanying text.

27. *See infra* notes 170-86 and accompanying text.

28. In the only criminal case he has decided, Judge Bork ruled against the criminal defendant in *United States v. Mount*, 757 F.2d 1315 (D.C. Cir. 1985) (fourth amendment). In the course of that opinion, he severely criticized the "shock the conscience" test. *Id.* at 1323.

29. Although it also involves the criminal justice system, I have included *Cosgrove v. Smith* in the text because it raises equal protection issues. 697 F.2d 1125 (D.C. Cir. 1983).

30. *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984).

31. Since this article went to press, Judge Bork has written an opinion narrowing the first amendment. He held that the District of Columbia could prevent demonstrators "critical" of foreign governments from demonstrating within five hundred feet of those governments' embassies. Bork held that the law properly balanced the first amendment against the United States' interest in protecting embassy officials. *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986).

extraordinary number of judicial opinions. In twelve constitutional cases raising significant access issues, he has favored the plaintiff nine times and neither party twice. Plaintiffs alleging first amendment violations won four out of eleven cases, with one split decision. He granted partial relief to a plaintiff in a "false light" suit against *Hustler* magazine, where the defendant had claimed first amendment protection. He fully supported only two out of ten plaintiffs raising equal protection arguments, and provided partial relief in two other cases. He has explored and partially redefined procedural due process in twenty-four opinions, seventeen of which favored the government. He discussed substantive due process in four decisions. Twenty-three out of twenty-seven criminal defendants or prisoners did not convince him that their constitutional claims should prevail.³²

32. Judge Posner has ruled against most criminal defendants and inmates, frequently by finding that any alleged error was "harmless." *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985) (parole violations); *United States v. Cerro*, 775 F.2d 908 (7th Cir. 1985) (harmless error); *Phelps v. Duckworth*, 772 F.2d 1419 (7th Cir. 1985) (fifth amendment); *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985) (seventh amendment, witness production); *Prater v. United States Parole Comm'n*, 764 F.2d 1230 (7th Cir.) (Posner, J., dissenting) (ex post facto laws), *vacated*, 775 F.2d 1157 (7th Cir. 1985); *Duran v. Elrod*, 760 F.2d 756 (7th Cir. 1985) (decree to improve jail conditions); *United States v. Molt*, 758 F.2d 1198 (7th Cir. 1985) (ex post facto), *cert. denied*, 106 S. Ct. 1458 (1986); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (fourth amendment), *cert. denied*, 105 S. Ct. 1853 (1985); *United States v. Silverstein*, 732 F.2d 1338 (7th Cir. 1984) (fifth amendment, defense counsel error); *McKinney v. George*, 726 F.2d 1183 (7th Cir. 1984) (fourth amendment); *Nichols v. Gagnon*, 710 F.2d 1267 (7th Cir. 1983) (jury instructions on lesser included offense), *cert. denied*, 466 U.S. 940 (1984); *United States v. Tranowski*, 702 F.2d 668 (7th Cir. 1983) (double jeopardy), *cert. denied*, 104 S. Ct. 3586 (1986); *Carbajol v. Fairman*, 700 F.2d 397 (7th Cir. 1983) (evidence); *Merritt v. Faulkner*, 697 F.2d 761 (7th Cir. 1983) (Posner, J., concurring in part and dissenting in part) (eighth amendment, right to counsel), *cert. denied*, 464 U.S. 986 (1983); *United States v. Bounos*, 693 F.2d 38 (7th Cir. 1982) (double jeopardy); *McKeever v. Israel*, 689 F.2d 1315 (7th Cir. 1982) (Posner, J., dissenting) (appointment of counsel in civil suit filed by inmate); *Sulie v. Duckworth*, 689 F.2d 128 (7th Cir. 1982) (right to counsel), *cert. denied*, 460 U.S. 1043 (1983); *United States ex rel. Stevens v. Circuit Court*, 675 F.2d 946 (7th Cir. 1982) (double jeopardy); *Davis v. Franzen*, 671 F.2d 1056 (7th Cir. 1982) (habeas corpus, sixth amendment).

He did allow a district judge to question allegedly excessive fees in a criminal case. *United States v. Vague*, 697 F.2d 805 (7th Cir. 1983). Posner reversed a conviction because the trial judge harassed the defendant's lawyer, stating: "It is enough that Judge Seraphim by his threats to [defendant's counsel] appreciably reduced the likelihood that [counsel] would conduct a vigorous defense." *Walsberg v. Israel*, 766 F.2d 1071, 1073 (7th Cir. 1985). He also favored a civil rights action in *Llaguno v. Mingey* by reversing a jury verdict in favor of the police. 763 F.2d 1560 (7th Cir. 1985). He noted the need for civil suits to deter unconstitutional police behavior, particularly with the narrowing of the exclusionary rule. *Id.* at 1570. On the other hand, he dismissed a section 1983 action that challenged two arrests based upon warrants containing racial discrepancies. *See Johnson v. Miller*, 680 F.2d 39 (7th Cir. 1982).

The judge discussed the "changed circumstances" argument in the course of upholding a prisoner's habeas corpus petition based upon possible perjury:

Townsend was a product of its time. The southern states' resistance to court-

Judge Easterbrook has been far less responsive than Judge Posner to plaintiffs bringing constitutional claims. He agreed with states' access defenses in three out of four cases. Plaintiffs seeking additional procedural protection under the due process clause lost three out of four times. His only discussion of substantive due process was filled with antipathy.³³ Plaintiffs prevailed on two out of four first amendment cases. All seven criminal defendants lost their claims.³⁴

Unlike his colleagues, Judge Winter has frequently favored criminal defendants and prisoners; he provided them with at least partial relief in six out of ten cases.³⁵ Winter, however, has not been so "lib-

ordered desegregation had induced a widespread skepticism concerning the willingness of government in those states, including the courts, to protect the federal constitutional rights of their black citizens

It is thus doubtful that the standard laid down in *Townsend* for deciding when an evidentiary hearing is mandatory would be adopted by the Supreme Court today.

United States *ex rel.* Jones v. Franzen, 676 F.2d 261, 268 (7th Cir. 1982) (citing *Townsend v. Sain*, 372 U.S. 293 (1963)).

33. *Gumz v. Morrisette*, 772 F.2d 1395 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1644 (1986).

34. United States *ex rel.* Miller v. Greer, 789 F.2d 438 (7th Cir. 1986) (fifth amendment); United States v. Schwartz, 787 F.2d 257 (7th Cir. 1986) (prosecutorial commentary, double jeopardy); United States v. Widgery, 778 F.2d 325 (7th Cir. 1985) (jury proceedings); United States v. Kimberlin, 776 F.2d 1344 (7th Cir. 1985) (sentencing); Phelps v. Duckworth, 772 F.2d 1410 (7th Cir. 1985) (fifth amendment), *cert. denied*, 106 S. Ct. 541 (1986); *Gumz v. Morrisette*, 772 F.2d 1395 (7th Cir. 1985) (due process), *cert. denied*, 106 S. Ct. 1644 (1986); United States *ex rel.* Jones v. Derobertis, 766 F.2d 270 (7th Cir. 1985) (due process), *cert. denied*, 106 S. Ct. 1280 (1986).

35. Winter's decisions in favor of criminal defendants or incarcerated individuals were often dissents and/or concurrences. Judge Winter upheld an extortion conviction, but protested charging politicians with mail fraud: "The majority opinion vests federal prosecutors with largely unchecked power to harass political opponents. It may be that we should expect only 'enlightened statesmen' to hold such office, but, with Madison, I would prefer not to take such a risk." United States v. Margiotta, 688 F.2d 108, 143 n.5 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part). He held that courts should not "permit the systematic interrogation of witnesses on direct examination by counsel who knows they will assert the privilege against self-incrimination." *Brink's Inc. v. City of New York*, 717 F.2d 700, 715 (2d Cir. 1983) (Winter, J., dissenting). Judge Winter held that the federal government did not meet its burden of proof in a wire fraud case, and that its theory of wire fraud was unconstitutional: "[C]onstitutional protection against double jeopardy becomes relatively meaningless since successive prosecutions need only allege different calls." United States v. DeFiore, 720 F.2d 757, 766 (2d Cir. 1983) (Winter, J., concurring in part and dissenting in part). He also wanted to remand a case because he found grounds to show that the defendant's counsel had been inadequate. United States *ex rel.* Roche v. Scully, 739 F.2d 739, 745 (2d Cir. 1984) (Winter, J., concurring in part and dissenting in part). He also held that a prisoner who had been denied temporary release time had a claim deserving additional discovery because the prisoner had behaved well for years. Flaherty v. Coughlin, 713 F.2d 10 (2d Cir. 1983). Finally, he declared a statute that gave the state broad power to detain juveniles unconstitutional: "We hold only that pre-trial detention may not be imposed for anti-crime purposes pursuant to a substantively and procedurally unlimited authority when, in

eral" in civil cases. He ruled against the plaintiff in the only case raising important access issues. All three plaintiffs alleging procedural due process violations lost. In the only case raising first amendment issues, he denied the media additional access to courts. Both of his important equal protection cases were "conservative;" he was hostile to affirmative action and to blacks who challenged quotas designed to limit "white flight." He favored the state in one out of two cases involving states' powers.

III. SCALIA

A. *Access to Courts*

Judge Scalia has been particularly adept at invoking procedural defenses to constitutional claims. As noted above, he ruled against sixteen out of seventeen civil plaintiffs who claimed their constitutional rights had been violated. He decided twelve of those cases on procedural grounds, ruling primarily in favor of the plaintiff only once.³⁶ Thus, Scalia's relentless conservatism is not readily apparent; we do not know how he would decide many problems because he often does not reach the merits.

In a law review article published after his appointment, Judge Scalia argued that the doctrine of standing had substantive content.³⁷ In other words, the Court should include such values as federalism in deciding if a plaintiff has a "case or controversy" under article III of the Constitution. Scalia cited Justice Rehnquist's opinion in *Valley Forge*:³⁸ "The dictum of *Flast* has been disavowed by opinions that

all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt." *Martin v. Stasburg*, 689 F.2d 365, 374 (2d Cir. 1982). Justice Rehnquist subsequently wrote an opinion upholding a New York preventive detention statute for juveniles. *Schall v. Martin*, 467 U.S. 253 (1984), *rev'g Martin v. Stasburg*, 689 F.2d 365 (2d Cir. 1982).

Judge Winter ruled completely in favor of the state in four cases: *United States v. Reed*, 773 F.2d 477 (2d Cir. 1985) (venue); *Cousart v. Hammock*, 745 F.2d 776 (2d Cir. 1984) (waiver); *Vasquez v. Scully*, 730 F.2d 868 (2d Cir. 1984) (exhaustion under habeas corpus); *Anderson v. Coughlin*, 700 F.2d 37 (2d Cir. 1982) (prison lock-up during guard funeral).

36. He found standing for most of the plaintiffs' claims in *Block v. Meese*, 793 F.2d 1303 (D.C. Cir.), *cert. denied*, 106 S. Ct. 3335 (1986). Because the opinion holding the Gramm-Rudman-Hollings Act unconstitutional was an unsigned per curiam decision, I have not included any of its refutations of procedural defenses in this section, even though Scalia may have written most or all of the opinion. Nor have I included it in my statistical survey. For discussion of that opinion, see *infra* notes 48-49, 53, 100-08.

37. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

38. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). In his article, Scalia also used the ripeness doctrine to deny relief in two cases. After observing that ripeness can be part of the "case and controversy" requirement of article III of the Constitution, he held that railroads could not challenge an

explicitly acknowledge that standing and separation of powers are intimately related.”³⁹

In several of his own opinions, Scalia has made it more difficult for plaintiffs to have standing. In *Community Nutrition Institute v. Block*,⁴⁰ the majority held that individuals could challenge USDA milk regulations that raised prices. Scalia replied in his dissent that although the Administrative Procedure Act (A.P.A.) admittedly expanded standing, “[g]overnmental mischief whose effects are widely distributed is more readily remedied through the political process, and does not call into play the distinctive function of the courts as guardians against oppression of the few by the many.”⁴¹

Scalia’s conception of standing is myopic. Economic injury has been the classic justification for standing ever since *Association of Data Process Service Organizations v. Camp*,⁴² in which the Supreme Court upheld a challenge by data processors to the Comptroller of Currency’s ruling that national banks could make their data processing services available to other banks and bank customers. Scalia is correct in arguing that combating majority oppression is the primary function of the federal courts; however, courts also have a duty to combat minority oppression, particularly when a minority has seized excessive control of an administrative agency. As contemporary political scientists have pointed out, diffuse groups are frequently vulnerable to well-organized interest groups, who can easily capture administrative agencies that regulate their activities.⁴³ If each con-

Interstate Commerce Commission alteration of the accounting method they used to depreciate improvements to their tracks because the rule had no immediate impact. He also refused to hear Air New Zealand’s challenge to the Civil Aeronautic Board’s (C.A.B.) denial of a special rate which the airline requested because it feared that the government of New Zealand would retaliate. Scalia narrowly read the two-pronged test in *Abbott Laboratories v. Gardner*, which provided that a case is ripe if it is “fit” for resolution and if injury is immediate. 387 U.S. 136 (1967). Scalia’s “fitness” test was very tough to satisfy: “No one asserts, in other words, that the Board’s condition is, in all its applications, substantively invalid.” Yet the drug companies in *Abbott Laboratories* had not claimed that the labelling requirements were invalid in all their applications. Scalia also concluded that no immediate injury existed because New Zealand had not yet retaliated, and the C.A.B. had not yet punished the airline for complying with New Zealand’s contradictory requests. Yet, in *Abbott Laboratories*, the Federal Drug Administration had not yet initiated prosecutions against *Abbott Laboratories* for failing to comply with the new labelling requirements. Scalia might reply that the labelling procedures in *Abbott Laboratories* were expensive, while Air New Zealand did not immediately incur any expenses.

39. Scalia, *supra* note 37, at 897-98.

40. 698 F.2d 1239 (D.C. Cir. 1983) (Scalia, J., concurring and dissenting).

41. *Id.* at 1256.

42. 397 U.S. 150 (1970).

43. See, e.g., R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); C. LINDBLOM, POLITICS AND MARKETS (1977); T. LOWI, END OF LIBERALISM (1969).

sumer has only lost pennies, how many consumers are going to struggle through the political process to rectify the abuse? Scalia also discounted the underlying policy of the A.P.A. to provide judicial review to injured citizens.⁴⁴ Finally, he ignored the Supreme Court decision in *United States v. SCRAP*,⁴⁵ in which the Court granted standing to environmentalists challenging the Interstate Commerce Commission's authorization of a 2.5% surcharge on nearly all freight rates on the grounds that the increased rates would raise prices, increase pollution, increase taxes, and discourage use of reusable waste materials. Some of the environmentalists' injuries were more attenuated than the specific injury to consumer pocketbooks of increased milk prices.

Corporations, but not consumers, will more likely have standing to challenge adverse agency actions. For example, Scalia granted standing to brokers who challenged a regulation preventing them from distributing more than \$100,000 to any bank that was federally insured for any account up to \$100,000.⁴⁶ On the other hand, Scalia denied standing to an ex-shipbuilder challenging federal regulations because the plaintiff had not built ships in years and was seeking relief that would not make it likely that he would build ships again.⁴⁷ Nor do all civil rights litigants lose access arguments. Before ruling against them on the merits, Scalia found that a film distributor and several would-be exhibitors had standing to contest the Justice

44. Scalia also narrowly construed the A.P.A. in *Gott v. Walters*, 756 F.2d 902 (D.C. Cir.), *vacated*, 791 F.2d 172 (D.C. Cir. 1985). He upheld the Veteran's Administration's refusal to comply with the A.P.A. notice and comment requirements for rulemaking because the VA's enabling statute precluded federal court review. He distinguished *Johnson v. Robison* on the ground that it involved a constitutional claim. *Id.* at 906 (citing *Johnson v. Robison*, 415 U.S. 361 (1974)). He cited his article on *Vermont Yankee* to support his thesis that the court should not graft additional procedures onto agencies. *Id.* at 908 (citing Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345). His response to the dissent's use of subsequent legislative history, a technique sometimes used by the Supreme Court, dripped in sarcasm: "A brief word is necessary concerning the dissent's use of what has become known (with a disappointing lack of sense for the paradoxical) as 'subsequent legislative history.'" *Id.* at 914.

45. 412 U.S. 669 (1973).

46. *FAIC Sec., Inc. v. United States*, 768 F.2d 352 (D.C. Cir. 1985).

47. Scalia also expressed in this case his controversial idea that because legislative history is not a very useful interpretive source for statutes, judges should primarily rely upon the text. *Id.* at 362. This article shall not discuss the political impact of different strategies for interpreting statutes. That subject is outside the scope of this article, but needs much more exploration. In another example of conservative efforts to reformulate statutory construction, Judges Posner and Easterbrook have proposed that the breadth of judicial creativity should depend upon the degree of specificity of the statutory language. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533 (1983); Lander & Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875 (1975).

Department's labelling several films "political propaganda."⁴⁸ Even if the public reaction was "irrational," some purchasers may have been deterred from purchasing the film because they feared public hostility triggered by the label and by disclosure of their purchase.⁴⁹

Scalia has been unsympathetic to the "chilling effects" and the "overbreadth doctrine," two concepts the Supreme Court has sometimes used to create extensive first amendment protection. Under those themes, parties could have standing either because they were intimidated from speaking or because the challenged governmental action clearly impaired protected speech of other citizens. In *United Presbyterian Church v. Reagan*,⁵⁰ Scalia held that a subjective chill was not enough.⁵¹ The plaintiffs had "not adequately averred that any specific action [was] threatened or even contemplated against them."⁵² They only had a "generalized grievance" against presidential orders that updated directives on how to process intelligence data.⁵³

In that same case, Scalia narrowly construed the D.C. Circuit doctrine of "equitable discretion," a doctrine which grants greater standing to legislators who challenge executive action than to average citizens. Scalia dismissed Congressman Dellum's challenge against the presidential orders because his complaint was "a generalized grievance about the conduct of government, not a claim founded on injury to the legislator by distortion of the process by which a bill becomes law."⁵⁴

When a group of Nicaraguans, congressional members, and Florida residents sued the President to stop supporting the Contras, Scalia

48. *Block v. Meese*, 793 F.2d 1303 (D.C. Cir.), cert. denied, 106 S. Ct. 3335 (1986).

49. *Id.* at 1308-09.

50. 738 F.2d 1375 (D.C. Cir. 1984). Judge Bork joined Judge Scalia on this opinion.

51. *Id.* at 1378.

52. *Id.* at 1380.

53. *Id.* at 1381. In *Block v. Meese*, Scalia also denied standing to film distributors challenging the vagueness of "political propaganda" labelling. 793 F.2d 1303 (D.C. Cir. 1986). He explained: "[I]t is beyond imagination how anyone except the foreign agent would have standing to complain about the vagueness of the statutory command." *Id.* at 1315.

54. *United Presbyterian Church*, 738 F.2d at 1382. Even Professor Ronald Dworkin might concur with Scalia's distinction. Why should congressional members have a broad constitutional right to more access to the courts than the average citizen? Allowing congressional members to challenge virtually any statute or executive action while prohibiting ordinary citizens from exercising the same power arguably violates Dworkin's concept of "equal concern and respect." See, e.g., R. DWORKIN, *A MATTER OF PRINCIPLE* (1985); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978). On the other hand, federal legislators are distinctively injured when the executive branch violates constitutional procedures for creating legislation. They should be able to challenge executive interference with the lawmaking process such as an improper use of the pocket veto. Otherwise, such profound violations of constitutional provisions would probably be unreviewable.

applied the totally preclusive political question doctrine to only one of the claims, the contention that the President violated the War Powers Act. Scalia held that the War Powers Act was designed to resolve interbranch responsibilities during armed hostilities, not to provide individuals with a federal court forum or to grant them damages.⁵⁵ Turning to the remaining claims, Scalia held that the plaintiffs could not proceed under the sequel to the 1789 Judiciary Act (now codified in the Judicial Code) because they had to allege sovereignty, and sovereign immunity had not been waived either by that act or by the Administrative Procedure Act.⁵⁶ Nor could aliens claim relief under either the fourth or fifth amendment because the federal courts were institutionally incompetent to design a remedy: "We must leave to Congress the judgment whether a damage remedy should exist."⁵⁷ By rarely using the political question defense, which totally prevents judicial review, Scalia created a flexible, discretionary jurisprudence. He then used that discretion against the plaintiffs.

Judge Scalia's dissent in *Ramirez de Arellano v. Weinberger*,⁵⁸ an en banc decision which reversed his earlier decision, demonstrates his ability to weave through complex procedural and substantive issues to reach a conclusion which may not in itself be heartless, but which leaves behind many barriers to broad judicial review. *Ramirez de Arellano*, a United States citizen, sued on his own behalf and as a shareholder of his foreign corporation to have United States military forces enjoined from continuing to occupy his ranch in Honduras. The majority held that the military had violated *Ramirez de Arellano's* due process rights, and consequently should be evicted.

Scalia did not hold that the issue was a nonjusticiable political question for three reasons: the adjudication of land disputes is a function of the courts; no confidential documents were needed to resolve the case; and the impact on foreign affairs did not provide the govern-

55. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985).

56. *Id.* at 207. Scalia also mentioned sovereign immunity in *Asociacion de Reclamantes v. United Mexican States* when he denied damages to Mexicans seeking compensation for the alleged taking and conversion of twelve million acres that they previously owned in Texas. 735 F.2d 1517 (D.C. Cir. 1984). Scalia decided the case primarily on statutory grounds. *Id.* at 1525; see also Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public Land Cases*, 68 MICH. L. REV. 867 (1970) (Scalia has criticized broad use of sovereign immunity).

Scalia referred to the language in the 1789 Act because it forms the basis for the language in the present Judicial Code. 28 U.S.C. § 1257 (1982).

57. *Sanchez-Espinoza*, 770 F.2d at 209.

58. 745 F.2d 1500, 1550 (D.C. Cir. 1984) (Scalia, J., dissenting), *rev'g* 724 F.2d 143 (D.C. Cir. 1983).

ment with a complete defense.⁵⁹ Ramirez de Arellano had standing as a United States citizen to raise constitutional complaints, but did not have standing as a shareholder of his foreign corporation.⁶⁰ Otherwise, any shareholder could sue any governmental official who was injuring that shareholder's corporation. Scalia thus used the standing doctrine to preclude a shareholder who had been injured in fact.

Although Scalia did not rule against Ramirez de Arellano on access grounds, he suggested that the court deny relief because the majority's injunctive remedy inappropriately violated separation of powers principles and conflicted with "common sense."⁶¹ Scalia noted that the case concerned a military operation abroad in a friendly country. The plaintiff never filed suit in that country, nor did the plaintiff seek damages that were available under the Tucker Act for any unconstitutional taking.⁶² Thus, Scalia did not draw a bright line, broadly construing the political question doctrine to preclude relief in all foreign affairs cases, but instead invoked the foreign affairs limitation on judicial review to deny the requested remedy. He retained some flexibility, but put pressure on the remedy of injunctive relief, a major tool of many civil rights litigants. Nevertheless, his decision was not totally deferential to the government because the plaintiff still could pursue the alternative remedy of damages.

Sometimes a relatively insignificant case can best capture a jurist's sympathy for constitutional claims. In *Carducci v. Regan*,⁶³ instead of ordering a remand, Scalia dismissed a civil servant's due process challenge to a reassignment partially because the plaintiff had not adequately briefed whether his interest was a constitutionally protected property right.

B. *First Amendment*

No case more dramatically demonstrates Scalia's reluctance to read the first amendment broadly than his dissenting opinion in *Ollman v. Evans*,⁶⁴ an opinion that was particularly critical of a concurrence by Judge Bork. The opinion of the court reversed a jury finding that the conservative political columnists Rowland Evans and Robert Novack had libeled Professor Bertell Ollman because the columnists had engaged in protected opinion. The columnists had

59. *Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 147 (D.C. Cir. 1983), *rev'd*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc). Judge Bork joined Scalia in this opinion.

60. *Ramirez de Arellano*, 745 F.2d at 1556.

61. *Ramirez de Arellano*, 724 F.2d at 156.

62. *Ramirez de Arellano*, 745 F.2d at 1561.

63. 714 F.2d 171 (D.C. Cir. 1983).

64. 750 F.2d 970, 1036 (D.C. Cir. 1984) (Scalia, J., dissenting).

attacked Ollman, a Marxist, when the University of Maryland considered making him head of the political science department. According to the opinion of the court, the defendants' use of such phrases as "political Marxist" or "activist" were so hopelessly imprecise as to preclude a finding of libel.⁶⁵ Columnists tend to engage in such hyperbole as "Ollman has no status within the profession but is a pure and simple activist."⁶⁶

Because Judge Bork assembled so many themes that he had previously explored in his academic writings and because Judge Scalia reserved his most biting counterattacks for Judge Bork's concurrence, I am going to digress temporarily from this article's structure of separately presenting each of the judge's opinions by now presenting Bork's *Ollman* concurrence in some depth. The following debate is intriguing because it demonstrates major similarities as well as differences in the two judges' jurisprudence. We also should spend some time studying Bork's views because Scalia may find them attractive.

In his academic writings, Judge Bork has maintained that the Framers' intentions are the touchstone for all legitimate constitutional interpretation. Applying that theory to the first amendment, Bork concluded that not only did the Framers intend to protect political speech by passing the first amendment,⁶⁷ but also that the Constitution would protect the structure of political speech even if the first amendment did not exist. On the other hand, Bork later wrote that welfare rights could never be found in the equal protection clause because they are "new rights."⁶⁸ Therefore, according to Bork, such rights cannot be inferred from text, history, structure, or precedent—the only "legitimate" sources of constitutional interpretation. In *Ollman*, Bork concluded that his assumptions did not preclude some alteration of constitutional doctrine:

In a case like this, it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application. The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the

65. *Id.* at 987.

66. *Id.* at 989.

67. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971). In that same article, Judge Bork also relied upon Justice Brandeis' concurrence in *Whitney v. California*, to help define the scope of protected speech. *Id.* at 32 (citing *Whitney v. California*, 274 U.S. 357 (1927)). In *Ollman*, Bork made another reference to Brandeis' concurrence. 750 F.2d at 1002.

68. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 *WASH. L.Q.* 695.

central value of that amendment to electronic invasions of personal privacy.⁶⁹

Bork proposed a new doctrinal defense to libel. Under this defense, the court should apply a balancing test weighted against politically active plaintiffs who "have entered the fray."⁷⁰ This balancing test would be both substantive and procedural. Activist plaintiffs would need to prove more than malice to prevail. Even if such a plaintiff proved malice, the defendant could sometimes successfully assert that the false statement was hyperbole.⁷¹ Bork concluded that such complex determinations were not fit for juries because juries are generally incompetent to handle first amendment cases.⁷²

Bork's doctrinal solution, one I happen to agree with, partially destabilized his basic constitutional jurisprudence that courts should only rely on text, history, precedent, and structure to interpret the Constitution. By including assessments about changing circumstances, jury error, and the need for evolutionary doctrine, Bork seemed to be overtly endorsing some of the flexible techniques that liberal realists claim all Supreme Court Justices actually use and ought to use.

Scalia scolded Bork for overtly embracing such evolutionary views, both as a mode of argument and as applied to the particular issue. Scalia thus fell into the theoretical quagmire he had usually avoided as a scholar. According to Scalia, the existing malice doctrine was perfectly adequate.⁷³ Indeed, the media currently has excessive power, sometimes engaging in sensationalistic investigative reporting, "a distressing tendency for our political commentary to descend from discussion of public issues to destruction of private reputations."⁷⁴ According to Scalia, the legislature should be the primary forum for constitutional evolution:

It seems to me that the identification of "modern problems" to be remedied is quintessentially legislative rather than judicial business—largely because it is such a subjective judgment; and that the remedies are to be sought through democratic change rather than

69. *Ollman*, 750 F.2d at 995. Bork also endorsed the Supreme Court's expansive readings of the commerce clause, of the equal protection clause to desegregate the schools in *Brown v. Board of Educ.*, and of the first amendment to create the malice standard to protect the media from libel suits by public officials in *New York Times v. Sullivan*. *Id.* at 996-97 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

70. *Ollman*, 750 F.2d at 1002.

71. *Id.* at 1005.

72. *Id.* at 1006.

73. *Id.* at 1036 (Scalia, J., dissenting).

74. *Id.* at 1039.

through judicial pronouncement⁷⁵

Scalia proposed a distinction as ambiguous as some of Bork's distinctions to explain why the court can regulate electronic eavesdropping but not change libel laws:

The application of existing principles to new phenomena—either new because they have not existed before or new because they have never been presented to a court before—is not what I would call “evolution” but merely routine elaboration of the law. What is under discussion here is not application of preexisting principles to new phenomena, but rather *alteration* of preexisting principles in their application to preexisting phenomena on the basis of judicial perception of changed social circumstances.⁷⁶

A major problem with Scalia's description of constitutional law is that constitutional decision-making since the time of Chief Justice Marshall has never been “routine elaboration of the law.” Furthermore, Scalia's theory may commit him to the status quo far more than Bork. Both men are wary of judicial novelty, be it “new rights” or “new principles,” but Scalia also apparently opposes any “alteration of preexisting principles in their application.” It is unclear what Scalia meant by such opposition, but he may have meant that all constitutional doctrine must be immediately and totally ossified, or that the courts should revert to doctrine existing at the time of the Framers unless there is a new technology, a “new phenomenon.” If the latter is the case, then seditious libel laws are constitutional because courts used such a doctrine to regulate newspapers at the time of the ratification of the first amendment.⁷⁷ On the other hand, he may have created an escape hatch during this esoteric conservative fight. Because constitutional litigants are frequently requesting new relief to new problems, he can characterize any doctrinal shift as appropriate because the phenomenon had never been presented to the court before. Yet, no court had previously considered giving special protection to columnists who are sued for libel by those who chose to be politically active. The line between new phenomena and new doctrine, which itself is a phenomenon, borders on the mystical.

This argument in favor of the status quo may come back to haunt Scalia in other areas of constitutional law. How can he find all forms of affirmative action to be unconstitutional or overrule abortion rights when those phenomena already exist and have already been presented

75. *Id.* at 1038.

76. *Id.* at 1038 n.2 (citations omitted).

77. L. LEVY, *LEGACY OF SUPPRESSION* (1985). Professor Levy recently wrote that the doctrine of seditious libel significantly influenced newspapers. See Levy, *The Legacy Reexamined*, 37 *STAN. L. REV.* 767, 769 (1985).

to the Court? How can he expand doctrine denying equitable relief to the Honduran rancher on the grounds of "common sense," which sounds like a method of identifying and rectifying modern problems? How can he alter the doctrine of standing to deny milk consumers their day in court? In short, this bizarre debate between Bork and Scalia, filled with vague distinctions, demonstrates the awkward positions conservative theorists may assume when they forget Edmund Burke's admonition that one of the greatest strengths of conservatism is its flexibility. I do not mean to suggest that Burke easily solved the distinction between right and wrong political action; he labelled changes he liked "reforms" and changes he did not like "innovations." Burke at least avoided such superficially mechanical words, tests, and theories as legitimacy and subjectivity.

In *Tavoulaareas v. Piro*,⁷⁸ Scalia joined Judge McKinnon in upholding a jury decision that the *Washington Post* libeled William Tavoulaareas, head of Mobil Oil, when it published an article alleging corporate nepotism. Unlike Bork, McKinnon and Scalia thought the appellate court should be totally deferential to jury findings, including credibility findings.⁷⁹ McKinnon also echoed Scalia's wariness of the media, as expressed in *Ollman*; the jury could consider, as part of its analysis, that the *Post's* aggressive policy of investigative reporting helped cause the libel.⁸⁰ Furthermore, the jury could infer malice by observing the inferences drawn by the *Post* editors.⁸¹

Scalia again deferred to jury resolutions of libel cases when he reversed a summary judgment decision in favor of columnist Jack Anderson, whom extreme right-wingers had sued for libel.⁸² Scalia held that the trial court should not have held that a plaintiff must prove his or her case by "clear and convincing" evidence at the summary judgment stage instead of by a "preponderance" of the evidence. Scalia held that such an enhanced standard would force the plaintiff to try the entire case before trial and would frustrate the Supreme Court's position that summary judgment is disfavored in libel cases.⁸³ Scalia agreed that opinions, journalistic inaccuracies, and political opinions (including Anderson's calling someone a "liar") were

78. 759 F.2d 90 (D.C. Cir. 1985).

79. *Id.*

80. *Id.* at 117.

81. *Id.* at 125.

82. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984). The Supreme Court of the United States recently reversed this decision on the ground that a trial court should use the "clear and convincing" standard at the summary judgment stage. *Anderson v. Liberty Lobby*, 106 S. Ct. 2505 (1986).

83. *Anderson*, 746 F.2d at 1570-71; see also *supra* note 82 (discussing the Supreme Court opinion).

protected forms of speech.⁸⁴ Other statements were not malicious because the editor could rely upon such reputable sources as trials, some articles, and statements made by previous employees.⁸⁵ Anderson, however, should have known that some of his information was based upon an unreliable source, a magazine article that had been the source of a prior libel action which generated a settlement.⁸⁶ Anderson also should not have relied upon Eringer, a suspect informant who claimed that the plaintiff was a Hitler-imitator, because although "Eringer was identified by name, . . . he was in all other respects unknown to [Anderson]."⁸⁷ Scalia has reduced the recklessness component of the "malice" standard to a negligence, malpractice standard. Assuming that the standard should exist at all, it should punish only gross journalistic sloppiness which can only be explained as the equivalent of malicious motivation.

These libel cases dramatize the confusion in Scalia's constitutional jurisprudence. When Judge Bork expanded first amendment jurisprudence because he perceived contemporary deficiencies with existing libel law,⁸⁸ Scalia castigated Bork's expansion as a usurpation of the legislature, which is best equipped to solve "modern problems." But Scalia did not hesitate to relax libel standards, both in definition and application, because of his belief that the news media presently have too much power.

Scalia also limited media power when he denied reporters access to prejudgment documents in a civil case.⁸⁹ Scalia first observed that

84. *Anderson*, 746 F.2d at 1574.

85. *Id.* at 1574-75.

86. *Id.*

87. *Id.* at 1579.

88. *See supra* notes 64-72 and accompanying text.

89. *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985).

Scalia did not rely upon Professor Ronald Dworkin's argument that the press has no special access right greater than the rights of any other citizen and that such a unique right would violate Dworkin's core principle of "equal concern and respect." R. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 54, at 373-97. There are interesting similarities between Dworkin's "equal concern and respect" jurisprudence and these jurists' theories of constitutional law. Dworkin draws a line between "principle" and "policy," requiring courts to enforce the former. The conservative judges distinguish between "core rights" and "new rights," banishing the latter as illegitimate. Although anyone engaged in constitutional law must make a "reasoned" distinction between winners and losers, all these men tend to act as if their systems were remarkably determinate, even self-evident, and can explain the most subtle constitutional issues.

I remain one of those skeptics who believe that many important constitutional issues do not have one "right answer," but have many tolerable, "legitimate" solutions. Once we get beyond such tyrannical practices as torture, apartheid, concentration camps, and content discrimination in speech, I am reluctant to ban as "illegitimate" or as "wrong" numerous constitutional opinions with which I disagree. Nor do I have any single technique to resolve such collateral issues (just as I have no automatic test to define "tyranny"). In other words, I

although the Supreme Court had not decided this particular issue of press access, it decided similar cases by studying the history of press access and by sometimes favoring access because the press plays “an essential role in the proper functioning of the judicial process and the government as a whole.”⁹⁰ Sounding like Bork, Scalia wrote that history and text were the exclusive sources of constitutional interpretation: “With neither the constraint of history nor the constraint of historical practice, nothing would separate the judicial task of constitutional interpretation from the political task of enacting laws currently deemed essential.”⁹¹ Whenever the text and history conflict, however, the text should prevail:

If the holding falls directly within the text of the constitutional provision—as . . . where not an implied right of access but the expressly protected right of “freedom of speech” was at issue—historical practice may be relegated to a lesser role, serving not as a *sine qua non* but as an important tool for interpretation.⁹²

Scalia concluded that the press had no special right to access. First, he narrowed the rationale for access, reducing the first amendment to a tool to help the government function rather than also characterizing it as an individual right. The public’s interest is constitutionally irrelevant; the “focus is upon the public’s ability to assure proper functioning of the courts.”⁹³ Scalia also invoked practical policy reasons: “The dissent’s categorical rule that no claim for confidentiality of trial exhibits can be sustained unless accompanied by a document-by-document justification is simply unworkable.”⁹⁴ Scalia’s argument about adequate judicial remedy was relevant and appropriate, and is perhaps even convincing. What is notable about such an argument, however, is its distance from text and history.

believe that the Supreme Court has “legitimate discretion” to resolve many constitutional issues in significantly different ways. I worship neither Hercules nor the Framers.

Some readers might wonder, then, why I have cited Dworkin. First, I agree with much of what he says. Consistency and equality are major legal virtues. I also wanted to show how one of Scalia’s opinions was directly supported by Dworkin’s writings and how another might be. And as I noted above, somehow all of us must explain why we support and reject different opinions, and these men have provided us with valuable guidelines. But I remain reluctant to make any single test the exclusive test, the litmus test. Not only does such an approach reduce needed flexibility, but it also is ultimately an illusion. A mysterious, foggy gap still remains between such abstractions as “core rights” or “equal concern and respect” and application of those abstractions to specific issues. I like that fog. Our ignorance is simultaneously constraining and liberating.

90. *In re Reporters Comm. for Freedom of the Press*, 773 F.2d at 1331.

91. *Id.* at 1332.

92. *Id.* at 1332 n.5.

93. *Id.* at 1337 n.9.

94. *Id.* at 1341.

When pressured, Scalia leaves text and history behind, and engages in basic policy arguments about "common sense," "remedy," and "proper functioning."

If the "core" of the first amendment is political speech, then the crucial doctrinal test is whether the regulation is content neutral. Judge Scalia joined Judge Bork in invalidating a ban of a poster in a public subway which falsely showed President Reagan mocking a group of poor people at a dinner; the artist placed a photograph of President Reagan over the figure who was ridiculing the impoverished.⁹⁵ But Scalia has whittled at the edges of the content neutrality doctrine. In *Molerio v. F.B.I.*,⁹⁶ he upheld the F.B.I.'s decision to turn down an applicant's request to be a special agent in part because the applicant's father had been involved in radical, pro-Castro groups. Scalia noted that the F.B.I. could discriminate against a person because of his father's acts, but not because of his father's speeches.⁹⁷ Even assuming that such discrimination can be constitutional, Scalia created a large procedural hurdle for plaintiffs seeking to prove which "type" of discrimination occurred. He upheld the trial court's affirmation of the F.B.I.'s actions based upon an F.B.I. affidavit.⁹⁸ Courts should give "considerable deference to the views of the executive department as to what sort of matter would impair national security."⁹⁹

Scalia's belief that the judiciary should be particularly deferential to the executive in its handling of foreign affairs helps explain *Block v. Meese*,¹⁰⁰ published just after his nomination to the Supreme Court. The plaintiffs challenged the Justice Department's description of three films made by the Canadian government as "political propaganda" and its requirement that the distributor disclose the names of all those organizations that exhibited the films. Two of the films studied acid rain, and the other portrayed the perils of nuclear war.¹⁰¹ Scalia first rejected the plaintiffs' statutory argument that Congress only passed the statute requiring registration of "political propaganda" to combat "subversive propaganda." Making Professor Dworkin's classic argument that courts are to implement the "concept" of a text, not the Framers' specific "conception" of the mischief that motivated initial

95. *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893 (D.C. Cir. 1984).

96. 749 F.2d 815 (D.C. Cir. 1984).

97. *Id.* at 824 n.4, 825.

98. *Id.* at 822. Scalia also reviewed the affidavit. *Id.*

99. *Id.*

100. 793 F.2d 1303 (D.C. Cir. 1986) (Judge Bork was on the unanimous panel.).

101. *Id.* at 1306.

passage of the text,¹⁰² Scalia dismissed the plaintiffs' argument that the Justice Department's actions exceeded the original purpose of the statute: "While the investigations which led to the FARA's enactment were undoubtedly aimed at 'subversive propaganda' . . . the statute as drawn was not so narrow . . ." ¹⁰³ This argument of inferring goals beyond the Framers' intentions is, of course, one liberals frequently rely upon in many opinions that the conservatives have argued are "illegitimate."

Turning to plaintiffs' first amendment argument, Scalia observed that the government could constitutionally identify "an objective phenomenon that is suspect."¹⁰⁴ The government had no constitutional duty to comply with the plaintiffs' request that "political advocacy" be substituted for "political propaganda" because those words were so similar. Scalia quoted Professor Tribe, "an eminent constitutional scholar not noted for a crabbed view of the first amendment," to support his argument that the government could actively participate in the marketplace of ideas.¹⁰⁵ Tribe, however, might reply that there is a constitutional distinction between the government's criticizing a film and the government's labelling and monitoring of a film. The Justice Department could, therefore, evaluate these films. Not only would the courts have practical problems determining when the government spoke properly if they started regulating its speech, but the courts also would be regulating political speech. Courts should only intervene if the government is suppressing another's speech, not when it is disparaging that speech.¹⁰⁶ Yet the government had gone beyond criticism; it had begun to regulate and to monitor with the intent to discourage distribution and viewing.

In *Block*, Scalia applied a balancing test to uphold the government requirement that the names of all exhibitors of such films be disclosed. The public's interest to know, which Scalia had dismissed when reporters sought increased court access in *Ollman*, now became constitutionally relevant, although not compelling: "This interest in public awareness is not, we are inclined to think, a state interest of the highest importance."¹⁰⁷ Scalia suddenly became an advocate of media access. Because mainly the national press used such information, nondisclosure would be "less a vindication than a frustration of first

102. R. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 54, at 33-71.

103. *Block*, 793 F.2d at 1310.

104. *Id.* at 1312.

105. *Id.* at 1314.

106. *Id.* at 1315.

107. *Id.* at 1316.

amendment values."¹⁰⁸

In his dissent in *Community for Creative Non-Violence v. Watt*,¹⁰⁹ Scalia narrowly construed and applied the "speech-conduct" distinction. His analysis has dramatic practical impact on activists' ability to be heard, particularly if they are not wealthy. Even when deciding cases far removed from foreign affairs, Scalia held that judicial deference to executive action prevailed over a broad definition of one of our most crucial constitutional rights; he upheld the Department of Interior's refusal to permit demonstrators to sleep in tents they had set up at LaFayette Square to dramatize the problem of the homeless. In an opinion, which Judge Easterbrook later endorsed in a *Harvard Law Review* foreword,¹¹⁰ Scalia accepted the Department's argument that the regulation against camping had been neutrally applied to all groups so that the public could use and enjoy LaFayette Park, even though that park had previously been the source of numerous demonstrations and even though many homeless persons would not come to the demonstration if they could not sleep in the tents. Easterbrook applauded Scalia's argument that allowing one group to camp would probably lead to the admission of other groups, a process which would defeat the purpose of the no camping regulation.¹¹¹

Scalia's analysis is far more provocative than his conclusion. After all, the prohibition was arguably constitutional because the park did not have to let the plaintiffs set up the tents in the first place, and because lines had to be drawn somewhere for time, place, and manner restrictions. Also, other political protesters who might want camp sites might have been able to allege content-based discrimination if they were denied such a privilege after the demonstrators against the homeless had received it. But in the course of resolving this difficult case, Scalia applied the ambiguous speech-content distinction to create new troublesome distinctions and tests. Courts should apply heightened judicial scrutiny only if the government limits "effective speech."¹¹² Scalia concluded that only spoken and written communication are forms of "effective speech," entitled to far more judicial

108. *Id.* at 1317.

109. 703 F.2d 586 (D.C. Cir 1983) (Judge Bork concurred in the Scalia opinion.).

110. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

111. Easterbrook described this classic "slippery slope" argument as an economic interpretation appropriately sensitive to how a decision having marginally insignificant costs can ultimately lead to decisions which generate undesirable results. *Id.* at 13. For a discussion of slippery slopes that is not cast in economic imagery, see Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

112. *Watt*, 703 F.2d at 623.

protection than “point-making conduct.”¹¹³ Such traditional forms of protest, such as marches and picketing, fall into a netherland of “speech plus.”¹¹⁴ Applying these definitions to the facts, Scalia tersely noted that sleep is “self-evidently” not “effective speech.”¹¹⁵ Indeed, sleep is not speech at all; the Court should rely upon “common and common-sense understanding” to make the needed distinctions.¹¹⁶ Scalia then held that courts should never apply intermediate scrutiny to activities labelled “conduct” unless the plaintiff could show improper motivation: “But a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause.”¹¹⁷

Scalia both limited and confused his motive test by stating that the plaintiff could prove improper motive only if the bad motive was the only reason for the challenged act.¹¹⁸ Yet many cases involve mixed motives. The law will have something to do with the conduct’s communicative character, meeting Scalia’s test in favor of the plaintiff. That same law, however, may also have been passed for other reasons, satisfying his second test, which requires a verdict for the defendant.

These tests conflict with the reasoning of such Supreme Court decisions as *Tinker v. Des Moines School District*,¹¹⁹ which held that school administrators could not prohibit students from wearing black arm bands protesting the Vietnam War. *Tinker* demonstrates the uncertainties contained in Scalia’s doctrine. Certainly the prohibition against armbands had something to do with their “communicative character,” meeting Scalia’s first test. But the administrators may have been worried about safety or school disruption; unconstitutional content-based suppression may not have been their “only reason.” Finally, how can Scalia justify this confused constriction of existing doctrine with his jurisprudential argument in *Ollman* that courts should only apply “existing principles” to “new phenomena”? Are his constrictions “existing principles”? How can we tell if these new definitions, standards, and theories are “improper alterations” or “legitimate applications”? And how do we determine if sleep is a “new phenomenon,” compared to armbands?

113. *Id.* at 622.

114. *Id.* at 623.

115. *Id.* at 624.

116. *Id.* at 622.

117. *Id.*

118. *Id.* at 624-25.

119. 393 U.S. 503 (1969).

However the reader might answer such quasi-physical questions, Scalia will apparently resolve most doubts about both his doctrinal and jurisprudential tests in favor of the government. He places on the legislatures the responsibility for protecting this segment of the first amendment. So long as they remain "neutral," temporary electoral majorities may totally regulate how minorities can use nonverbal forms of their most important right—the right to criticize, even to displace, that majority. Political pressures alone must prevent the government from "neutrally" proscribing all expressive conduct.¹²⁰

C. *Procedural Due Process*

Scalia only wrote three opinions discussing the due process clause. None is of great importance, although all three demonstrate his reluctance to impose any supplemental procedures upon government agencies. In two of those cases he ruled against the plaintiffs because they had not met the threshold requirement of proving they had a constitutionally protected "liberty" or "property interest." In *Molerio v. F.B.I.*,¹²¹ he held that a person applying to be an F.B.I. special agent had no property interest in the job. Nor could the plaintiff claim his liberty was impaired. He had no constitutionally protected reputation interest, he was not stigmatized because one could be denied a F.B.I. job and still be considered loyal, and the government had not broadly published the denial of the job.¹²²

In *Carducci v. Regan*,¹²³ Scalia dismissed a civil servant's challenge to a reassignment partially because the due process issue had not been adequately briefed, while cryptically suggesting that constitutional claims are not limited by statutory structure, unless Congress so indicates.¹²⁴ Even assuming that Scalia should have dismissed Carducci's due process claim instead of remanding it, his opinion was ambiguous. He noted that hearing evidence outside the record was a classic due process violation¹²⁵ and that the Constitution can mandate more procedures than currently exist under positive law. Yet he also stated that the court should not impose constitutional procedures where Congress has spoken clearly.¹²⁶ So what happens if Congress clearly authorizes *ex parte* communications?

In the one case where the plaintiff may have had a constitution-

120. *Watt*, 703 F.2d at 626.

121. 749 F.2d 815, 823 (D.C. Cir. 1984).

122. *Id.* at 924.

123. 714 F.2d 171, 177 (D.C. Cir. 1983).

124. *Id.* at 173-74.

125. *Id.*

126. *Id.*

ally protected interest, Scalia deferred to existing judicial interpretations of the positive law: "Federal courts would hardly interpret the unspecified 'full hearing' requirement of § 205(e) to permit procedures so inadequate that, if the due process clause were applicable, they would not pass muster."¹²⁷ Such deference to the positive law and to existing procedures coincides with the views Scalia expressed when he wrote an article¹²⁸ explaining why the Supreme Court so harshly criticized the D.C. Circuit for imposing additional procedural requirements upon the Environmental Protection Agency in *Vermont Yankee v. Natural Resources Defense Council*.¹²⁹

Although Judge Scalia has not written any opinions applying substantive due process, he joined Judge Bork in holding that the Navy could discharge a serviceman for being homosexual.¹³⁰ Although his judicial viewpoint on abortion remains uncertain, Scalia has personally spoken out against abortion, and in a debate, criticized the Supreme Court for imposing its own values on the electorate by providing constitutional protection to women seeking an abortion.¹³¹

D. Equal Protection

Judge Scalia has written two opinions construing the equal protection clause. In *Molerio v. F.B.I.*,¹³² discussed above, Scalia denied the plaintiff's claim that he was discriminated against because he was Cuban. Scalia observed that the F.B.I. had good reasons for denying the plaintiff his clearance, even though he never said what those reasons were. The F.B.I. was neither creating a pretext nor acting unconstitutionally when it denied Molerio's application to become an F.B.I. special agent because he still had relatives in Cuba.¹³³ Scalia's opinion partially revives that dark moment in our history when the Court upheld the internment of the Japanese-Americans during World War II.¹³⁴ Government agencies can discriminate against people because of their national origin when national security is at stake. Admittedly, there are major differences between the cases, but those

127. *City of Cleveland v. Federal Energy Regulatory Comm'n*, 773 F.2d 1368, 1373 (D.C. Cir. 1985).

128. Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345.

129. 435 U.S. 519 (1978).

130. *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

131. *In His Own Words: Antonin Scalia on Abortion, Bias and Libel*, N.Y. Times, June 19, 1986, at D 27, col. 1.

132. 749 F.2d 815 (D.C. Cir. 1984).

133. *Id.* at 823.

134. The Supreme Court deferred to the military's judgment that Japanese-Americans should be put in camps. *Korematsu v. United States*, 323 U.S. 214 (1944).

distinctions cut both ways. On the one hand, Molerio's interest in a new job was hardly as important as the Japanese-American citizens' right to physical liberty. On the other hand, the government's need to win World War II transcended any F.B.I. security anxiety concerning Molerio.

In *United States v. Cohen*,¹³⁵ Scalia rejected an equal protection challenge to a District of Columbia law that automatically committed to mental institutions all who were found not guilty by reason of insanity, even though federal law in the rest of the country required immediate release unless the state committed the defendant. Missing the point, Scalia sardonically observed that no fundamental right exists to commit a crime while insane.¹³⁶ Nor was there a fundamental right to equal sentencing.¹³⁷ Scalia distinguished *Skinner v. Oklahoma* on the ground that the gravity of Skinner's punishment, involuntary sterilization, raised a due process claim, not an equal protection claim.¹³⁸

The plaintiffs in *Cohen*, Scalia argued, were not members of any suspect class. They were not the victims of congressional animus, they had no immutable traits, and they were not a politically powerless group.¹³⁹ Nor did District of Columbia residents have any right to intermediate scrutiny.¹⁴⁰ He then referred to John Hinckley's shooting of President Reagan to argue that the District might even need special protection against mentally ill criminals.¹⁴¹ Scalia concluded with yet another paean to deference: Congress could gradually reform the District's laws without judicial interference.¹⁴²

E. Government Structure

As seen throughout the above opinions, judicial deference has been a major theme in Scalia's writings and opinions. He has been particularly deferential to the Executive when it is involved in foreign affairs. In a relatively insignificant rate case, Scalia digressed to present a broad theory of autonomous executive power, a controversial theory which seems to undercut the Supreme Court opinion in

135. 733 F.2d 128 (D.C. Cir. 1984).

136. *Id.* at 133.

137. *Id.* at 134.

138. *Id.* at 134 n.11.

139. *Id.* at 134-35.

140. *Id.* at 136 n.12.

141. *Id.* at 138.

142. *Id.*

Youngstown Sheet & Tube v. Sawyer,¹⁴³ and *Youngstown's* two classic concurrences written by Justice Frankfurter and Justice Jackson.¹⁴⁴ Scalia argued that the President may have some implied powers that cannot be constitutionally displaced by Congress. He offered as an example an executive decision that the "Navy should use a foreign ship, faster and less vulnerable than any American ship available, to deliver urgently needed supplies to troops in wartime."¹⁴⁵ Does his example suggest that the President can ignore any congressional statute during wartime, even one outlawing such seizures, or does Scalia only mean that in times of great urgency the President can act because he or she does not have time to get congressional approval?

Scalia's deference to Congress is also limited by his bright-line conception of separation of powers, a conception that tends to favor the Executive.¹⁴⁶ One of his most influential law review articles articulated numerous objections to the legislative veto.¹⁴⁷ Expanding his criticisms beyond textual, structural, and historical grounds, he discussed the practical effects of continuing to allow this congressional power to exist. He also observed that strict separation of powers fulfilled James Madison's political goal of diffusing power to prevent tyranny. Although Chief Justice Burger did not precisely adopt Scalia's reasoning when striking down a House veto of the Attorney General's decision not to deport an alien, Burger wrote a broadly reasoned opinion, threatening all legislative vetoes as "legislation" that has not met the presentment clause requirement.¹⁴⁸

143. 343 U.S. 579 (1952). Justices Black and Douglas held the President had no implied powers. *Id.*

144. Justice Jackson agreed that presidential power ebbed to the degree that it conflicted with congressional power. His conclusion is far different in tone than Scalia's analysis: "I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress." *Id.* at 654. Justice Frankfurter expressed similar reservations in his separate concurrence. *Id.* at 593; see Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953); Kauper, *The Steel Seizure Case: Congress, the President, and the Supreme Court*, 51 MICH. L. REV. 141 (1952).

145. *Rainbow Navigation, Inc. v. Department of Navy*, 783 F.2d 1072 (D.C. Cir. 1986).

146. The tenth amendment's potential protection of the States' autonomy presents another interesting constitutional issue where the conservatives sometimes have not been extremely deferential to Congress. Scalia dissented from an opinion holding that the federal government had preempted state regulation of intrastate railroads in *Illinois Commerce Comm'n v. Interstate Commerce Comm'n*, 749 F.2d 875 (D.C. Cir. 1984). He did not discuss, however, much less dispute, the majority's rejection of the state's arguments that Congress did not have such power under the commerce clause and that Congress was barred by the tenth amendment. *Id.* at 886. Scalia based his dissent upon statutory construction, arguing that the majority read a compromise out of the statute. *Id.* at 892 (Scalia, J., dissenting).

147. Scalia, *The Legislative Veto: A False Remedy for System Overload*, 3 REG. 19 (Nov.-Dec. 1979).

148. *Immigration Natur'n Serv. v. Chadha*, 462 U.S. 919 (1983).

Scalia had an opportunity to put his separation of powers beliefs into action in *Synar v. United States*¹⁴⁹ when he sat on the three-judge district court that found the Gramm-Rudman-Hollings Act (designed to balance the budget) to be unconstitutional. Scalia is rumored to have written most, if not all, of the unsigned, per curiam decision,¹⁵⁰ and I am therefore going to analyze the decision as if he wrote it. As in Scalia's law review article on the legislative veto,¹⁵¹ the *Synar* court used virtually every existing interpretive technique to reject the law which gave continuing authority to the Comptroller General.

The three-judge district court first found that both the congressional plaintiffs and an organization representing active and retired federal employees had standing under the "minimum" tests of (1) an actual or threatened injury, (2) traceable to the defendant, and (3) amenable to judicial remedy.¹⁵² It reasoned that because the Act allowed the Executive "effectively to nullify" prior congressional votes by diminishing appropriations through automatic budget cuts, the congressional members had standing. They were not asserting such generalized grievances as the Court held to be insufficient in *United Presbyterian Church v. Reagan*.¹⁵³

After citing the "deferential post-*Schechter* cases"¹⁵⁴ which the Supreme Court decided, the court dismissed plaintiffs' argument that the statute was an unconstitutional delegation of power.¹⁵⁵ The court rejected plaintiffs' argument that Congress had improperly delegated a "core function" because such an analysis would be "effectively standardless,"¹⁵⁶ leaving its application to the "court's own perceptions."¹⁵⁷ The delegation was not excessively broad because Congress had included very precise standards for the application of the statute.¹⁵⁸

The *Synar* court, however, agreed with the plaintiffs that Congress could not allow the Comptroller General, a presidentially appointed officer who can be removed not just by impeachment but

149. 626 F. Supp. 1374 (D.D.C. 1986), *aff'd sub nom.* *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

150. Lewis, *The Court: Scalia*, N.Y. Times, June 26, 1986, at 23, col. 1.

151. Scalia, *supra* note 147, at 19.

152. *Synar*, 626 F. Supp. at 1380.

153. *Id.* at 1382 (distinguishing *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984)).

154. *Id.* at 1384.

155. *Id.* at 1391.

156. *Id.* at 1385.

157. *Id.*

158. *Id.*

also by joint resolution of Congress, to supervise the process.¹⁵⁹ The case was ripe because the possibility existed that the Comptroller would improperly try to please Congress while also serving in the executive branch.¹⁶⁰ To support this conclusion on the merits, the district court utilized virtually every form of constitutional argument. After all, as Judge Scalia had once written in a law review article, the entire theory of separation of powers can only be implied from the text of the Constitution.¹⁶¹ The court relied upon the text to discuss how the appointments clause determined who had removal power. The court turned to history, including the actions of the First Congress, to determine the purpose of the text.¹⁶² The three judges thoroughly discussed Supreme Court precedent to reach the conclusion that the peculiar status of the Comptroller General placed that bureaucrat in a "no-man's land"¹⁶³ neither clearly an executive officer nor clearly outside the executive department.

The court held that those bureaucrats living in "no-man's land" were congressional officers who could not administer executive programs.¹⁶⁴ Drawing such a bright line served several purposes. It was judicially manageable, unlike the tests the defendants proposed. Courts would have difficulty determining if the appointment was an "adequate admixture," or if nonexecutive powers were "predominate."¹⁶⁵ The court cited Montesquieu and Madison to support its political theory that separation of powers is essential to combat tyranny.¹⁶⁶ The three judges tried to predict the practical consequences of upholding the Act, and thereby favoring Congress:

Moreover, insofar as effect upon balance of power is concerned, congressional power to remove is much more potent [than the Presidential power to remove], since the Executive has no means of retaliation that may dissuade Congress from exercising it—other than leaving the office vacant, thereby impairing the Executive's own functions.¹⁶⁷

The court concluded its opinion by citing Professor Krattenmaker's

159. *Id.* at 1403.

160. *Id.* at 1392.

161. Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

162. *Synar*, 626 F. Supp. at 1395.

163. *Id.* at 1399. The court noted that the Supreme Court left this no-man's land for future consideration. *Id.* (citing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)).

164. *Id.* at 1404.

165. *Id.* at 1401.

166. *Id.* at 1401-02.

167. *Id.* at 1402.

recent article, which supported drawing bright lines in separation of powers cases:

The United States has chosen, by the device of a written constitution, and on the basis of specific historical experience, to resolve that question at one time and in one way for almost all cases. To respect that judgment promotes stability, predictability and consistency, and avoids constant reexamination of troublesome policy issues underlying the question.¹⁶⁸

The main purpose in presenting and discussing this opinion, which reaches a result I agree with, is to reveal how its author[s] used virtually every form of constitutional argument to reinforce the decision. This opinion even included an example of the “changed circumstances” argument, a maneuver Judge Scalia had previously criticized in *Ollman*. Judicial recognition of this development could radically change the administrative law of “independent” agencies:

Justice Sutherland’s decision . . . is stamped with some of the political science preconceptions characteristic of its era and not of the present day—if not stamped as well, as President Roosevelt thought, with hostility toward the architect of the New Deal. It is not as obvious today as it seemed in the 1930’s that there can be such things as genuinely “independent” regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process.¹⁶⁹

This dicta, which could lead to a constitutional transformation of many crucial agencies—particularly the Federal Reserve Board—appears to be an “application” of “new principles” to “new phenomena.” Once again we see the price of arguing that certain modes of argument are not “legitimate” constitutional arguments. Eventually, judges use virtually every type of argument. Of course, once most forms of argument are no longer considered “illegitimate,” then most decisions, including many these conservative judges disapprove of, are also no longer automatically “illegitimate” because the opinions rested upon allegedly improper interpretive techniques. They can only be “illegitimate” because they reached the wrong result. This brings us back to the realm of political jurisprudence—where we have been during the entire “legitimacy” debate.

168. *Id.* at 1404 (quoting Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 *GEO. L.J.* 297, 301-302, 311 (1981)).

169. *Id.* at 1398.

IV. BORK

A. *Access to Courts*

In eleven civil cases raising constitutional court access issues, Judge Bork ruled against the plaintiffs ten times.¹⁷⁰ Bork, like Scalia, implements much of his conservative jurisprudence by ruling in favor of the government on procedural grounds, rather than fully discussing the merits.

Unlike Judge Scalia, however, Judge Bork no longer agrees that congressional members have any special standing status under the "equitable discretion" doctrine. When he first considered the doctrine in *Vander Jagt v. O'Neill*,¹⁷¹ Bork did not completely repudiate the doctrine in his concurrence to a decision that denied a suit brought by Republican House leaders who disputed rule changes the Democratic Speaker of the House had made. Bork applied an overtly substantive standard to deny the plaintiffs standing: "[I]njury in fact, far from being a simple, descriptive term is a concept freighted with policies that limit the kinds of injury courts may consider."¹⁷² Bork explained that those policies were his constitutional beliefs in legitimacy and democracy: "Courts may take cognizance only of injuries of certain types, and the limitations are often defined less by the reality of the litigant's 'adverseness' than by the courts' view of the legitimate boundaries of their own power."¹⁷³ Bork admitted that the line was hard to draw, but stated that the line should be based upon "more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the power of an unelected, unrepresentative judiciary in our kind of government."¹⁷⁴

170. Throughout this article, some cases will not be discussed in the main text, but will be mentioned in the footnotes. For example, I will not analyze *Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218 (D.C. Cir. 1986) (eleventh amendment sovereign immunity) (Scalia joining); *Brown v. United States*, 742 F.2d 1498 (D.C. Cir. 1984) (Bork, J., concurring) (sovereign immunity); or *Grano v. Barry*, 733 F.2d 164 (D.C. Cir. 1984) (mootness). Bork did hold that sovereign immunity did not bar a plea for injunctive relief in *Dronenburg v. Zech*, 741 F.2d 1388, 1390 (D.C. Cir. 1984).

171. 699 F.2d 1166 (D.C. Cir. 1983).

172. *Id.* at 1177. In a case denying plaintiffs standing when they challenged an interpretive regulation that protected their employers from enhancing pensions of those who worked past the age of sixty-five, Bork made a similar observation about the relationship of the merits to the scope of standing: "[S]ome inquiry into the merits is necessary in a variety of situations presenting justiciability questions—those involving, for example, the 'zone of interests' test for standing." *Von Aulock v. Smith*, 720 F.2d 176, 185 (D.C. Cir. 1983).

He also denied standing to plaintiffs who requested a special prosecutor be appointed: "[T]he principle of Executive control extends to all phases of the prosecutorial process." *Nathan v. Smith*, 737 F.2d 1069, 1079 (D.C. Cir. 1984).

173. *Vander Jagt*, 699 F.2d at 1177.

174. *Id.* at 1179. Later in 1983, Bork argued in a concurrence that the majority should

Two years later, Judge Bork dissented in *Barnes v. Kline*¹⁷⁵ from a decision upholding a congressional challenge to a pocket veto made during a nine week intersession adjournment, even though Congress had authorized an agent to receive notice of the pocket veto. Bork returned to his favorite jurisprudential themes to explain his total rejection of the "equitable discretion" doctrine. The judiciary was gaining power at the expense of the legislature: "Every time a court expands the definition of standing, the definition of interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts."¹⁷⁶ Bork criticized the equitable discretion doctrine because it had no limits,¹⁷⁷ it gave special rights to congressional leaders,¹⁷⁸ and it could make the judiciary supreme in areas where courts are incompetent to make difficult decisions.¹⁷⁹

My prior article on these five judges concluded that they may have been attracted to the concept of legitimacy because it would allow them to overrule Supreme Court precedent.¹⁸⁰ They could argue that they were not imposing their old judicial ideology; they were only purging the system of illegitimate decisions. Bork made that tactical move all but explicit in *Barnes*: "Though we are obligated to comply with Supreme Court precedent, the *ultimate source* of constitutional legitimacy is compliance with the intentions of those who framed and ratified our Constitution."¹⁸¹ Precedent is thus a far

have used the standing doctrine instead of the "equitable discretion" or the "political question" doctrines to deny a congressional challenge to the President's sending troops to El Salvador. *Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (Bork, J., concurring).

Bork also avoided using the totally preclusive political question doctrine while concurring with a decision holding that the Israelis could not sue the Palestinian Liberation Organization (PLO) for slaughtering civilians in Israel: "By deciding that there is no private cause of action here we do not reach substantive issues that are best decided by the political branches." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring). Bork refused to apply or create federal common law, partially because of "the PLO's impingement upon American foreign relations." *Id.* at 808.

Bork did toy with the political question doctrine when he concurred with a decision upholding the closing of shelters for homeless men without full due process procedures. Such an action was an unreviewable "political decision," similar to "political questions." *Williams v. Barry*, 708 F.2d 789, 793 (D.C. Cir. 1983) (Bork, J., concurring).

175. *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985) (Bork, J., dissenting).

176. *Id.* at 44. Bork cited Judge Scalia's article on standing to support his substantive conception. *Id.* at 52 (citing Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983)).

177. *Id.* at 61.

178. *Id.* at 68-69.

179. *Id.* at 58 (Bork cited Hamilton's discussion about the comparative impotence of the judiciary. THE FEDERALIST No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961)).

180. Wilson, *supra* note 2, at 913.

181. *Barnes*, 759 F.2d at 56 (emphasis added).

less "legitimate" source of constitutional law: "Constitutional doctrine should continually be checked not just against words in prior opinions but against basic constitutional philosophy."¹⁸² But Bork still hedged. After citing Alexander Bickel on the virtues of judicial delay, Bork turned Burkean: "No good society can be unprincipled; and no viable society can be principle-ridden."¹⁸³

How can Bork reconcile this desirable Burkean flexibility with such rigid tests as "legitimate" and "ultimate source"? Readers shall see that Bork is sometimes flexible (making libel more difficult to prove for certain plaintiffs),¹⁸⁴ sometimes inflexible in the face of precedent he disputes (not extending rights to homosexuality),¹⁸⁵ and sometimes deferential to precedent he does not like (requiring reinstatement of employees after dismissals that violate the first amendment).¹⁸⁶ While Bork's decisions may or may not be wrong, they are not easily explained merely by "legitimacy" and/or by the "ultimate source," the Framers' intentions.

B. *First Amendment*

This article has already discussed Judge Bork's opinion expanding libel protection to the media in *Ollman v. Evans*.¹⁸⁷ For some reason, Bork did not restate in *Liberty Lobby, Inc. v. Anderson*¹⁸⁸ the theory he presented in *Ollman* that libel plaintiffs who entered the fray have a higher burden of proof, even though those two similar cases were decided within weeks of each other. I also noted his concurrences with Judge Scalia's narrow interpretations of the first amendment in *United Presbyterian Church v. Reagan*,¹⁸⁹ *Community for Creative Non-Violence v. Watt*,¹⁹⁰ and *Block v. Meese*.¹⁹¹

From a contemporary liberal perspective, the most reassuring Bork opinion, which Judge Scalia joined, was his decision in *Lebron v. Washington Metropolitan Area Transit Authority*.¹⁹² The court ordered a public transit authority to display a poster that superimposed the face of President Reagan on a figure who was mocking poor people. The opinion had ironic overtones because Bork had once

182. *Id.* at 67.

183. *Id.* at 55.

184. *See infra* notes 263-65 and accompanying text.

185. *See infra* notes 239-49 and accompanying text.

186. *See infra* notes 200-02 and accompanying text.

187. *See supra* notes 64-76 and accompanying text.

188. 746 F.2d 1563 (D.C. Cir. 1984).

189. 738 F.2d 1375 (D.C. Cir. 1984); *see supra* note 50.

190. 703 F.2d 586 (D.C. Cir. 1983); *see supra* note 109.

191. 793 F.2d 1303 (D.C. Cir. 1986); *see supra* note 100.

192. 749 F.2d 893 (D.C. Cir. 1984).

written that art was not protected by the first amendment, a position he later recanted in print after Jamie Kalven lambasted it.¹⁹³ Bork first implied that because the transit authority had accepted other political and public interest posters, it had converted itself into a public forum.¹⁹⁴ The poster was "plainly political."¹⁹⁵ He refused to defer to the authority's argument that it was acting on the allegedly neutral grounds of preventing deception. First, this satirical poster was not deceptive: "No reasonable person could think this a photograph of an actual meeting."¹⁹⁶ Second, government agencies are disqualified from making judgments about deception when evaluating political speech: "Since [the transit authority] is judging the truth of a political statement, to accept its argument is to destroy the distinction between content-neutral and content-based regulations."¹⁹⁷ Furthermore, the ban was an unconstitutional prior restraint.¹⁹⁸ Bork paid homage to first amendment advocate Harry Kalven, Sr.: "To assess speech in a public forum some balancing may be necessary, but the 'thumb of the [c]ourt [should] be on the speech side of the scales.'"¹⁹⁹

In *Reuber v. United States*,²⁰⁰ Bork concurred with a decision permitting a research scientist to sue the United States government because the scientist resigned after his company, which contracted with the United States government, had distributed a hostile reprimand letter. The scientist had previously criticized the company's business practices. Bork easily found state action: "[A] private person whose conduct is allegedly instigated and directed by federal officers should be treated as a federal agent."²⁰¹ Bork agreed that the plaintiff was entitled to damages and reinstatement, but expressed disappointment with the Supreme Court's prior cases authorizing the latter remedy: "But for that precedent, the analysis set out above might persuade me that no action for reinstatement would lie."²⁰²

Bork's dissent in *Abourezk v. Reagan*²⁰³ reveals some of the limits to his first amendment jurisprudence. The majority held that the district court needed to restudy the Secretary of State's denial of non-immigrant visas to aliens who wish to visit this country to give

193. Kalven, *Round Two for Judge Bork*, 238 NATION 731 (1984).

194. *Lebron*, 749 F.2d at 894.

195. *Id.* at 895.

196. *Id.* at 897.

197. *Id.* at 899.

198. *Id.* at 898.

199. *Id.* at 897.

200. 750 F.2d 1039, 1063 (D.C. Cir. 1984) (Bork, J., concurring).

201. *Id.*

202. *Id.* at 1068.

203. 785 F.2d 1043 (D.C. Cir. 1986).

speeches in response to requests by United States citizens. The court remanded the case to the trial court for it to determine if the Secretary had statutory authority to deny entry merely because entry or presence is "prejudicial activity" or if the Secretary also had to prove that the aliens would "engage" in prejudicial "activities" beyond mere arrival. The court wanted more proof concerning whether Congress acquiesced in the Secretary's strict reading of the statute,²⁰⁴ and whether the Secretary had administered the statute consistently.²⁰⁵ The majority also held that the Secretary may have violated the McGovern Amendment, which states that the Secretary can prevent a member of a proscribed organization from entering only if the Secretary can prove that the applicant threatens national security for a reason independent of membership in a proscribed group.²⁰⁶

Bork's dissent revolved around a familiar theme: deference to the Executive's handling of foreign affairs and its interpretation of statutes.²⁰⁷ He found that legislative history supported his construction that entry by itself can be an activity prejudicial to the public interest. He conceded that the text supported the majority; but the text dropped in significance: "[L]iteralness may strangle meaning."²⁰⁸ Bork stated that the court did not need to remand the case to the trial court because it was unlikely that any new evidence would be found.²⁰⁹

Bork limited the effect of the McGovern Amendment by stating that the Secretary barred these aliens in part because they were affiliated with hostile governments, not merely because they were members of proscribed parties.²¹⁰ Furthermore, the Attorney General could deny visa requests because he was not affected by the McGovern Amendment.²¹¹

Turning to the plaintiffs' constitutional claims, Bork held that the power to exclude aliens is "largely immune from judicial control."²¹² Under the ruling in *Kleindienst v. Mandel*,²¹³ the Executive may base its decision to exclude an alien upon the content of his

204. *Id.* at 1055.

205. *Id.* at 1056.

206. *Id.* at 1058 & n.20.

207. *Id.* at 1063 (Bork, J., dissenting).

208. *Id.* at 1066 (quoting *Lynch v. Overholser*, 369 U.S. 705, 710 (1962)).

209. *Id.* at 1068. Note, however, that Bork eagerly remanded a case to look for unknown law when he was uncomfortable with the merits in *Planned Parenthood v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983).

210. *Id.* at 1069-70.

211. *Id.* at 1073.

212. *Id.* at 1075.

213. 408 U.S. 753 (1972).

beliefs. Furthermore, Bork suggested that these aliens were not being excluded because of their ideas;²¹⁴ they were barred because of their relationships with certain foreign governments.²¹⁵ If the Executive can prevent United States citizens from visiting certain countries under *Zemel v. Rusk*,²¹⁶ it can also stop aliens from visiting the United States.²¹⁷

Bork concluded his attack on the majority by noting it had begun "a process of judicial incursion into the United States' conduct of its foreign affairs."²¹⁸ Bork's unwillingness to combine statutory and first amendment analysis to constrain the Executive may be consistent with existing Supreme Court precedent, particularly *Regan v. Wald*,²¹⁹ which upheld travel restrictions to Cuba. But his deferential approach to the Executive is far removed from the approach of the Court in *Kent v. Dulles*,²²⁰ which strictly read congressional delegations of passport powers in light of the first amendment.

C. Due Process

Unlike Judge Scalia, his colleague on the D.C. Circuit, Judge Bork has had several opportunities to write major opinions concerning both procedural and substantive due process. He has favored the plaintiffs in four out of the nine cases.

1. PROCEDURAL DUE PROCESS

Several plaintiffs failed to convince Bork that the state deprived them of constitutionally protected property or liberty. A municipal employee had no liberty interest to contest a lateral transfer and his employer's public criticism of his performance.²²¹ Bork concluded that a party must lose a job or contractual rights, not just opportunities for advancement.²²² Nor was public criticism actionable under the due process clause: "[T]he [Supreme] Court held that defamation is not enough to give rise to a due process right; 'other governmental action' is required."²²³

Bork twice ruled against plaintiffs representing the homeless.

214. *Abourezk*, 785 F.2d at 1075 (Bork, J., dissenting).

215. *Id.*

216. 381 U.S. 1 (1965).

217. *Abourezk*, 785 F.2d at 1075.

218. *Id.* at 1076.

219. 468 U.S. 222 (1984).

220. 357 U.S. 116 (1958).

221. *Mosrie v. Barry*, 718 F.2d 1151 (D.C. Cir. 1983).

222. *Id.* Bork concurred with an opinion upholding a plaintiff's due process challenge to a constructive discharge. *Reuber v. United States*, 750 F.2d 1039 (D.C. Cir. 1984).

223. *Mosrie*, 718 F.2d at 1158 (citing *Paul v. Davis*, 424 U.S. 693 (1976)).

Homeless men had no due process right to challenge a "legislative" decision to close their shelters because the shelters were not their property.²²⁴ Bork did not end his inquiry with the relatively noncontroversial position that individuals have no right to full hearings over legislative issues, such as whether to close group homes. He also argued that the case was immune from review because it was a "political decision," similar to a "political question."²²⁵ Bork found this new defense in the classic case *Marbury v. Madison*,²²⁶ in which Chief Justice Marshall found a cause of action against the President because Marbury had a vested interest in the employment he had been offered. In the course of that multifaceted opinion, Marshall observed that the Supreme Court should not become involved in such "political" issues as foreign affairs. Bork expanded that classic limitation on judicial review: "There being no substantive constraints on the decision whether to close the shelters, that decision is a wholly political one and under no circumstances that I can imagine can there be a constitutional right to have that political judgment set about and circumscribed by procedural requirements."²²⁷ Bork varied that theme when he held that plaintiffs could not challenge a refusal to build a "model shelter" for the homeless because the plaintiffs did not allege any statutory violations; there was neither law to apply under the Administrative Procedure Act, nor were there any "judicially manageable standards."²²⁸

2. PROCEDURAL DUE PROCESS/"TAKING"

Bork has been sympathetic to plaintiffs who have alleged unconstitutional takings as well as procedural violations. Bork agreed with landlords who disputed "emergency" acts committed by officers of the District of Columbia that prevented them from converting their apartments to condominiums.²²⁹ Brushing aside such procedural defenses as exhaustion, abstention, and jurisdiction, Bork observed that there may have been an unconstitutional "taking" without just compensation—because the analysis of this issue requires factual inquiry.²³⁰ That ambiguous observation is troubling because the Supreme Court's traditional distinction in "taking" cases has been

224. *Williams v. Barry*, 708 F.2d 789 (D.C. Cir. 1983) (Bork, J., concurring).

225. *Id.* at 793.

226. 5 U.S. (1 Cranch) 137 (1803).

227. *Williams*, 708 F.2d at 793.

228. *Robbins v. Reagan*, 780 F.2d 37, 58 & n.7 (D.C. Cir. 1985) (Bork, J., concurring and dissenting).

229. *Silverman v. Barry*, 727 F.2d 1121 (D.C. Cir. 1984).

230. *Id.* at 1126.

between "regulation" and "taking."²³¹ The District of Columbia neither physically invaded nor totally devalued the landlords' property; it engaged in ad hoc zoning. To characterize such regulations as "fact specific" only blurs the already unclear, but essential distinction between "regulation" and "taking." Under Bork's theory, every pollution enforcement case might be a "taking" because it involves specific facts.

Bork's expansion of the taking doctrine favors the wealthy. The government is less able to reallocate property interests without compensating those who currently have most of such interests. Bork even made a positive cryptic reference to substantive economic due process for the rich, claiming that a "private delegation" issue may be viable because the Supreme Court has never explicitly repudiated the *Lochner*-type cases upholding economic due process.²³²

After initially denying a utility company's challenge to the Federal Energy Regulatory Commission's (FERC) denial of rate increases based upon cancelled projects, Bork reconsidered the case and held that the utility had asserted valid taking and due process arguments.²³³ He would not follow the normal path of judicial deference because the plaintiff had alleged that it was being given no rate of return.²³⁴ Brushing off the dissent's "ultimate malediction" that he was reviving *Lochner*,²³⁵ Bork creatively applied taking and due process doctrine:

It should be noted that the *Hope Natural Gas* end result test secures Jersey Central's constitutional right that its property not be taken without just compensation. Thus, the utility has raised a constitutional as well as a statutory claim in this case. . . . Before an alleged taking may occur, it seems likely that FERC should have conducted a due process hearing to determine the merits of the utility's case. Thus, even aside from Jersey Central's statutory right to a hearing, the utility might well have a valid constitutional due process claim.²³⁶

The prior commentary cannot be easily reconciled with Bork's homeless cases. The FERC was implementing a general policy of not letting utilities include all projects in their rate base; that decision was "legislative" because it was broad-based and future-oriented.

231. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

232. *Id.*

233. *Jersey Cent. Power & Light Co. v. Federal Energy Regulatory Comm'n*, 730 F.2d 816 (D.C. Cir. 1984), *vacated*, 768 F.2d 1500 (D.C. Cir. 1985).

234. *Jersey Cent. Power & Light Co. v. Federal Energy Regulatory Comm'n*, 768 F.2d 1500, 1503 (D.C. Cir. 1985).

235. *Id.* at 1504 (discussing *Lochner v. New York*, 198 U.S. 45 (1905)).

236. *Id.* at 1505 n.7.

Although one should never assume too much from a limited set of cases, one can see how the taking doctrine can be used by conservative judicial activists to favor the wealthy.²³⁷ We saw another example of possible class bias when Judge Scalia held that milk consumers had no standing to challenge the government, but stockbrokers did.²³⁸

These cases may not signify the resurrection of *Lochner* and the constitutional ranking of property rights above civil rights. Certainly it is easier to find a property interest in money or real property than in a job transfer or in a rejected promise to build a shelter. Bork may be only toying with *Lochner*, labelling it an "ultimate malediction" in one case, claiming it is not dead in another. But as we shall later see, Judge Posner is clearly interested in reviving a limited version of economic due process.

3. SUBSTANTIVE DUE PROCESS

*Dronenburg v. Zech*²³⁹ probably generated the most media attention of any case these five men decided. In *Dronenburg*, Judge Bork validated the Navy's power to discharge homosexuals.²⁴⁰ After relying upon the Supreme Court's summary affirmance of a lower court rejection of a challenge to a law outlawing sodomy,²⁴¹ Bork again applied his constitutional jurisprudence. Calling upon a concept he initially proposed in a law review article,²⁴² Bork argued that lower federal courts should not expand any of the Supreme Court's "new rights."²⁴³ "New rights" are those not clearly within the penumbras of existing textual rights.²⁴⁴ They are rights that have no "explanatory principle," and thus the lower courts can only stare at the Supreme Court opinions, which provide no general direction.²⁴⁵ Bork limited the sources of "existing textual rights," which can only be "suggest[ed] [by] the contours of a value already stated in the docu-

237. See R. EPSTEIN, TAKINGS 345-46 (1985).

238. See *supra* notes 40-46 and accompanying text.

239. 741 F.2d 1388 (D.C. Cir. 1984). The Supreme Court has recently held that states may outlaw homosexual sodomy. *Bowers v. Hardwick*, 106 S. Ct. 284 (1986).

240. *Id.*

241. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976).

242. See *supra* note 68 and accompanying text. In a footnote, Bork discussed the relevance of his prior criticisms of Supreme Court decisions to his role as a jurist. He conceded that the Court had created "new rights" when he would not have done so. He also noted that the lower courts have a duty to follow those decisions and their "methodology." *Dronenburg*, 741 F.2d at 1396 n.5. Following the methodology, however, does not necessitate expanding any principles that might be found under the cases. Indeed, lower courts should not go beyond the narrow holdings of such cases. *Id.*

243. *Id.* at 1396.

244. *Id.* at 1392.

245. *Id.* at 1395.

ment or implied by the Constitution's structure and history."²⁴⁶ Supreme Court precedent is of less weight. Therefore, Bork wrote that the *Griswold* Court found a "new right" when it struck down a state law regulating contraceptives. The *Eisenstadt* decision to give unmarried citizens the right to contraceptives did not imply a general right to sexual freedom because *Eisenstadt* involved a different type of "personal decision."²⁴⁷ Bork once again revived the concept of legitimacy, citing Judge White's dissent from an opinion striking down narrowly defined family zoning ordinances in which White made the argument that such substantive due process decisions come "nearest to illegitimacy."²⁴⁸

Premised upon his majoritarian assumption that legislative choices are not presumptively invalid,²⁴⁹ Bork has created a novel methodology of constitutional interpretations for lower courts, a hierarchy the Supreme Court itself has never expressed. Lower court judges can expand doctrine when they believe the Supreme Court has properly construed an "existing textual right." Bork would claim he did just that in his concurrence in *Ollman v. Evans*²⁵⁰ when he suggested that the court increase the burden on libel plaintiffs who are politically active. Lower courts should narrowly read all holdings of Supreme Court opinions creating "new rights." The line between these two groups of rights will be unclear. For instance, Bork agreed with the voiding of antimiscegenation laws because such racist laws violate the purpose of the fourteenth amendment.²⁵¹ Was that decision a family decision, a sexual autonomy decision, a racial decision, or all three? Would Bork disagree with the Supreme Court's decision that common criminals should not be sterilized?²⁵² Would he approve a statute that allowed a state to sterilize all welfare recipients if they wanted to continue to receive benefits? Sexuality and family autonomy, as well as the eighth and fourteenth amendments, are themes in such cases. After all, sterilization is cruel because of its sexual impact. Unless all of these decisions are illegitimate, one has to

246. *Id.*

247. *Id.*

248. *Id.* at 1396 (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting)). White's dissent is the only time a Supreme Court Justice mentioned legitimacy as a constitutional test. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 112-13 (1983).

249. *Dronenburg*, 741 F.2d at 1397.

250. 750 F.2d 970, 993 (D.C. Cir. 1984) (Bork, J., concurring).

251. *Dronenburg*, 741 F.2d at 1393 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

252. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *Skinner* was decided on equal protection grounds. *Id.* at 538.

make difficult judgments as to how far a court should go. Labelling cases you don't like "illegitimate" only clouds that inquiry.

Even assuming that Bork's distinction makes sense, where did he find authority for this theory of lower court jurisprudence? Certainly neither constitutional history nor text mandate it. If he turns to "structure," he is relying upon a vague concept. In my previous article about these judges, I suggested that the underlying structural theme of the Constitution was and ought to be to combat tyranny.²⁵³ Although we may disagree over when a government has acted tyrannically, at least everyone will know what we are debating about and why. And even if "tyranny" were to be narrowly defined, such a standard would provide more constitutional protection and direction than solely relying upon the uncertain distinction between "existing textual rights" and "new rights," an esoteric, legalistic distinction which judges can easily manipulate to fit their own political preconceptions while appearing to remain "neutral."

Bork continued to define family rights narrowly in *Franz v. United States*,²⁵⁴ when he denied a noncustodial parent the right to a hearing to determine if he could visit his children, who were part of the Witness Protection Program. Bork first argued that family law should primarily be state law: "It will not do to shrug off the most fundamental precepts of federalism so casually."²⁵⁵ Turning to substantive due process family rights, Bork expressed his regrets: "It is not to be doubted by an inferior court that substantive due process is part of our constitutional law. The Supreme Court has made it so, and that must be enough for us."²⁵⁶ Once again, Bork stated that lower courts should not go further and create "a new substantive right to visit [one's] children."²⁵⁷ Although Bork thought that such visitation might be good policy, he concluded a federal court would be erring by acting aggressively in an area without the guidance of text or structure.²⁵⁸ He observed that federal courts might become entangled in all custody cases. He preferred to defer to congressional assessments of how to best protect witnesses.²⁵⁹ He then climbed down from his world of constitutional distinctions to note that the majority's superimposed procedures did not adequately serve any of

253. See Wilson, *supra* note 2, at 916-17 & n.4.

254. 712 F.2d 1428 (D.C. Cir. 1983) (Bork, J., concurring and dissenting).

255. *Id.* at 1436.

256. *Id.* at 1438.

257. *Id.*

258. *Id.*

259. *Id.* at 1437, 1440.

the parties; he feared that many people might unnecessarily die.²⁶⁰

In *Franz*, Bork shed more light on his definition of the “history” of “existing textual rights.” According to him, such rights have to have existed for an awfully long time: “Courts have enough trouble identifying and deriving specific meaning from traditions that are real and have been with us *for centuries past* without imagining traditions that have yet to exist.”²⁶¹ But Bork then ended his opinion with a surprising maneuver, one granting the plaintiffs limited relief:

If the new substantive constitutional right had not been constructed, [the plaintiff] would still have had a liberty interest requiring due process, a right which, if he had no state or federal substantive right, would have been vindicated by a process designed to determine whether the Attorney General, through his delegate, had acted within the ambit of authority granted by Congress.²⁶²

This mysterious passage raises several questions. Why is the “liberty interest” not a “new right”? What procedure does the plaintiff receive—a right to an individual hearing or a right to a court hearing to determine if the statute was properly construed?

Judge Bork has become somewhat entangled in these dualistic distinctions that either accept or reject decisions and/or modes of argument based upon their “legitimacy.” Recall that he altered underlying libel law to increase media protection in *Ollman v. Evans*. He justified a higher standard for politically active plaintiffs because the existing law was not working,²⁶³ juries were unreliable in such cases,²⁶⁴ and “unchanging values find their application” in a changing world.²⁶⁵ Bork explained that his new doctrine—which, of course, could be called a “new right” for the media—was consistent with existing Supreme Court precedent. He observed that if courts cannot override legislatures when times have changed, the malice standard in *New York Times v. Sullivan*²⁶⁶ would be “illegitimate.”²⁶⁷ Bork has not provided any clear guideline between what is an illegitimate “new right” and what is a legitimate application of a “known principle”: “When there is a known principle to be explicated the evolution of doctrine is inevitable.”²⁶⁸ His test becomes particularly murky

260. *Id.* at 1442-43.

261. *Id.* at 1439 (emphasis added).

262. *Id.* at 1443.

263. *Ollman v. Evans*, 750 F.2d 970, 995 (D.C. Cir. 1984) (Bork, J., concurring).

264. *Id.* at 995, 998.

265. *Id.* at 995.

266. 376 U.S. 254 (1964).

267. *Ollman*, 750 F.2d at 996.

268. *Id.* at 995.

because of *Dronenburg v. Zech*, in which Bork held that because no “explanatory principle” existed, the lower court had a duty not to expand any previously articulated rights beyond what the Supreme Court had already articulated.²⁶⁹ Actually, prior privacy cases offered several “explanatory principles,” ranging from sexual autonomy to family autonomy, just as prior libel/first amendment doctrine did not speak with perfect clarity. Additionally, several Justices used the “changed times” argument to justify their conclusion that anticontraceptive laws were unconstitutional.

Constitutional analysis is neither clarified nor simplified by running all cases through a legitimacy test that tries to eliminate certain decisions and certain forms of argument as improper through some allegedly “neutral,” determinate analysis. Furthermore, it is always risky for a judge or a lawyer to totally exclude one commonly used form of argument as illegitimate, because over the course of a career that person will almost invariably use virtually all forms of argument in different cases to best express how and why different cases should be resolved in a certain way. Lawyers and judges invariably use the “changed times” argument. Indeed, both Bork and Scalia used it in *Ollman* to reach opposite conclusions. That is, however, the real point of the changed times argument—courts should and do respond to new circumstances. The difficult problem is to determine when times have changed, how times have changed, and what the court should do, if anything.²⁷⁰

D. *Equal Protection*

Bork was equally unreceptive to the equal protection argument of the homosexual serviceman who sued to overturn his discharge

269. 741 F.2d at 1395-97.

270. In one case involving sexual and family relations, *Planned Parenthood Fed. of America v. Heckler*, Bork was not very deferential to Congress. 712 F.2d 650 (D.C. Cir. 1983). Although the case was resolved on statutory grounds, it is noteworthy because it demonstrates the malleability of the deference argument. Plaintiffs challenged a federal regulation that required all family planning centers to give notice to parents that their teenagers sought contraceptives. The majority struck down the regulation because federal law stated that all persons shall receive such services and because it was contrary to legislative history. *Id.* at 652. Bork agreed that the section the majority relied upon did not allow such regulations, but he concluded that Congress did not clearly prohibit such regulations. *Id.* at 667. Although Bork conceded that the Executive had misinterpreted the relevant law, he stated that they might have such authority somewhere else. *Id.* at 665. Thus, Bork suggested that the case be remanded to search for this unknown law and to force Congress to make up its mind, even though he agreed that the statute did not allow the disputed executive action. As the majority observed, such a remand would be totally gratuitous because the Executive had obviously violated the law. *Id.* at 665 n.*.

from the Navy in *Dronenburg v. Zech*.²⁷¹ Applying the deferential “rational purpose” test, Bork held that the Navy’s policy was based upon implementing morality, a permissible goal.²⁷² The Navy also was concerned about maintaining discipline and morale; it did not want to worry about troops trying to seduce each other. Bork stated that the Navy did not need statistical proof to verify these fears, “common sense” was sufficient.²⁷³ He concluded with the familiar theme of enhanced judicial deference to the military, a unique institution.²⁷⁴

Bork also dismissed an equal protection challenge to unequal parole treatment of District of Columbia residents who were prisoners in District of Columbia prisons instead of being imprisoned in regular federal prisons.²⁷⁵ Once again he applied the rationality test, noting that tradition by itself is a defense.²⁷⁶ He also deferred to the prison system: “Uniformity of parole standards *within* a prison might well be adopted as an important tool of prison management.”²⁷⁷

E. *Government Structure*

Bork has twice expressed some homage to state powers. In the course of dismissing for mootness a suit seeking enforcement of a state initiative, Bork observed: “It is one thing for the federal Constitution to guarantee a right of access to a state electoral process that has been restricted by state law. It is quite another to assert that the federal Constitution guarantees that state officials will act in conformity with state law.”²⁷⁸ Recall that Bork also did not want to interfere with the federal Witness Protection Program because federal courts would be invading the state arena of child custody: “It will not do to shrug off the most fundamental precepts of federalism so casually.”²⁷⁹

V. POSNER

Posner’s judicial opinions frequently have not been as “conservative” as those of Bork or Scalia. Posner’s commitment to the applica-

271. 741 F.2d 1388 (D.C. Cir. 1984).

272. *Id.* at 1398.

273. *Id.*

274. *Id.*

275. *Cosgrove v. Smith*, 697 F.2d 1125 (D.C. Cir. 1983) (Bork, J., concurring and dissenting).

276. *Id.* at 1144.

277. *Id.* (emphasis added).

278. *Grano v. Barry*, 733 F.2d 164, 168 (D.C. Cir. 1984). Bork observed that state courts should first resolve state claims so that federal courts would not be flooded. *Id.* at 169.

279. *Franz v. United States*, 712 F.2d 1428, 1436 (D.C. Cir. 1983) (Bork, J., concurring and dissenting); see *supra* notes 254-62 and accompanying text.

tion of free market economics to legal problems reflects libertarian values, while Bork's and Scalia's traditionalism and deference are tools of positivism. Furthermore, as Posner's critics have frequently observed, economic analysis of law generates uncertain results.²⁸⁰ People will disagree about the costs, benefits, and externalities of any decision. Therefore, when Posner uses economic tools to analyze a case, he may reach a surprisingly "liberal" conclusion.

Unlike Bork or Scalia, Posner has peppered many of his constitutional opinions with economic rhetoric. For example, in the course of ruling against a mandatory retirement standard he made the somewhat gratuitous observation that: "The usual assumption *in economics as in life* is that a dollar today is worth more than a dollar tomorrow, both because it can be invested and earn interest and because the future is uncertain."²⁸¹ At least economics and life are yet not the same. In addition, Posner is not as deferential to history as Bork and Scalia claim to be: "Rigidly historicist interpretations of the Constitution have not been much in vogue for generations."²⁸²

A. Access to Courts

Judge Posner has been more willing to provide a federal forum to constitutional claims than Judges Bork or Scalia. In many cases he did not discuss access issues; but when he did, he often favored the plaintiff.²⁸³

1. ABSTENTION/RIPENESS

Posner's opinion in *Lynk v. Pearson*²⁸⁴ exemplified his willingness to provide a forum to constitutional plaintiffs. Lynk, a prison inmate, argued that a state court denied him due process and equal protection when it would not decide his divorce petition. The trial judge had refused to grant Lynk special permission to attend a divorce hearing and refused to decide the case solely on public records,²⁸⁵ a possibility because Lynk only had to prove under state law that he had been married and had been convicted of a felony.²⁸⁶ The state prevailed at the federal district court level by arguing that

280. See, e.g., B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984).

281. *Heiar v. Crawford County, Wis.*, 746 F.2d 1190, 1203 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 3500 (1985) (emphasis added).

282. *Dragan v. Miller*, 679 F.2d 712, 714 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982).

283. One might try to explain such doctrinal distinctions by the different facts of the cases. But that argument destroys all comparisons between judges sitting on different benches.

284. 789 F.2d 554 (7th Cir. 1986).

285. *Id.* at 557.

286. *Id.*

the Supreme Court decision in *Younger v. Harris*²⁸⁷ required the federal court to abstain from hearing the case because the divorce action was a "pending state proceeding."²⁸⁸

The state in *Lynk* did not convince Posner with its argument that the federal courts would become domestic courts if they intervened in such cases. Posner noted that the plaintiff was not seeking a divorce in federal court.²⁸⁹ The inmate was only trying to escape from the "Catch-22" created by the state court: requiring his attendance at his divorce hearing, but refusing his request to participate because he was a prisoner.²⁹⁰ Posner also pointed out that the Supreme Court had evaluated the constitutionality of state divorce procedures when it struck down filing fees for indigents in *Boddie v. Connecticut*,²⁹¹ but had not entangled the federal courts in domestic conflicts.²⁹² In the course of making this distinction between reviewing procedures and reviewing substantive decisions, Posner revealed his limited weighting of history as a source of constitutional law. Posner explained that diversity jurisdiction did not cover domestic disputes: "The existence of the exception rests on dubious historical, but powerful pragmatic grounds."²⁹³

Judge Posner avoided many opportunities to dismiss the plaintiff's claim. According to him, no parallel proceeding existed because the state court was not active. After all, the prisoner could not obtain relief in state court. The prisoner did not need to seek an interlocutory appeal partially because such an order had to be signed by the trial judge, "and the judge was unlikely to do that here."²⁹⁴ Even if certification were normally the preferred route, it need not be pursued in this case because the defendants provided no guidance as to how to certify such a case in their brief to the federal appellate court. The plaintiff's failure to cite constitutional violations in state court did not matter because the trial judge used the adjective "fundamental," "the

287. 401 U.S. 37 (1971).

288. *Lynk*, 789 F.2d at 557-58.

289. *Id.* at 558.

290. *Id.* at 559.

291. 401 U.S. 371 (1971).

292. *Lynk*, 789 F.2d at 563.

293. *Id.* at 558. Posner elaborated upon the limits of history in another diversity case: "But however shoddy the historical underpinnings of the probate exception, it is too well established a feature of our federal system to be lightly discarded, and by an inferior court at that . . ." *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982). He added that "several practical reasons" exist to preclude probate cases from federal court: legal certainty, judicial economy, and federal court experience. *Id.* at 714-15. He did not add a test he had proposed in his writings; federal jurisdiction should be granted to those likely to suffer injury via interstate externalities. R. POSNER, *THE FEDERAL COURTS* (1985).

294. *Lynk*, 789 F.2d at 561.

language of constitutional law.”²⁹⁵ Simple involuntary dismissal, therefore, would leave “a plaintiff whose case has been completely frustrated by a judicial ruling without appellate recourse.”²⁹⁶ Furthermore, an oral hearing would be unnecessary because the case can be resolved by a review of public records and/or depositions.

Posner also minimized the relevance of the principle that no federal constitutional right to appeal exists: “The significance of this principle in an age when the right of appeal from final judgments is universal is by no means clear; it seems inconceivable for example that due process would be interpreted today to allow a state to execute a criminal defendant without giving him any right to appeal from his conviction and sentence.”²⁹⁷ History once again played a minor role in his constitutional adjudication.

The judge also rejected the *Pullman* abstention doctrine, which requires federal courts to remand cases to state courts to resolve uncertainties in state law: “Everyone recognizes that abstention under *Pullman* is a great time waster.”²⁹⁸ Posner applied the ubiquitous cost-benefit analysis in a way that liberals might applaud: “The waste is justified only when there are large benefits, as when a statute or ordinance can be saved by a narrowing construction.”²⁹⁹ Posner, because he could not predict how the state courts would handle the plaintiff’s claim, held that “[t]he uncertainty is too great to justify invoking the *Pullman* doctrine.”³⁰⁰

Creative use of the remand power has been one of Posner’s judicial trademarks. In *Lynk*, he ordered the district court to retain jurisdiction and take no further action until the plaintiff voluntarily dismissed the original divorce suit and refiled his suit in state court, asserting all state and federal claims.³⁰¹ The federal courts, therefore, need not excessively intervene into state proceedings; instead, the state court had an initial opportunity to eliminate the Catch-22. Posner concluded by indicating how the state judiciary should decide the case: “An individual judge has erected seemingly arbitrary procedural obstacles to the adjudication of Lynk’s petition for divorce.”³⁰²

In *Illinois v. General Electric Co.*,³⁰³ Posner considered one of the

295. *Id.* at 562.

296. *Id.* at 563.

297. *Id.* at 565.

298. *Id.* at 568 (discussing *Railroad Comm’n v. Pullman*, 312 U.S. 496 (1941)).

299. *Id.*

300. *Id.*

301. *Id.* at 569.

302. *Id.*

303. 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). In *Duckworth v. Franzen*, Posner conditioned his remand of a pendent state claim on the defendant’s waiving a

Supreme Court's most famous Catch-22's: the relationship between *Younger* abstention and "ripeness." A plaintiff who files in federal court before the state acts in state court can have his case dismissed as "unripe," while a plaintiff who files after the state has initiated state proceedings faces the *Younger* defense.³⁰⁴ In a case involving a state's refusal to permit deposit of out-of-state shipments of nuclear fuel into its storage facility, Posner opposed strict application of the two defenses: "There must be something wrong with this argument, because if it were accepted it would prevent people from ever challenging the constitutionality of state legislation in federal court."³⁰⁵ The case was ripe for four reasons: the dispute was not nebulous, the law was clear, the state would act, and the state would almost certainly discover violations and enforce the law.³⁰⁶

Refusing to remand the case to state court just because the state had filed suit after the plaintiff filed in federal court, Posner explained that *Younger* did not apply; the state could not initiate a criminal proceeding where the plaintiffs had not violated the law.³⁰⁷ Furthermore, judicial resources were not being wasted because the state court had not acted.³⁰⁸ Nevertheless, Posner appeared somewhat uncomfortable with his rejection of the ripeness-abstention trap: "But at another level, if understood to require federal claimants always to litigate their claims as defenses in state court if they can, it must be wrong If not wrong, such a reading would still be an inappropriate flight of fancy for an inferior federal court to take."³⁰⁹ Turning to the merits, he held that the state law violated both the dormant commerce clause and the Atomic Energy Act.³¹⁰

Posner again overcame any ambivalence about *Younger* when he concluded that a state violated both the commerce clause and the privileges and immunities clause of article IV, § 2, by requiring all local governments to favor state workers for local construction projects.³¹¹ The community's policy was not as important as the pub-

statute of limitations defense. 780 F.2d 645 (7th Cir. 1985), *petition for cert. filed*, 106 S. Ct. 1085 (1986).

304. See, e.g., Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

305. *General Electric*, 683 F.2d at 212.

306. *Id.* at 209-10.

307. *Id.* at 212.

308. *Id.*

309. *Id.* at 211. Later in the opinion, Posner again hedged: "While there are arguments in favor of [dismissing under *Younger*], for among other things it is unseemly to allow a single federal district judge to enjoin a state statute, it would be too radical a break with precedent to be decreed by a lower court." *Id.* at 213.

310. *Id.* at 214-16.

311. *W.C.M. Window Co. v. Bernadi*, 730 F.2d 486 (7th Cir. 1984).

lic policy in criminal proceedings in *Younger*-type cases: "Thus, both the nature of the remedy sought by, and more important the underlying right asserted by, the state in its suit make the remedy that these plaintiffs are seeking less invasive of state sovereignty than in the usual *Younger* case."³¹² Posner observed that expansion of *Younger* would extend Supreme Court jurisdiction.³¹³ Furthermore, forcing the plaintiffs into state court would be futile because of existing hostile state court precedent.³¹⁴

The jurist then turned to the merits and once again was not overly solicitous of states' rights. Although states have the discretion to help local residents, "in none of the cited cases was the difference between the state's own purchasing and that of its local governmental units discussed."³¹⁵ Because of this distinction and because the state failed to provide proof of costs and benefits,³¹⁶ Posner struck the law down. Illinois was not entitled to deference; they had to prove that harm would probably occur "from allowing nonresidents to work on public construction projects in Illinois."³¹⁷ Nor did he favor the states by manipulating the uncertain Supreme Court doctrine defining the constitutional relationships between state and local governments. For example, four "liberal" Supreme Court Justices wrote in *Milliken v. Bradley*³¹⁸ that local governments were state actors when determining the scope of busing as a remedy for de jure segregation, while four "conservative" Justices decided in *Washington v. Seattle School Dist. No. 1*,³¹⁹ that local governments were the progeny of the state when reviewing the state's power to rescind a local busing ordinance. In both *Milliken* and *Washington*, the opposing side replied that the state and local governments were constitutionally distinct. Posner, therefore, could have decided that the local government deserves full protection, protection the Supreme Court might very well have affirmed. Supreme Court Justices seem to consider the distinction between state and local governments to be less important than the merits of any given issue.

Posner's skeptical approach toward abstention reappeared in *Mazanec v. North Judson-San Pierre School Corp.* when he held that

312. *Id.* at 490.

313. *Id.* at 491.

314. *Id.*

315. *Id.* at 495.

316. *Id.* at 497.

317. *Id.* at 496.

318. 418 U.S. 717 (1974) (White, Marshall, Douglas, and Brennan, JJ.).

319. 458 U.S. 457 (1982). *But see* *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527 (1982). For a general discussion of constitutional constraints on local government, see D. GELFAND, *FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT* (1984).

Jehovah's Witnesses did not have to first proceed to state court to clarify a state statute making school attendance mandatory for children.³²⁰ He did not defer to the district court's application of the *Pullman* doctrine because the case would be delayed and because neither side requested abstention before the trial.³²¹ The plaintiffs' victory was Pyrric; Posner concluded that the law was constitutional on its face: "At least so far as these plaintiffs are concerned, it is a valid law—at worst, one applied too harshly to them, to forbid home instruction that really was the equivalent to instruction in public schools."³²²

On the other hand, Posner aggressively employed the *Pullman* doctrine to remand to state court a first amendment vagueness challenge to a loitering statute.³²³ Police had harassed the plaintiff under the law. The judge conceded that the case was ripe because the police had threatened to arrest the plaintiff.³²⁴ He then wrote that the state courts had never construed the act and that the law could be interpreted to protect the plaintiff. In this case, delay was not a major cost: "[W]e imagine his goals in this litigation are more symbolic than practical"³²⁵

Posner was also hostile to the Illinois Attorney General's request for a declaratory judgment to determine if federal law had preempted the Illinois Strikebreaker Act.³²⁶ The Attorney General had filed his complaint in federal court almost two years before, but had never filed criminal charges in state court. Because the Attorney General had failed to invoke his prosecutorial discretion, the case was not ripe. Furthermore, it may have been resolvable under purely state grounds.³²⁷

2. STANDING

When a group of administrative law judges attacked a new Social Security instruction which limited their discretion to determine when to begin recouping improperly paid benefits, Posner held that the

320. *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985); see also *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986) (discussing municipal liability under section 1983).

321. *Mazanee*, 763 F.2d at 846.

322. *Id.* at 848.

323. *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983).

324. *Id.* at 1353. When dissident nonunion members tried to enforce their right not to contribute to nonbusiness related issues, Posner ignored a ripeness defense. *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1192 (7th Cir. 1984).

325. *Waldron*, 723 F.2d at 1353.

326. *Illinois v. Archer Daniels Midland Co.*, 704 F.2d 935 (7th Cir. 1983).

327. *Id.* at 941-42.

judges had no standing.³²⁸ Invoking economic imagery, he all but agreed the judges had been injured: "Discretion is a power, a commodity that judges, like other people, prize. A reduction in discretion is a reduction in an important though nonpecuniary form of compensation for a judge."³²⁹ The recipients, however, not the judges, were the best parties: "[The judges'] proper course is to obey the instruction and let any claimant injured by it ask the courts to set it aside."³³⁰ Posner's holding was similar to Professor Brilmayer's argument that standing protects self-representation and due process by insuring that the best party represents himself or herself.³³¹

A political organization, because it failed to allege that any of its members were injured, had no standing to demand that the state allow registration of voters in public aid and unemployment compensation offices.³³² Posner distinguished between ideological and personal injury: "[The injury] must therefore affect one's possessions or bodily integrity or freedom of action, however expansively defined . . . not just one's opinions, aspirations, or ideology."³³³ He reiterated the argument that parties could only assert their own interests, not the interest of others.³³⁴ But he went far beyond any values contained in due process and self-representation notions to support his holding. He warned against zealots and other "self-appointed protectors."³³⁵ He defended his broad definition of standing because it helped fulfill "the need to limit the amount of litigation."³³⁶

B. *Eleventh Amendment*

The Supreme Court's broad reading of the eleventh amendment has been another source of consternation for civil rights lawyers. For example, even though the text only prohibits federal suits against states by out-of-state citizens, the Court has held that in-state citizens

328. *D'amico v. Schweiker*, 698 F.2d 903 (7th Cir. 1983).

329. *Id.* at 905.

330. *Id.* at 906.

331. Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B.U.L. REV. 807, 823-26 (1977).

332. *People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167, 171-72 (7th Cir. 1984).

333. *Id.* at 171.

334. *Id.* He did concede that lawyers probably had standing to contest a trial court's finding that they acted reprehensively even though the court did not enter any sanctions. *Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984). He dismissed the appeal, however, because the lawyers should have filed a writ of mandamus instead of filing under 28 U.S.C. § 1291. *Id.*

335. *Id.* at 173.

336. *Id.*

are barred from receiving retroactive damage relief.³³⁷ Posner, unlike his colleague Judge Easterbrook, has not expanded the doctrine.

In *Heiar v. Crawford County*,³³⁸ Posner supported the award of back pay and attorney's fees to policemen who challenged a county requirement that they retire at age fifty-five. Posner concluded that their claim was not barred by the eleventh amendment because counties are not states and because the Age Discrimination in Employment Act of 1967, under which the plaintiffs brought suit, was passed as "an exercise of Congress's powers under section 5 of the Fourteenth Amendment."³³⁹ He did not have to adopt either argument. As discussed above, the constitutional relationship between state and local governments is extremely unclear, thereby providing jurists with great discretion when new applications of the distinction arise. Posner could have easily held that local governments receive full eleventh amendment immunity. His second justification is also not totally conclusive; the Court had already rejected the argument that the fourteenth amendment completely trumps the eleventh amendment.³⁴⁰ Posner was also tough against the states on the merits. Once again he placed the burden of proof on the government, which had to show that the plaintiffs were unfit to be policemen. The local authorities could not automatically rely on prior cases upholding similar age limits for airplane pilots.³⁴¹ Posner explained that the effects of death or severe illness will vary if, for instance, the employee is a book-keeper instead of a pilot.³⁴²

In *Continental Insurance Co. v. Illinois Department of Transportation*, the eleventh amendment did not bar an action seeking to strike down a state statute setting different liability limits for vehicular than

337. *Edelman v. Jordan*, 415 U.S. 651, 664-65 (1974).

338. 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 3500 (1985).

339. *Id.* at 1194. The Supreme Court explained the significance of an act that is enacted pursuant to U.S. CONST. amend. XIV, § 5:

When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

340. "[A]lthough Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, we have required an unequivocal expression of congressional intent . . ." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (citation omitted).

341. *Heiar*, 746 F.2d at 1198.

342. *Id.*

for nonvehicular torts.³⁴³ Posner held that the plaintiffs were primarily seeking injunctive relief to have the differential declared unconstitutional. Any damages that they might have received were incidental to the equitable relief, and therefore were not barred by the eleventh amendment.³⁴⁴ Once again, we see Posner's willingness to find liability; he could have read the prohibition in *Edelman v. Jordan*³⁴⁵ against retroactive damages to bar any monetary compensation. Perhaps he wished to retain monetary damages as a constitutional remedy because damages are the best deterrent to wrong action where no other market exists.

C. *Due Process*

Posner's redefinition of procedural due process has emerged as his most interesting, creative judicial work. He has provided a far more coherent framework for deciding which interests are constitutionally protected "life, liberty, and property" than has the Supreme Court. First, he has proposed expanding due process to protect "liberty of occupation,"³⁴⁶ which he has also called "liberty of contract."³⁴⁷ Second, he has limited governmental liability by arguing that the Constitution is a "charter of negative liberties."³⁴⁸

1. "LIFE, LIBERTY & PROPERTY"

After surviving such threshold issues as state action,³⁴⁹ deprivation,³⁵⁰ and personage, a plaintiff must prove that the state has deprived him or her of constitutionally protected "life, liberty, or property" which deserves more procedural protection prior to deprivation.

343. *Continental Ins. Co. v. Illinois Dep't of Transp.*, 709 F.2d 471 (7th Cir. 1983).

344. *Id.* at 474. Posner's decision came down before the Supreme Court decided *Green v. Mansour*, which held that the eleventh amendment barred granting declaratory relief that would lead to damages. 106 S. Ct. 423 (1985).

345. 415 U.S. 651, 664-65 (1974).

346. *See Perry v. Federal Bureau of Investigation*, 781 F.2d 1294, 1304 (7th Cir. 1986) (Posner, J., concurring) (denying relief on the grounds of common law privilege).

347. *Vail v. Board of Educ. of Paris Union School Dist. No. 95*, 706 F.2d 1435, 1450 (7th Cir. 1983).

348. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

349. Posner held that a trader who lost a commodity seat had no due process claim because the Commodity Exchange is a private organization. Consequently, there was no state action. *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 186 (7th Cir. 1984).

350. Posner has denied constitutional relief under the due process clause to plaintiffs who brought tort actions against the state because the state actors did not act deliberately and because the Constitution is a "charter of negative liberties." *See supra* notes 346-48. One could make the textual argument that the element of "intent" is a necessary component of "deprivation" under the due process clause. Even so, the court must still determine what type of intent generates constitutional liability.

vation than the state already offers.³⁵¹ The analysis is inevitably complex because, as Posner has observed, the “right-privilege” distinction has faded away: “No one believes any more that since the captain of a warship has no duty to let members of the general public on board to visit the ship when it is docked, he can decide to allow only Protestant visitors on board.”³⁵² Nevertheless, courts must create some distinction unless all disputes with the state are to be resolved by a formal hearing.

In a dissent to an opinion holding that a high school football coach had a right to a hearing when the high school fired him after the first year of a two-year contract,³⁵³ Posner cited James Madison’s *Essay on Property* to support the proposition that not all contract rights deserve constitutional protection.³⁵⁴ Posner stated that the plaintiff could still coach football: “If the State of Illinois forbade Mr. Vail to work as a football coach it would be interfering with his liberty of contract.”³⁵⁵ The judge distinguished the coach’s firing from Supreme Court precedent giving additional procedural protection to welfare recipients and tenured teachers:

[S]tatutory entitlements of indefinite duration have enough attributes of conventional property to be protected by the due process clause. *Sindermann* and the welfare cases extend to individuals who lack substantial assets of a conventional sort the protection of the due process clause for the unconventional assets they have.³⁵⁶

The jurist explained that the courts were particularly anxious to protect teachers: “The idea that teachers have a special claim to judicial protection now goes by the name of academic freedom.”³⁵⁷ Posner

351. Sometimes due process issues are avoided because the court holds that the plaintiff did not receive his or her statutory rights. For example, Posner struck down a state law that delayed the payment of unemployment compensation benefits to people indicted for a felony or misdemeanor theft in connection with their employment until they are found innocent. Posner held that such a law violated the federal law requiring that unemployment benefits be paid “when due.” *Jenkins v. Bowling*, 691 F.2d 1225, 1228 (7th Cir. 1982).

Judge Posner also denied a request for individual hearings to contest a referendum that sought to prevent the sale of liquor. Not only was such state action specifically protected under the twenty-first amendment, but it also was legislative, not adjudicative. *Philly’s v. Byrne*, 732 F.2d 87, 92-93 (7th Cir. 1984).

352. *Philly’s*, 732 F.2d at 90.

353. *Vail v. Board of Educ. of Paris Union School Dist. No. 95*, 706 F.2d 1435 (7th Cir. 1983), *aff’d per curiam*, 104 S. Ct. 2144 (1984) (equally divided court).

354. *Id.* at 1450 (Posner, J., dissenting) (citing J. MADISON, *Essay on Property*, in 6 WRITINGS 101 (Hunt ed. 1906)).

355. *Id.* Posner also referred to enhanced protection of “liberty of occupation” in *Perry v. Federal Bureau of Investigation*. 781 F.2d 1294, 1305 (7th Cir. 1986).

356. *Vail*, 706 F.2d at 1451 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

357. *Id.* at 1452.

therefore openly combined history, precedent, and policy to reformulate doctrine: "I plead guilty, though, to Judge Eschbach's charge that I am 'super-imposing a unifying doctrinal thread onto the cases which would explain their outcomes in a principled fashion.' I had understood this to be my job."³⁵⁸

By additionally focusing on remedial distinctions, Posner overjustified his theory:

[A] contract right, as such, is not property. We infer the existence of a property right from the remedies the law gives to protect it. A right protected by an injunction, by specific performance, or by criminal penalties is a property right. But if the only remedy the law provides is damages, we speak of a liability rule rather than of a property right.³⁵⁹

This analysis begs numerous questions. For instance, it does not help us in the immediate case if the football coach sought his job back as a form of injunctive relief or as specific performance. Nor does it help us decide if a plaintiff deserves injunctive relief.

Posner may be right to exclude most contract rights from due process coverage. Otherwise, the state would be entangled with process whenever it hired people temporarily or negotiated with the private sector. Distinctions between protected and unprotected contract rights may be partially arbitrary, but that problem does not mean that such distinctions are either avoidable or undesirable. Posner, for example, concluded that "[t]he dismissal of a football coach does not endanger academic freedom."³⁶⁰ One might disagree with that specific conclusion, but still accept Posner's basic theory that "liberty of occupation" should be a constitutionally protected right, while most other contractual rights may not be protected.

In an opinion denying a plaintiff's request for a hearing after a city had taken away his license to sell guns because he was a felon who had previously sold guns to minors,³⁶¹ Posner overtly embraced a substantive, "natural law" theory of procedural due process. Posner first found that the plaintiff had a property right because a "good cause" standard was implied in the license.³⁶² Posner inferred that good cause standard because standardless statutes are particularly suspect: "The letter of due process would be observed—the deprivation would be pursuant to a duly enacted ordinance explicitly devoid of standards and hence not vague in the lack-of-notice sense. But the

358. *Id.*

359. *Id.* at 1453.

360. *Id.* at 1452.

361. *Baer v. City of Wauwatosa*, 716 F.2d 1117 (7th Cir. 1983).

362. *Id.* at 1122.

spirit of due process—protection from arbitrary government action—would be violated.”³⁶³

Posner found that due process “places a residual substantive limitation on a state’s depriving a person of life, liberty, or property: the deprivation must have a rational basis in some lawful interest of the state.”³⁶⁴ In an extraordinary passage, Posner explained why he was not a positivist:

Although since *Board of Regents v. Roth* it has been customary to think of property as the emanation of state or federal law, rather than the product of human work as John Locke thought, there may be limits, as yet untested, to this idea. If a state decreed that every new business would have to have a state license revocable at will, the older view that *some property rights are natural rather than created by government*—a view still occasionally encountered in the cases—might be resurrected and might, in combination with the concept of vagueness as absence of standards, make such a law invalid under the due process clause.³⁶⁵

It is difficult to imagine Judges Bork or Scalia writing such sentences.

Posner provided another example of his property/contract distinction when he held that state employees could not prevail on their § 1983 action seeking immediate payment of money owed for overtime work or compensatory leave.³⁶⁶ This time Posner commenced his analysis by giving historical authority for his distinction: “[T]he Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts.”³⁶⁷ Although all contract rights were not constitutionally protected property interests, other interests, such as welfare, were covered: “[I]t [is] evident that the Supreme Court considered the common law definition of ‘property’ too confining to achieve the objectives of the due process clause.”³⁶⁸ Consequently, courts must make a policy assessment: “Both security of tenure and importance to the holder of the right are illustrated by the teacher’s tenure right in *Sindermann*.”³⁶⁹

Posner’s reformulation of the procedural due process doctrine is dazzling. Remaining reasonably consistent with precedent, he has offered a methodology that allows a court to provide meaningful procedural protection to people who may lose their jobs, their licenses,

363. *Id.* at 1124.

364. *Id.* at 1123.

365. *Id.* at 1125 (emphasis added) (citation omitted).

366. *Brown v. Brienen*, 722 F.2d 360 (7th Cir. 1983).

367. *Id.* at 364.

368. *Id.* at 363.

369. *Id.* at 364 (referring to *Perry v. Sindermann*, 408 U.S. 564 (1972)).

their ability to work in their chosen field, or their welfare benefits, without permitting every state personnel action to end up in federal court. For instance, he concluded that a policeman had no property interest when being demoted from chief detective, but had a protected property interest in his tenured job as an ordinary policeman.³⁷⁰ Distinctions along such lines should be made. There have to be some limits to procedural due process in the state workplace; otherwise, a state employee could sue in federal court because he did not receive proper reimbursement for driving his car ten miles while on the job. Expanding procedural due process to protect all livelihood interests—ranging from “freedom of occupation” to welfare—provides a coherent baseline, supplementing the common law interests in personal and real property. I believe, however, courts should also protect other interests, and anticipate disagreements over where those additional lines should be drawn; these disputes will be similar to the ones that will arise over how lines should be drawn within Posner’s structure. For example, Posner wrote that but for *Logan v. Zimmerman Brush Co.*,³⁷¹ he would not find a cause of action to be a protected property interest.³⁷² Under his theory, plaintiffs could therefore lose their claim solely because the state never got around to processing their claim in time.

Posner has not been as willing to redefine “liberty” interests as he has some “property” interests. For example, he held that prisoners had no independent liberty interest, but that they had a “right” to reduced sentencing under a federal “good time” statute.³⁷³ On the other hand, he held that dissident nonunion members had a due process right to a full hearing with judicial review to determine if they had been forced to contribute to nonbusiness-related activities because: “The liberty in question is freedom of association.”³⁷⁴

Posner reached a far more shocking conclusion when he wrote that children had little or no liberty interest in staying with their natural parents because when the state intervened, the children were only

370. *Parrett v. City of Connersville*, 737 F.2d 690, 693-94 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 828 (1985). Posner has held plaintiffs have no property right to a promotion. *Bigby v. City of Chicago*, 766 F.2d 1053, 1057 (7th Cir. 1985). Posner explained that his “liberty of occupation” theory did not apply because a rank within an occupation is not an occupation. *Id.*

371. 455 U.S. 422 (1982).

372. *In re Chicago, Rock Island, & Pac. R.R. Co.*, 788 F.2d 1280, 1282 (7th Cir. 1986). Posner would prefer to find that only meritorious causes of action are protected property interests.

373. *Jackson v. Carlson*, 707 F.2d 943 (7th Cir.), *cert. denied*, 464 U.S. 861 (1983).

374. *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1193, 1196 (7th Cir. 1984).

going from "one form of bondage to another."³⁷⁵ Posner apparently had not heard of "separation anxiety," the enormous stress children feel when they are removed from their parents.³⁷⁶ Posner continued this approach when he concluded that parents had no liberty interest in not being disturbed: "Peace of mind is not liberty."³⁷⁷ What makes these callous assessments of family needs and of privacy so disturbing is that they were gratuitous. Posner could have simply relied upon his other argument that the father had not been damaged by the state's failure to give him proper initial notice, because the state proved at a subsequent hearing that the father was very dangerous and had beaten his children: "So plaintiffs have failed to establish a causal connection between the alleged deprivation of due process and any injury resulting from the removal of the children . . . and the principles of tort causation apply to constitutional as to other tort suits."³⁷⁸

Posner's far-ranging liberty analysis could immunize the state whenever it broke up any family, not just those terrorized by dangerous parents. In fact, in a similar case, *Ellis v. Hamilton*,³⁷⁹ Posner conceded, while taking a swipe at the Supreme Court's use of "substantive due process," that some such liberty interest existed:

We do not think any exotic constitutional doctrine—not even the ubiquitous oxymoron "substantive due process"—would be necessary in order to reach that result. It is plain to us that the "liberty" protected by the due process clause of the Fourteenth Amendment includes the right to custody of one's minor children and that it would be a deprivation of that liberty without due process of law for persons acting under color of state law permanently to separate the children from their parents without notice and hearing.³⁸⁰

One of the most difficult problems currently facing the federal courts is the determination of when to award damages for injuries under the due process clause. Such due process claims, which could include negligence, recklessness, malice, or even sadism, are peculiar hybrids of procedural and substantive due process. Under all those situations, the plaintiff's interest in "life, liberty, and property" have been impaired without any hearing; nevertheless, the question remains whether plaintiff should have a substantive right to compensation. Posner has tried to solve this problem by relying on contro-

375. *Lossman v. Pekarske*, 707 F.2d 288, 290 (7th Cir. 1983).

376. See, e.g., J. BOWLBY, *SEPARATION* (1973).

377. *Lossman*, 707 F.2d at 292.

378. *Id.* at 291.

379. 669 F.2d 510 (7th Cir.), cert. denied, 459 U.S. 1069 (1982).

380. *Id.* at 512.

versial philosophical assumptions about the Constitution instead of merely basing his decision upon the Supreme Court's decision in *Parratt v. Taylor*,³⁸¹ which prohibited an action under the due process clause of the fourteenth amendment for negligent loss of property. Denying relief to the estate of a person who had been murdered by an insane person recently released by state officials,³⁸² Posner created a global theory of the Constitution:

But there is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect the residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let the people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.³⁸³

Even the libertarian philosopher Robert Nozick might be troubled by the totality of Posner's theory. According to Nozick, the state's primary justification is its ability to protect citizens from each other and from outsiders.³⁸⁴ Posner's position races beyond constitutional immunity for inevitable state error to create total constitutional immunity for state desertion of duty. He does not distinguish between failure to properly implement existing services and failure to provide any services at all. Furthermore, his vision does not explain how a court should handle claims that the state acted recklessly when it injured a party.

Posner continued to apply this theory when he ruled against an estate in *Jackson v. City of Joliet*³⁸⁵ where administrators of estates sought damages because police officers failed to rescue people who burned to death in their car. According to Posner, the plaintiffs had to prove that the police officers acted deliberately.³⁸⁶ The state has no duty to provide any resources, except to criminal defendants. Both to

381. 451 U.S. 527 (1981). Posner did use *Parratt* to hold that a plaintiff who had been denied a taxicab license had no procedural due process claim where the plaintiff had alleged that the defendant had not followed existing procedures because state remedies existed. *Flower Cab Co. v. Petite*, 685 F.2d 192, 193 (7th Cir. 1982). The Supreme Court has extended *Parratt* to deny relief to a prison inmate who slipped on a pillow that a deputy sheriff left on stairs in the jail, *Daniels v. Williams*, 106 S. Ct. 662 (1986), and to an inmate who alleged that prison officials negligently failed to protect him from another inmate, *Davidson v. Cannon*, 106 S. Ct. 668 (1986).

382. *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982).

383. *Id.* at 618.

384. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

385. 715 F.2d 1200 (7th Cir. 1983).

386. *Id.* at 1203.

support his philosophy and to resolve the immediate issue, Posner turned to history for additional support: "What happened in this case is not the kind of thing that the framers were not concerned about because they could not foresee but the kind of thing they knew about and surely did not think required a federal tort remedy to prevent."³⁸⁷ Posner added that rejection of his theory would lead to adopting the views of Professor Michelman, who had proposed that the state must provide "just needs" under the equal protection clause:³⁸⁸

To adopt these proposals, however, would be more than an extension of traditional conceptions of the due process clause. It would turn the clause on its head. It would change it from a protection against coercion by state government to a command that the state use its taxing power to coerce some of its citizens to provide services to others. The Supreme Court has refused to go so far except where indigence prevents an individual (a criminal defendant in particular) from protecting himself against coercion by the state.³⁸⁹

Whatever else one may think of Posner's sweeping constitutional jurisprudence, one should remember that it does not perfectly capture Supreme Court precedent. In *Plyler v. Doe*,³⁹⁰ the Court held that states had a constitutional responsibility to pay for the education of the children of illegal aliens. Furthermore, one does not have to turn the Constitution into a socialist document or a tort code to conclude that the state has a constitutional duty to provide minimal services and/or not to act recklessly.

2. THE PROCESS THAT IS DUE

Once a court has found that a plaintiff has a right to procedural protection under the Constitution, that court must then determine what specific procedures the plaintiff should receive. Posner acknowledged the Supreme Court's repudiation of Justice Rehnquist's and Judge Easterbrook's positivist position that the plaintiff should only receive procedures previously authorized by law.³⁹¹ Instead, he has used the *Mathews v. Eldridge* three-pronged balancing test, "a simple cost-benefit test of general applicability."³⁹²

In general, he has found that existing procedures tend to be satis-

387. *Id.* at 1205. He offered no legislative history of the fourteenth amendment to support this speculation.

388. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1979).

389. *Jackson*, 715 F.2d at 1203-04 (citation omitted).

390. 457 U.S. 202 (1982).

391. *Philly's v. Byrne*, 732 F.2d 87, 91 (7th Cir. 1984).

392. *Sutton v. City of Milwaukee*, 672 F.2d 644 (7th Cir. 1982).

factory. A city could immediately tow cars because advance notice and hearing would not only be expensive, but would also prevent all ticketing.³⁹³ Prisoners threatened by loss of good time credit had no right to sworn testimony by prison officers because those inmates had received precise notice of the charge and of the identity of the witness: "[T]hese prisoners had the essential elements of an adversary hearing in the Anglo-American tradition."³⁹⁴ An administrative agency allowing a railroad to abandon a line may act regrettably when it fails to articulate standards, but it still is acting within its power.³⁹⁵ That same bureaucracy may dismiss evidence out of hand and not explicitly consider valid points a claimant may have asserted.³⁹⁶ A person who was injured by a railroad when he was a child had no cause of action after his mother failed to respond to a notice from a bankruptcy trustee.³⁹⁷

D. *Substantive Due Process*

We shall start with Posner's snide reference in *Ellis v. Hamilton* to that "ubiquitous oxymoron 'substantive due process.'"³⁹⁸ Posner made that quip while citing *Moore v. City of East Cleveland*³⁹⁹ in *Ellis* where he noted that parents have a liberty interest in the custody of their minor children. Posner claimed that this substantive definition of liberty could be found without relying upon "substantive due process."⁴⁰⁰ He does not explain how he accomplished that task. After all, the family's interest is substantive and the court would have to proceed under the due process clause. In fact, in *Moore*, the Court explicitly held that zoning laws regulating family structure violated substantive due process. Even if the court chose another clause—the eighth amendment, for example—critics would still claim that the court was really engaging in substantive due process decision-making.

Posner glossed over the methodology needed to reach the conclusion that families have a liberty interest in staying together because he was struggling with a dilemma of contemporary conservative constitutional theory. Modern conservatives criticize the pro-abortion decisions for being based upon an allegedly unprincipled, ahistorical reading of the due process clause: "substantive due process." But if

393. *Id.* at 646.

394. *Jackson v. Carlson*, 707 F.2d 943, 948 (7th Cir.), *cert. denied*, 464 U.S. 861 (1983).

395. *Illinois v. Interstate Commerce Comm'n*, 709 F.2d 1186, 1195 (7th Cir. 1983).

396. *Illinois v. Interstate Commerce Comm'n*, 722 F.2d 1341 (7th Cir. 1983).

397. *In re Chicago, Rock Island, & Pac. R.R. Co.*, 788 F.2d 1280 (7th Cir. 1986).

398. *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir.), *cert. denied*, 459 U.S. 1069 (1982).

399. 431 U.S. 494 (1977).

400. *Ellis*, 669 F.2d at 512.

all substance were eliminated from due process, how could conservatives oppose, as unconstitutional, state decisions to remove children for any reason or to limit the size of families? Or, for that matter, how could they challenge state attacks on "liberty of occupation"? Conservatives cannot have it both ways. If substantive due process is an illegitimate methodology, then the state has total discretion to regulate the family and the job market.

In the course of rejecting a fireman's suit brought against a city because it fired him for not living in the city and disrupted his family life, Posner again expressed reluctant skepticism about substantive due process:

Granted, it is not easy to derive a doctrine of substantive family rights from the language or history of the Fourteenth Amendment; but the doctrine is far too well established to be questioned at our level; our only task is to apply it as best we can to the facts of this case.⁴⁰¹

While rejecting a constitutional attack claiming that an employment examination was inadequately conceived,⁴⁰² Posner reduced substantive due process to emotivism: "[T]he concept [of substantive due process] has been used to invalidate state action unrelated to judicial or administrative procedure or to specific rights enumerated in the Bill of Rights only when that action was deeply repulsive to the feelings of Supreme Court Justices."⁴⁰³

Unlike Judge Bork, Judge Posner has not actively applied the "taking" doctrine to expand substantive due process to protect wealth, even though his former colleague, Professor Richard A. Epstein, recently proposed such a constitutional maneuver.⁴⁰⁴ When reviewing a state's purchase of an abandoned railroad line, Posner held that the state need only pay what it would be worth after abandonment, not what it would be valued at as a continuing railroad even though the state planned to continue service.⁴⁰⁵ Posner indicated that the railroad is only entitled to "what a liquidating railroad could obtain in the marketplace."⁴⁰⁶ To support that holding, Posner claimed that courts were poorly equipped to determine the railway's

401. *Hameetman v. City of Chicago*, 776 F.2d 636, 642 (7th Cir. 1985). Posner explained that the Constitution may prohibit some direct regulation of family life, such as setting zoning requirements for family structure, but it will not proscribe most laws that "collaterally" affect families. *Id.* at 643.

402. *Bigby v. City of Chicago*, 766 F.2d 1053 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 793 (1986).

403. *Id.* at 1058.

404. See R. EPSTEIN, *TAKINGS* 279-81 (1985).

405. *Chicago & N.W. Transp. Co. v. United States*, 678 F.2d 665, 667-68 (7th Cir. 1982).

406. *Id.* at 667.

maximum value: "The maximum value of the line to GLA [the transit commission] is a function very largely of the political muscle of GLA's constituents—an area of inquiry that courts, even the ICC, . . . are poorly equipped to explore."⁴⁰⁷ Thus, we see the makings of another surprise that may be emerging from this admittedly limited set of cases. Judge Bork, the allegedly restrained traditionalist, may be more willing to apply economic substantive due process via the taking clause than Judge Posner, the leader of the law and economics movement.

E. *Equal Protection*

When I studied these jurists' academic writings in the previous article, I expressed anxieties over Posner's tendency to reduce law to economic analysis. Clearly, as a jurist, he has adopted a broader vision than that contained in most of his writings. For instance, he responded to a plaintiff's equal protection argument in which the plaintiff disputed a city's car towing procedures with a Frankfortian reaction: "The sense of justice is not outraged."⁴⁰⁸ Indeed, in one case he explicitly rejected the "proper" economic conclusion. An out-of-state lawyer who argued that he should not have to take the bar lost his appeal because Posner maintained that the state had a legitimate purpose in preserving the quality of the bar.⁴⁰⁹ Posner thought the lawyer had a strong argument on the merits: "[T]he licensing of lawyers is an anachronism or worse; . . . a free market in legal services will yield the optimal quality at the optimal price."⁴¹⁰ Nevertheless, "we do not think that the equal protection clause ordains in effect a national bar"⁴¹¹

Posner has rigorously applied the rational relationship test to deny plaintiffs relief. States can allocate their limited resources to tow only vehicles that have more than one parking violation.⁴¹² A fireman could not complain that he was dismissed for living outside of a city although others in similar circumstances were not being punished because "incomplete enforcement of the law is the norm in this country."⁴¹³ Posner used an economic argument to help provide a "rational purpose" why states can have different liability standards for vehicular torts than for nonvehicular torts:

407. *Id.* at 670.

408. *Sutton v. City of Milwaukee*, 672 F.2d 644, 648 (7th Cir. 1982).

409. *Sestric v. Clark*, 765 F.2d 655, 664 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 862 (1986).

410. *Id.* at 663.

411. *Id.*

412. *Sutton v. City of Milwaukee*, 672 F.2d 644, 648 (7th Cir. 1982).

413. *Hameetman v. City of Chicago*, 776 F.2d 636, 641 (7th Cir. 1985).

Since motor vehicle accidents are so much more frequent than other types of accidents in which state employees are involved, the mathematical law of large numbers enables the state to estimate and provide for its liability without placing any limitation on the amount of damages that can be awarded in an individual case.⁴¹⁴

In the murky, discretionary area of intermediate scrutiny, Posner has not been relentlessly hostile to plaintiffs. Recall the access case in which he ruled that counties did not receive eleventh amendment immunity and that they had to prove that fifty-five was an appropriate age at which to require policemen to retire.⁴¹⁵

Joined by Judge Easterbrook in his opinion, Judge Posner also did not completely reject a sex discrimination suit, although his analysis will undoubtedly trouble many feminists.⁴¹⁶ Posner first argued that women generally are paid less because they take time off to raise children.⁴¹⁷ Nevertheless, Posner contended, states may be more likely to discriminate against women because states have less incentive to be efficient than private employers;⁴¹⁸ governmental decisions are more likely to be influenced by politics, including bias, than business decisions. Given these controversial assumptions, Posner concluded that a court should not intervene just because a state did not follow a comparative worth study.⁴¹⁹ The main effect of such a holding "would be to discourage employers from commissioning comparative worth studies."⁴²⁰ To prevail, the women had to show improper state intent, not just knowledge of disparate impact: "Knowledge of a disparity is not the same thing as an intent to cause or maintain it."⁴²¹ Consequently, their comparative worth argument had no constitutional weight.⁴²² The women, however, did raise several factual allegations that could constitute a constitutional violation: steering of women into low-paying jobs, poor job classifications, hand picking of employees based upon gender, exclusions based upon gender, uneven layoffs, and different classifications for the same jobs.⁴²³ Addressing the problems of designing an appropriate remedy, Posner became a

414. *Continental Ins. Co. v. Illinois Dept. of Transp.*, 709 F.2d 471, 475 (7th Cir. 1983).

415. *Heiar v. Crawford County, Wis.*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 3500 (1985).

416. *American Nurses' Ass'n v. Illinois*, 783 F.2d 716 (7th Cir. 1986).

417. *Id.* at 719.

418. *Id.* at 720.

419. *Id.* at 723.

420. *Id.* at 721.

421. *Id.* at 722.

422. See, e.g., Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986).

423. *American Nurses*, 783 F.2d at 728.

judicial activist: "But if difficulties of remedy, unless completely insurmountable, were a proper reason for throwing out a complaint at the pleading stage, *Brown v. Board of Education* would have been decided in favor of allowing public schools to continue to segregate the races."⁴²⁴

Posner's analysis of racial issues has not been predictably conservative. He opposed a plan which gave black school teachers total seniority over white teachers during lay-offs,⁴²⁵ a position with which the Supreme Court recently agreed.⁴²⁶ But he did not reject all forms of affirmative action. He stated, "Affirmative action in hiring is sometimes permitted, but it is not mandatory,"⁴²⁷ even though he criticized the remedy in his academic writings.⁴²⁸

When a majority held in *United States v. Board of School Commissioners*, that only the state, not the suburbs, should pay the costs of school desegregation because only the state was found responsible for violations,⁴²⁹ Judge Posner wrote a scathing dissent that not only revealed limits to his reliance on economics (particularly to favor the wealthy), but also showed his political courage. First, he did not sound like an economist while allocating costs: "The end of an equity suit is an injunction, or if the injunction is not obeyed a contempt proceeding; it is not an inquiry into who will bear the costs of the injunction."⁴³⁰ Posner then cut through legal fictions to explain who was truly responsible for the segregation: "I would consider it highly unlikely that a school district could cause, and so in a legal sense be

424. *Id.* at 730 (citation omitted).

425. *Britton v. South Bend Community School Corp.*, 775 F.2d 794 (7th Cir. 1985) (Posner, J., dissenting). Posner did deny a request that federal court clerks investigate why some people do not respond to jury questionnaires. Posner observed that the plaintiffs had not proven systematic discrimination against counties with large black populations. *United States v. Gometz*, 730 F.2d 475, 478 (7th Cir. 1984).

426. *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986).

427. *Britton*, 775 F.2d at 816. The whites were not barred from bringing this suit merely because the union approved the contract. *Id.* at 819. The whites had not consented to the plan. *Id.* at 820. Thus, in this circumstance, Posner did not employ a broad definition of "implied consent" to bind the workers. He did not analogize their plight to the dilemma of a homeowner who buys a home that depreciates in value when a factory moves away. Yet union agreements with unfavorable terms are no less foreseeable than company plant closings. For a discussion of the role consent plays in Posner's jurisprudence, see West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

428. See, e.g., Posner, *The Bakke Case and the Future of 'Affirmative Action'*, 67 CALIF. L. REV. 171 (1979); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1. Posner did not follow his pattern of expressing reservations in his opinion about existing Supreme Court doctrine.

429. *United States v. Board of School Comm'rs*, 677 F.2d 1185 (7th Cir. 1982).

430. *Id.* at 1192 (Posner, J., dissenting).

liable for, segregation between districts [I]t is the residents of the white suburbs of Marion County who are the primary wrongdoers, as a matter of equity if not of law"⁴³¹ Posner thought it unjust that the rest of the state should subsidize wealthy suburbs which have engaged in discrimination:

In light of this history, for the suburban school districts, which are apparently among the richest in the state, to urge that the costs of the busing order should be borne by the people throughout the state who are dependent on the noneducational appropriations in the state budget and that the educational budgets of Marion County should be sacrosanct is to invoke the spirit not of equity but of effrontery.⁴³²

What makes this remarkably straightforward opinion so admirable is that it was unnecessary; Posner could have easily joined the majority in finding the state to be solely liable. As we have already seen in the eleventh amendment context, the constitutional distinctions between state and local governments are extremely ambiguous.

On the other hand, he did revert to an economic interpretation when he held in *Jones v. Reagan*, that black reservists could not prevail on their argument that the Reserve transferred them for racially motivated reasons because they only sought punitive damages: "It is enough for us to hold that damage remedies for constitutional torts are not appropriate and hence not available, unless expressly authorized by Congress, if no monetizable injury is alleged."⁴³³

F. *First Amendment*

1. THE STATE AS EMPLOYER OR CONTRACTOR

Just as in due process cases, Judge Posner focused upon the severe deprivation of job loss to determine the scope of the first amendment when the state has injured an employee or contractor. Those who lost their jobs for political reasons received significant substantive and procedural protection, while other plaintiffs remained virtually unprotected. Thus, a police officer had a valid due process cause of action against a city which constructively discharged him after he investigated his boss's daughter, but had no similar claims for being demoted from chief detective.⁴³⁴ Furthermore, the policeman's substantive right generated new procedural rights. Existing arbitra-

431. *Id.* at 1192-93.

432. *Id.* at 1193-94.

433. *Jones v. Reagan*, 696 F.2d 551, 555 (7th Cir. 1983).

434. *Parrett v. City of Connersville*, 737 F.2d 690, 693-94 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 828 (1985).

tion procedures were inadequate because the arbitrator did not consider post-transfer evidence of harassment, decided cases slowly, and could not award full compensation because he could only grant back pay.⁴³⁵

In a dissent from an opinion upholding the firing of a bookkeeper for allegedly valid nonpolitical reasons, Posner responded that the plaintiff appeared to have been fired for two reasons: "her failure to perform as a faithful public servant, and her siding with Dr. McCarthy."⁴³⁶ According to Posner, the trial judge erred both by not giving protection to those involved in primary politics within a party, and by not applying the classic "but for" tort test: "If she would not have been fired but for her taking sides in a political struggle, then the defendants violated her First Amendment rights"⁴³⁷

Finally, a secretary had a right to have a jury decide if she deserved protection because she was a regular state employee or if she could be fired because she was a confidential secretary:

Rightly or wrongly, our system commits the decision of complex as well as simple facts, facts tintured with legal or policy significance (such as negligence) as well as the who-did-what-to-whom facts that can be found without any instruction in the law, to the jury in cases in which a right to a jury trial is given.⁴³⁸

Applying the other part of the occupation/conditions of employment distinction, Posner held that the first amendment does not prohibit the state from awarding a contract to a politically favored bidder: "It is not like losing your job An independent contractor would tend we imagine to feel a somewhat lesser sense of dependency."⁴³⁹

Far more troubling was Posner's conclusion that an F.B.I. agent could not invoke the first amendment to contest a job transfer or even a subsequent discharge because the speech in question directly affected immediate superiors, morale, confidentiality, and discipline.⁴⁴⁰ Posner did not worry about "liberty of occupation":

Government law enforcement agencies, whether they be the FBI, Secret Service, U.S. Marshall, local police forces, sheriffs, etc.,

435. *Id.* at 697.

436. *Grossart v. Dinaso*, 758 F.2d 1221, 1236 (7th Cir. 1985) (Posner, J., dissenting).

437. *Id.* at 1235.

438. *Soderbeck v. Burnett County*, 752 F.2d 285, 289 (7th Cir.), *cert. denied*, 105 S. Ct. 2360 (1985).

439. *LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

440. *Egger v. Phillips*, 710 F.2d 292 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983). Posner held that the speech could "presume to have had a substantial disruptive influence on the regular operations of the department." *Id.* at 327.

are indeed very similar to the military in terms of the need for direction, supervision, discipline, confidentiality, efficiency and esprit de corps. Thus, courts should defer, whenever possible consistent with the Constitution, to the superior expertise of law enforcement professionals in dealing with their respective personnel.⁴⁴¹

Posner's conclusion, of course, is similar to Scalia's conclusion in *Molerio*.

2. THE STATE AS REGULATOR OF SPEECH

One might have predicted that Posner, an advocate of the free market, would be a more vigorous defender of the first amendment than a traditionalist such as Judge Bork because the first amendment protects the "marketplace of ideas," a libertarian-economic metaphor with which Posner is comfortable. Indeed, Posner used that image when requiring the state to provide dissident nonunion teachers with a better forum than arbitration proceedings to protect their constitutional right not to contribute to nonbusiness-related issues: "this indirect effect on the marketplace of ideas is we think sufficient to require the creation of procedures that protect against such compulsion."⁴⁴² Nevertheless, Posner has not read the first amendment as broadly as Bork, who has sometimes enhanced values he believes the first amendment protects.

Remember that Posner dismissed two first amendment cases on procedural grounds.⁴⁴³ In *Waldron v. McAtee*,⁴⁴⁴ Posner demonstrated his willingness to blend procedure and substance at the expense of the plaintiff, a law student whom the police had threatened to arrest under a loitering statute.⁴⁴⁵ Posner's tightening of standing, ripeness, abstention, vagueness, and overbreadth may not totally conflict with Supreme Court doctrine, but he turned those complex doctrines into virtually impenetrable Catch-22's. Posner held, under the *Pullman* abstention doctrine, that the plaintiff had to go first to state

441. *Id.* at 328.

442. *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1192 (7th Cir. 1984), *aff'd*, 106 S. Ct. 1066 (1986). In the course of denying an antitrust suit contesting an exclusion from a professional organization, Posner expressed similar sentiments when he linked the first amendment freedom of association with the right to privately exchange views: "If the Academy has to reveal its membership files, members may be reluctant to offer candid evaluations of applicants, and the atmosphere of mutual confidence that encourages a free exchange of ideas will be eroded." *Marrese v. American Academy Orthopaedic Surgeons*, 726 F.2d 1150, 1159-60 (7th Cir. 1984), *rev'd*, 105 S. Ct. 1327 (1985).

443. *See People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167 (7th Cir. 1984); *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983) (*Pullman* abstention).

444. 723 F.2d 1348 (7th Cir. 1983).

445. *Id.*

court: "It is quite possible therefore that the police exceeded their authority under the ordinance and that the Indiana courts will make this clear."⁴⁴⁶ Thus, as the dissent observed, this interpretation of the *Pullman* test, which Posner had described elsewhere as a "time waster,"⁴⁴⁷ would require all first amendment plaintiffs alleging overbreadth or vagueness claims to litigate their claims in state court unless they could produce a state court ruling finding that their activity was proscribed by the challenged law.⁴⁴⁸ The dissent noted that the Supreme Court did not require exhaustion in most first amendment cases.⁴⁴⁹ After all, vagueness challenges are brought, by definition, against poorly drafted statutes, statutes which usually may be more narrowly construed by state courts. Under Posner's theory, plaintiffs who have been arrested must litigate their case in state court under *Younger* and plaintiffs who have not been arrested, but still have standing, must also litigate their cases in state court.

Posner narrowly construed the vagueness doctrine, deemphasizing its due process role in requiring adequate notice: "The practical effect of the vagueness doctrine is not to make statutes readable by the laity but to limit the discretion of police and prosecutors"⁴⁵⁰ That statist construction ignores the fact that one of the best ways to constrain discretion is to make laws intelligible to the average citizen as well as to the average law enforcement official. If a police officer does not know what he cannot do, he may do anything. Meanwhile, the average citizen cannot determine the scope of the officer's power if the relevant statute is too vague, and thus will not know when to turn to the courts for protection.

When a district court heard a request to determine if new F.B.I. surveillance standards were consistent with a prior consent decree regulating how the F.B.I. could oversee controversial domestic political activists, Judge Posner held, in *Alliance to End Repression v. City of Chicago*, that the court acted prematurely, even if it had jurisdiction.⁴⁵¹ He used a very contemporaneous "changed circumstances" argument to justify not deferring to the trial court: "Much has changed since then—not only the management of the Bureau, whose present director is a former federal circuit judge, but the magnitude of

446. *Id.* at 1354.

447. *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 568 (7th Cir. 1986).

448. *Waldron*, 723 F.2d at 1355 (Swygert, J., dissenting).

449. *Id.* at 1356-57 (citing *Baggett v. Bullitt*, 377 U.S. 360 (1964)).

450. *Waldron*, 723 F.2d at 1354.

451. 733 F.2d 1187, 1196-97 (7th Cir.) (Posner, J., concurring and dissenting), *vacated*, 742 F.2d 1007 (7th Cir. 1984).

the terrorist threat, which has increased."⁴⁵²

Unlike Judges Bork and Scalia, who held that an artist had a constitutional right to display his satirical poster in a subway, Judge Posner expressed little sympathy for artist plaintiffs. In *Piarowski v. Illinois Community College*,⁴⁵³ an artist sued a community college for ordering him to relocate several stained-glass windows from a general exhibit of faculty artwork, located on the school's mall, to a room on the fourth floor.⁴⁵⁴ The works were "in the style of Audrey Beardsley."⁴⁵⁵ Several people had complained about three representational pieces that portrayed "brown women" engaging in sexually demeaning acts. For instance, one of the pieces "depicts the naked rump of a brown woman, and sticking out from (or into) it a white cylinder that resembles a finger but on careful inspection is seen to be a jet of gas."⁴⁵⁶ In another, a brown woman is on her knees, worshipping a white man's gigantic phallus.⁴⁵⁷ Posner impugned the plaintiff's motives, claiming the artist was more interested in being a martyr.⁴⁵⁸ Finding that the hallway was not a public forum despite the display of other pieces there,⁴⁵⁹ Posner applied a balancing test even though the school⁴⁶⁰ clearly engaged in content discrimination:

When we consider that the expression in this case was not political, that it was regulated rather than suppressed, that the plaintiff is not only a faculty member but an administrator, that good alternative sites may have been available to him, and that in short he is claiming a First Amendment right to exhibit sexually explicit and racially offensive artwork in what amounts to be the busiest corridor in a college . . . [the college may] . . . order him to move it.⁴⁶¹

Because he did not label these works "obscene,"⁴⁶² Posner had begun to slide down the slippery slope to egregious content discrimi-

452. *Id.* at 1197.

453. 759 F.2d 625 (7th Cir.), *cert. denied*, 106 S. Ct. 528 (1985).

454. *Id.*

455. *Id.* at 627.

456. *Id.*

457. *Id.*

458. *Id.* at 632.

459. *Id.* at 629.

460. Posner also showed how that first amendment theme of "academic freedom" does not resolve the tension between a state school and an individual employee. He noted that a tension exists between the individual need for academic freedom and the institution's need to be free from governmental regulation (including the courts). *Id.* at 629-30. Thus, the courts, who should be primarily the guardians of individual first amendment rights become constrained from active enforcement because of Posner's deference to first amendment rights of academic institutions.

461. *Id.* at 632.

462. *Id.* at 627. The defendants did not argue that the works were obscene. Indeed, as

nation. One might agree with those who found some or all of the displays to be both vulgar and politically inappropriate. Most academics would not like to see a display of fascist art in their schools, but many would not want to see it banned. For instance, I find the movie *Rambo* disturbing and disgusting, but I would not want to stop students from seeing it. After all, *Birth of a Nation* is both one of the world's greatest films and one of its most racist films, and is frequently shown to students. On the other hand, a faculty member has no right to display obscene art in public. But by making nonobscene art a less protected form of speech and by allowing viewer discomfort to prevail over individual expression in the absence of any finding of obscenity, Posner has created a disturbing precedent. He also glossed over the political content of the art; the three pieces may have been intended as a protest against white male sexual domination of black women.

Posner continued to express ambivalence about providing first amendment protection to art during his review, in *Douglass v. Hustler Magazine, Inc.*, of a "false light" tort action an actress filed against *Hustler* magazine for displaying nude photographs of her without her permission.⁴⁶³ Her prior posing for *Playboy* magazine did not defeat her case because a jury might conclude that *Hustler* was a less reputable magazine.⁴⁶⁴ Turning to the first amendment defense, Posner found, in a passage some might consider witty and others might find tasteless, that the plaintiff was a public figure "in a literal sense."⁴⁶⁵ He used this case as an opportunity to express his regrets about broad constructions of the first amendment:

As an original matter one might want to confine the class of public figures to government officials and other politicians; freedom of political speech, and in particular freedom to criticize government officials and aspirants to public office, was the original concern of the First Amendment. But it is too late in the day to make such a distinction, at least at this judicial level. Art, even of the questionable sort represented by erotic photographs in "provocative" magazines—even of the artless sort represented by "topless" dancing—today enjoys extensive protection in the name of the First Amendment.⁴⁶⁶

Posner observed, the windows were based upon Beardsley illustrations displayed in the Victoria and Albert Museum. *Id.*

463. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1489 (1986).

464. *Id.* at 1137.

465. *Id.* at 1141.

466. *Id.* Posner has been unresponsive to an electoral access case, which combines the first amendment and equal protection. In response to a suit brought by the Communist Party

3. FREEDOM OF RELIGION

In the only major freedom of religion case decided by any of the five judges, Judge Posner lucidly described how he would weigh the plaintiffs' interests in wearing yarmulkes when they played basketball against the state's interest in safety:

As under any balancing test, each case tends to be *sui generis*, so that the principal value of precedent is to identify the interests that must be weighed and to tell us whether, in weighing them, we should place our thumb on one pan or the other. *Sherbert* indicates that our thumb should be on the claimant's pan, because it says that the state's interest must be "compelling" to outweigh the claimant's.⁴⁶⁷

Posner did not press too hard with his thumb. The plaintiffs had the burden of proof; the state did not have to wait until somebody slipped on a yarmulke. Yet Posner sought a compromise in a clever remand of the case. He thought the case might be a "false conflict;" other headgear might be safer, while still complying with Orthodox requirements. Because the plaintiffs know more about Jewish law than the defendants, the plaintiffs had the burden of proposing new designs.⁴⁶⁸

G. Government Structure

Because they sat on the Court of Appeals for the District of Columbia bench, Judges Scalia and Bork considered several federal separation of powers cases. Judge Posner's structural constitutional cases more frequently involved the relationship between the states and the federal government. Posner continued the pattern he established in the access cases—praising the rights of the states, but often ruling in favor of national power.

In response to the argument that a legislature had delegated too

challenging a state law raising party registration requirements from .5 to two percent, Posner replied that courts did not scrutinize such regulations as closely as they did laws involving race or political speech. *Hall v. Simcox*, 766 F.2d 1171, 1174 (7th Cir.), *cert. denied*, 106 S. Ct. 528 (1985). According to Posner, the new limit was acceptable and was not the result of improper motivation. Writing like a historian, he conceded that a major motive may have been the "traditional American antipathy to the coalition governments that minor parties precipitate." *Id.* at 1176.

467. *Menora v. Illinois High School Ass'n*, 683 F.2d 1030, 1033 (7th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983). Posner also considered a religious challenge to compulsory education laws under the first amendment, noting that "[t]here is little . . . likelihood that Indiana's compulsory-schooling law will be held unconstitutional." *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845, 847 (7th Cir. 1985). After this article went to press, Posner held that the ACLU was entitled to a preliminary injunction proscribing a city's display of a lighted Latin cross during Christmas. *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986).

468. *Menora*, 683 F.2d at 1035.

much power to a state agency regulating alcohol, Posner held that no federal constitutional doctrine exists limiting state delegation of powers to an administrative agency.⁴⁶⁹ The federal doctrine of separation of powers did not apply to the states: “[T]he Constitution nowhere requires states to have a tripartite system of government.”⁴⁷⁰ Posner even revived his scholarly argument that federal courts should only be concerned with interstate externalities, not internal injustice: “If you didn’t like Huey Long’s Louisiana, you could move to a different state; tyranny at the federal level is more difficult to escape.”⁴⁷¹

Posner also rebuffed a fireman’s due process claim with federalism arguments: “The principles of federalism require . . . that the due process clause not be interpreted to place more stringent procedural constraints on state agencies than the same language in the Fifth Amendment, plus the Administrative Procedure Act and the body of federal administrative case law, places on federal agencies.”⁴⁷² We have also seen that he sometimes used the remand power to allow the states to correct possible injustices before federal court intervention because he thought that process better promoted comity.⁴⁷³

Posner did not hesitate, in *Indianapolis Airport v. American Airlines, Inc.*,⁴⁷⁴ to strike down the user fees for airlines at a local airport. He used economic theory to interpret the dormant commerce clause: “Locational monopoly—the type of monopoly that the Indianapolis airport enjoys—is one of the traditional levers by which a state can (if not prevented) unreasonably burden interstate commerce.”⁴⁷⁵ In *Illinois v. General Electric Co.*, Posner found that a state law, which proscribed the shipment of spent nuclear fuel, was a violation of the commerce clause because the state still allowed intrastate shipments. Posner shed crocodile tears for federalism: “[I]t is unseemly to allow a single federal district judge to enjoin a state statute”⁴⁷⁶

469. *United Beverage Co. v. Indiana Alcoholic Beverage*, 760 F.2d 155, 157 (7th Cir. 1985).

470. *Id.* at 158.

471. *Id.*

472. *Hameetman v. City of Chicago*, 776 F.2d 636, 645 (7th Cir. 1985).

473. *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554 (7th Cir. 1986); *Menora v. Illinois High School Ass’n*, 683 F.2d 1033 (7th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983).

474. 733 F.2d 1262 (7th Cir. 1984).

475. *Id.* at 1267. He presented a pragmatic explanation why federal courts can employ the dormant commerce clause to strike down state laws in the absence of congressional legislation:

[T]his interpretation of the commerce clause can be defended on the practical ground that Congress is too busy—and maybe as James Madison feared too factionalized—to police every infringement of the policy (implied by a number of separate provisions of the Constitution) that the United States be a single “common market” for goods and services.

Id. at 1266.

476. 683 F.2d 206, 213 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

Only once did Posner discuss separation of powers—in a dissent from a decision holding that magistrates can try diversity cases if all parties consent.⁴⁷⁷ Posner, who at the time was writing a book describing how excessive caseload was damaging the federal court system,⁴⁷⁸ agreed that the procedure would help alleviate case overload. Nevertheless, the values underlying the tenure provisions of Article III should not be sacrificed for short-term benefits:

The caseload crisis makes the idea of invalidating section 636(c) seem futile, unfair to the district courts, and ungrateful to Congress: in short, ill advised.

This reaction is understandable, and if I could find more play in the text and policies of Article III, section 1 than I have been able to find, I might be swayed by it.⁴⁷⁹

Judge Posner again ranked policy above history—in a passage that makes an appropriate end to this section because it nicely demonstrates how Judge Posner's thinking differs from Judge Scalia's and Judge Bork's views:

I am sympathetic to functional analysis and to flexible, nonliteral constitutional interpretations, especially of a provision such as Article III that belongs to the original Constitution, which means it was written 197 years ago. But, speaking with great respect, I think my brethren's argument takes too narrow a view of the functions of the tenure and compensation provisions in several respects.⁴⁸⁰

IV. EASTERBROOK

Although Easterbrook has occasionally used economic analysis in his constitutional adjudication, he has not let his economic perspective pressure him into a libertarian construction of the Constitution. Indeed, he has probably been the most deferential of the five judges.

477. *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984) (Posner, J., dissenting).

478. R. POSNER, *THE FEDERAL COURTS* (1985).

479. *Geras*, 742 F.2d at 1050.

480. *Id.* at 1051. Posner then explained that the tenure provisions protect judicial quality, judicial independence, and even the states' interests. *Id.* at 1052. Magistrates are not sufficiently independent because they are beholden to district judges. *Id.* at 1053.

Professor Carter has recently argued that historicism should play a major role in construing the more determinate "political Constitution," or what I have called the "structure." See Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 *YALE L.J.* 821 (1985). Thus Carter might agree with Posner's application of the tenure/compensation standard, but would base his defense far more upon history. Posner also used historical arguments, including a reference to the *Federalist Papers*, which eloquently defended judicial independence. *Id.* at 1046.

Easterbrook has been a gleeful positivist, filling his opinions with fiery prose that acknowledges his toleration of inefficiency and unfairness.

A. Access to Courts

Unlike Judge Posner, Judge Easterbrook has aggressively applied the Supreme Court's eleventh amendment doctrine to deny monetary relief to plaintiffs. He held that welfare recipients could not request a federal court to issue a declaratory judgment determining if the state improperly characterized tort compensation as disqualifying "income" instead of as "resources," which the plaintiffs could spend as they please.⁴⁸¹ Because the plaintiffs were seeking damages for prior injuries, they could not prevail in federal court: "When there is 'no ongoing violation of federal law,' a suit against a state officer—a suit the decision of which will as a practical matter bind the state—should be treated for what it is: a suit against the state."⁴⁸² The judge reduced *Ex Parte Young*'s authorization of injunctive relief to a "narrow and somewhat anomalous sidestep."⁴⁸³ Easterbrook did not discuss Posner's arguments in *Heiar v. Crawford County*⁴⁸⁴ that the eleventh amendment is partially trumped by the subsequent fourteenth amendment or that damages can be an incidental remedy to injunctive relief. Admittedly Posner's arguments have less strength after the Supreme Court decided *Green v. Mansour*,⁴⁸⁵ which held that the eleventh amendment barred federal courts from issuing declaratory orders that would lead to damage awards. Ranging beyond the facts of the case, Easterbrook spiced his opinion with the observation that his decision may lead to unfairness because states could deny welfare benefits to people who have to spend most of their award on medical benefits: "This may be heartless, but it is not unlawful."⁴⁸⁶

Just as Judges Scalia and Bork have included substantive values within standing doctrine, Judge Easterbrook has substantively expanded the procedural defense of governmental immunities. In *Walker v. Rowe*,⁴⁸⁷ he held that the eleventh amendment prevented the estates of prison guards from obtaining damages after prisoners had killed the guards during a prison riot. The plaintiffs argued that prisoners were able to murder the guards because of unsafe working

481. *Watkins v. Blinzinger*, 789 F.2d 474 (7th Cir. 1986).

482. *Id.* at 484 (citation omitted).

483. *Id.* (construing *Ex Parte Young*, 209 U.S. 123 (1908)).

484. 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 3500 (1985).

485. 106 S. Ct. 423 (1985).

486. *Watkins*, 789 F.2d at 483.

487. 791 F.2d 507 (7th Cir. 1986).

conditions.⁴⁸⁸ They sought relief for the alleged due process violations under 42 U.S.C. § 1983. While Judge Posner had avoided the *Younger* abstention/ripeness "Catch-22" and had castigated a trial judge for creating a "Catch-22" by preventing a prisoner from getting a divorce in *Lynk*, Easterbrook designed a theory of immunity that gave most plaintiffs the freedom to choose two different ways to lose:

[T]he "capacity" in which litigation proceeds is largely the plaintiff's choice. If the theory is that the defendant occupied a given office, and the occupant had a duty (one attaching to any occupant of the office) to do such-and-such, then we have an "official capacity" suit. It avoids the immunities that apply to "individual capacity" suits but is likely to be brought up short by the eleventh amendment. If the theory is that the defendant did something that is tortious independent of the office the defendant holds, we have an "individual capacity" suit.

The plaintiff may plead a claim either way, and if he pleads what is naturally an official capacity suit as an individual capacity suit, he avoids the eleventh amendment but confronts a fatal problem—inability to prove personal responsibility. The plaintiff who says that the occupant of a given office should have done something (by virtue of office) but neglected to do it fails for two reasons: most provisions of the bill of rights do not forbid simple neglect . . . and the constitution does not make supervisory officeholders vicariously liable for the acts and omissions of their subordinates.⁴⁸⁹

Easterbrook was not satisfied to deny relief because of a tough reading of the eleventh amendment. Turning to the fourteenth amendment, he held that gross negligence as well as negligence was immunized behavior, basing that doctrinal expansion upon controversial theories of the Constitution and of choice. He first reduced the underlying tort doctrine to economic terms: negligence meant "that the costs of reducing the risks were less than the benefits," while gross negligence only signified "that the costs were substantially less than the anticipated benefits."⁴⁹⁰ He conceded one exception: state officials can be liable when the state has taken physical custody of the plaintiff, thereby becoming partially responsible for the plaintiff's well-being.⁴⁹¹ Prison officials, therefore, could be liable for negligently failing to protect a prisoner's health, but they could not be sued for negligently handling a prisoner's property.

488. *Id.*

489. *Id.* at 508.

490. *Id.* at 509.

491. *Id.* at 511. Posner, of course, designed a "Catch-22" for the law student.

Easterbrook justified limiting governmental liability to intentional acts by reiterating Posner's theory in *Bowers v. DeVito*: "The bill of rights is a charter of negative liberties."⁴⁹² Under this metatheory of the Constitution, the courts should totally defer to the resource allocations made by the markets and the political processes: "The level of safety to be provided by the police to the people—like the level of safety to be provided to the police and prison guards—is determined by political and economic forces, not by juries implementing the due process clause."⁴⁹³ Just like Posner in *Bowers*, Easterbrook did not discuss the Supreme Court's decision in *Plyler v. Doe*⁴⁹⁴ requiring the states to pay for the education of the children of illegal aliens. Easterbrook also failed to consider the cases holding that supervisors can be held liable under 42 U.S.C. § 1983 for the acts of their subordinates if they had poorly trained those employees, a potentially large exception premised upon recklessness.⁴⁹⁵

Easterbrook, in *Walker*, found additional substantive support in his theory of choice. The guards had assumed the risk: "But the state did not draft its guards; they enlisted, on terms they found satisfactory, and they were free to quit whenever they pleased."⁴⁹⁶ Easterbrook concluded this praise of choice with an analogy that seems callously cute, given the misery facing the guards' families: "[The State] may not throw Daniel into the lions' den, but if Daniel chooses to be a lion tamer in the state's circus, the state need not separate Daniel from his charges with an impenetrable shield."⁴⁹⁷ But Easterbrook, in effect, held far more; the State can send Daniel in with a shield of cardboard or fall asleep when Daniel begins to scream.

By characterizing all resource allocations and all "nonintentional" torts as unreviewable "tragic choices," Easterbrook has ignored the fact that there is an element of intent, of choice, in all tort law. We punish the negligent tortfeasor with damages because he or she acted "unreasonably." Failure to pay reasonable attention is a form of intention, of a state of mind. Perhaps we do not want always to hold the government to a pure negligence standard under the Constitution, just as we may not want to incorporate all contract law under the due process clause. But it does not follow that the states

492. *Id.* at 510 (citing *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982)). He also cited *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

493. *Walker*, 791 F.2d at 511.

494. 457 U.S. 202 (1982).

495. See, e.g., Oliver, *Municipal Liability for Police Misconduct Under 42 U.S.C. § 1983 After City of Oklahoma v. Tuttle*, 64 WASH. U.L.Q. 151 (1986).

496. *Walker*, 791 F.2d at 511.

497. *Id.*

should be immune whenever their omissions are total or their negligence is gross. Gross negligence is a proxy for an intentional tort, both in terms of proof and of moral responsibility. Such a standard is similar to concluding that recklessness can be malice in media libel cases.

Finally, Easterbrook's reasoning begs the crucial question when he attempts to distinguish prisoner health cases under the eighth amendment because the state is responsible for prisoners' well-being: When is the state responsible to others? Easterbrook may be correct in concluding that the plaintiffs have no "constitutional right to be protected from a safe working environment," but it does not follow that they have no constitutional protection from a totally unsafe, hopelessly ill-managed one. The guards may have assumed normal risks when they took inherently dangerous jobs, but they did not assume that their employers could be totally indifferent to their fate. They chose the job, but they did not choose to be completely unprotected by a new theory of immunity that did not exist when they accepted employment. Easterbrook should have remanded the case, ordering the jury to determine if the state officials acted recklessly or committed gross negligence (to the degree that the two torts differ).

In a dissent from a decision certifying a case to the Illinois Supreme Court for clarification of state law, *Citizens for John W. Moore v. Board of Election Commissioners*,⁴⁹⁸ Easterbrook expressed some reservations about existing eleventh amendment doctrine. He complained that the Supreme Court's requirement in *Pennhurst State School & Hospital v. Halderman*⁴⁹⁹ that only state courts can enjoin state officials for violations of state law "may force a federal court to reach constitutional issue[s] even though plausible state-law grounds are available for decision."⁵⁰⁰ Nevertheless, unlike Judge Bork in *Dronenburg*, the homosexual rights case, Easterbrook felt obligated to expand the doctrine when appropriate:

I must accept the law of sovereign immunity as it is, however, and if the logic of a decision compels its extension to a situation not expressly contemplated, a lower court must follow. There is no principled escape from the analysis that produces the dismal conclusion that our court cannot do anything constructive with the advice we have requested from the Supreme Court of Illinois.⁵⁰¹

Easterbrook also expressed reservations about the *Pullman* defense:

498. 781 F.2d 581 (7th Cir. 1986) (Easterbrook, J., dissenting).

499. 465 U.S. 89 (1984).

500. *Citizens for John W. Moore*, 781 F.2d at 585.

501. *Id.* at 586.

“abstention is an uncommon response to constitutional challenges to statutes.”⁵⁰²

When a couple sued several administrators of the Farmers Home Administration (FmHA) for failing to defer repayments, Easterbrook held that the defendants could not be sued for failure to administer properly a payment-deferral program: “Most of the Court’s cases deal with absolute immunity from tort liability. They hold that officials have immunity against damages for losses caused by acts within the duties of their office.”⁵⁰³ The judge once again used provocative language to explain when governmental defendants can be sued: “The defendants injured the Carsons by acting on an application for deferral, in the scope of the normal activities of their jobs, rather than (say) by shooting them.”⁵⁰⁴

Easterbrook explained that the source of the liability determines the scope of the immunity. Congress could create the scope of liability for statutes because it created the statutes. On the other hand, Congress could not define the scope of constitutional torts: “The political branches may not alter constitutional rules, and some rules were written into the fundamental law out of concern that the political branches would alter them if they could.”⁵⁰⁵ The Carsons, therefore, could proceed further with their first amendment claim and their procedural due process argument. As we shall see, they did not get very far.

B. *First Amendment*

Easterbrook quickly dismissed the Carsons’ argument that the FmHA had denied their request for deferral of payments in retaliation for exercising the right to free speech. The plaintiffs had “shouted down” the FmHA’s public auction. Such activity was not protected by the first amendment: “‘Shouting down’ an auction is noise, not speech [It] is the antithesis of speech. The first amendment does not protect loud noises that prevent others from speaking or hearing.”⁵⁰⁶

In his most important first amendment case, Judge Easterbrook jumped over several procedural defenses⁵⁰⁷ to void a statute outlawing

502. *Id.* at 587. Easterbrook also rejected a *Pullman* defense against a challenge to an anti-pornography statute. *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 106 S. Ct. 1172 (1986).

503. *Carson v. Block*, 790 F.2d 562, 564 (7th Cir. 1986).

504. *Id.* at 565.

505. *Id.*

506. *Id.* at 566.

507. *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 106 S. Ct.

“pornography” which the legislature defined as “sexually explicit subordination of women.” This definition included depictions of the “humiliation” and “domination” of women.⁵⁰⁸ Perhaps because he felt awkward protecting lewd merchandise, Easterbrook wrote a bewildering opinion. He first criticized the statutory language for being so vague that it could authorize vast censorship: “It is unclear how Indianapolis would treat works from James Joyce’s *Ulysses* to Homer’s *Iliad*; both depict women as submissive objects for conquest and domination.”⁵⁰⁹ He then condemned the statute for being impermissibly content-based. Professor Catherine MacKinnon, a feminist who believes that pornography is so hostile to women and so damaging that it should be outlawed, drafted the statute.⁵¹⁰ Easterbrook cited an article written by MacKinnon: “[I]f a woman is subjected, why should it matter that the work has other value?”⁵¹¹ Professor MacKinnon’s writings thus proved the content-based assumptions of the statute: “The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.”⁵¹²

Easterbrook then shifted gears by supporting MacKinnon’s proposition that pornography injures: “Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.”⁵¹³ In addition, courts should defer to legislative findings, even in sensitive first amendment cases: “[A]s judges we must accept the legislative resolution of such disputed empirical questions.”⁵¹⁴ Proof of some bad effects, however, cannot alone justify the law: “Seditious libel is protected speech

1172 (1986). Easterbrook held that because the booksellers had been injured, they clearly had standing and did not need to invoke the overbreadth doctrine. *Id.* at 327. He also held that the case was ripe even though the statute had not yet taken effect because “[w]e gain nothing by waiting.” *Id.* The court did not need to abstain under the *Pullman* doctrine. *Id.*

508. *Id.* at 324. Easterbrook decided two other cases raising first amendment issues. He did not have to resolve a first amendment claim a billboard company brought against restrictive legislation because the case could be resolved on statutory grounds. *National Advertising Co. v. City of Rolling Meadows*, 789 F.2d 571, 574 (7th Cir. 1986). His discussion of a candidate’s first amendment challenge to an election board’s invalidation of signatures needed to obtain a place on the ballot touched on whether to use the *Pullman* abstention doctrine. See *Citizens for John W. Moore v. Board of Election Comm’rs*, 781 F.2d 581 (7th Cir. 1986) (Easterbrook, J., dissenting).

509. *American Booksellers*, 771 F.2d at 325.

510. MacKinnon, *Pornography, Civil Rights, and Speed*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

511. *American Booksellers*, 771 F.2d at 325 (citing MacKinnon, *supra* note 510, at 21).

512. *Id.* at 325.

513. *Id.* at 329.

514. *Id.* at 329 n.2.

unless the danger is not only grave but also imminent."⁵¹⁵ Thus, it did not matter if MacKinnon's perspective might be true: "A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth."⁵¹⁶

Easterbrook's opinion fails to answer at least one major question. If a court is to defer to legislative findings of harm (and assumedly of imminence of harm), and if the court even agrees that harm exists, then why can't a city prohibit pornography if it is convinced that pornography is dangerous?

C. *Due Process*

1. PROCEDURAL DUE PROCESS

Judge Easterbrook found that a plaintiff who had had his car towed and could not get the car out of the impoundment lot after one month had a procedural due process claim: "[The] city must establish the process and tender an opportunity for a hearing; it may not sit back and wait for the aggrieved person to file a suit."⁵¹⁷ In a decision issued while sitting as a district court trial judge, Easterbrook held that unemployment insurance claimants had no due process rights to know about administrative rule changes as long as the rules were published: "The plaintiffs may well be right that Illinois should implement this approach as a matter of wise administration, but the Constitution does not require it."⁵¹⁸ Once again we see Easterbrook describe how courts cannot use the Constitution to implement justice or efficiency. He seems unsympathetic to Professor Lon Fuller's argument that law has its own procedural morality, including public notification.⁵¹⁹

The plaintiffs who sued because the FmHA had not deferred their mortgage payments also lost their due process argument.⁵²⁰ Easterbrook stated that because the general policy not to defer collection of payments was "legislative," not adjudicative, the plaintiffs had no right to an individual hearing.⁵²¹ Nor did the government have any due process duty to carry out the Act; otherwise, the due process clause would incorporate all existing federal law.⁵²² Finally, the plaintiffs had not lost any "property" because the government had

515. *Id.* at 329.

516. *Id.* at 330.

517. *Frier v. City of Vandalia*, 770 F.2d 699, 701 (7th Cir. 1985).

518. *Cosby v. Ward*, 625 F. Supp. 619, 637 (N.D. Ill. 1985).

519. L. FULLER, *THE MORALITY OF LAW* (1964).

520. *Carson v. Block*, 790 F.2d 562 (7th Cir. 1986).

521. *Id.* at 565.

522. *Id.*

discretion in granting deferrals. Easterbrook cited another Seventh Circuit opinion: "To the extent a request appeals to discretion rather than to rules, there is no property."⁵²³

2. SUBSTANTIVE DUE PROCESS

We have already seen how Easterbrook interpreted the governmental immunity doctrine to deny damages to the estates of prison guards who had been murdered during a prison riot.⁵²⁴ He adopted Posner's "charter of negative liberties" conception of the Constitution to limit the scope of the due process clause of the fourteenth amendment: "There is no solution within the reach of a federal court, no easy recourse in the due process clause of the fourteenth amendment. The state has many choices, all costly, many bound to end in tragedy for someone. It may make these tragic choices for itself."⁵²⁵ This flamboyant conclusion radically extended *Parratt*, which only immunized tragic blunders. Easterbrook's invocation of Professor Calabressi's notion of "tragic choices" was particularly inappropriate. Choice implies intent, which even Easterbrook agrees is an element of "deprivation under the fourteenth amendment." The immunization of some choices—ordinary negligence, for example—does not require the immunization of all choices—willful cruelty, for instance.

Judge Easterbrook even more clearly revealed his dislike of substantive due process in *Gumz v. Morrissette*,⁵²⁶ writing a lengthy concurrence to a decision in which the court held that the government had not used "excessive force" when it arrested the plaintiff.⁵²⁷ The majority held that the government had not "shocked the conscience" of the court because the plaintiff had not satisfied all three prongs of the "shock the conscience" test: (1) serious injury, (2) disproportionate force, and (3) malice.⁵²⁸ The state officials had not severely injured the plaintiff even though the plaintiff may have proven that the state had used disproportionate force and had acted maliciously.⁵²⁹

Easterbrook replied that courts should only apply a "reasonableness" test: if the arrest was "objectively reasonable" under the fourth amendment, the court should end its inquiry.⁵³⁰ Easterbrook provided two examples of unreasonableness: "A claim that the police never

523. *Scott v. Village of Kewaskum*, 786 F.2d 338, 340 (7th Cir. 1986).

524. *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986).

525. *Id.* at 517.

526. 772 F.2d 1395 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1644 (1986).

527. *Id.*

528. *Id.* at 1400.

529. *Id.* at 1401.

530. *Id.* at 1404.

made a lawful arrest, or that after arrest the police skipped trial on the way to the punishment, is within the central meaning of due process."⁵³¹ According to Easterbrook, the "reasonableness" test was not as vague as the three pronged "shock the conscience" test,⁵³² partially because a court did not have to examine motive to determine reasonableness. Motive inquiries frustrate attempts to create bright lines in an area where the system needs rules, not vague standards or balancing tests.⁵³³ Citing with approval Judge Bork's opinion in *Dronenburg v. Zech*,⁵³⁴ Easterbrook argued that lower courts should not expand the "shock the conscience" doctrine unless under the Supreme Court's explicit direction.⁵³⁵

Is Easterbrook's analysis inconsistent with some of his other opinions? In *Rowe*, he limited constitutional tort liability to intentional acts,⁵³⁶ thereby making motive the central inquiry, but in this case he decried the consideration of motive. He stated, in *Citizens for John W. Moore*,⁵³⁷ that the lower courts had a duty to expand Supreme Court doctrine in its logical direction, but here he refused to apply the "shock the conscience" test. Finally, in a dissent from an opinion holding that prosecutors cannot comment on defendant's silence in response to *Miranda* warnings, he argued that a court should determine if any error was "harmless" by using a balancing test, not bright lines: "I recognize that all of this has the makings of a bad stew. A cup of analogy to the exclusionary rule, . . . a slice of *Stone v. Powell*, a dollop of *Wainwright v. Sykes*, all seasoned by *Donnelly*. . . . Why scramble due process, preclusion of review, . . . ineffective assistance of counsel, and other doctrines? Why not keep things straight?"⁵³⁸ His answer to those rhetorical questions was that simplistic "dichotomous answers" can be dangerous. Standards, not formal rules, are better solutions.

Easterbrook's response to charges of inconsistency may be contained in *Gumz* itself. He loathed substantive due process: "The use of the Due Process Clauses to achieve substantive ends has no support

531. *Id.* at 1405.

532. *Id.* at 1406-07.

533. *Id.* at 1407.

534. 741 F.2d 1388 (D.C. Cir. 1984).

535. *Gumz*, 772 F.2d at 1406. Apparently Easterbrook would not agree with Judge Posner's natural law proposal to provide due process protection to "occupational liberty" because that expansion would take place under the fourteenth amendment. *Id.*

536. See *supra* notes 487-93 and accompanying text.

537. *Citizens for John W. Moore v. Board of Election Comm'rs*, 781 F.2d 581, 583 (7th Cir. 1986) (Easterbrook, J., dissenting).

538. *United States ex rel. Miller v. Greer*, 789 F.2d 438, 456 (7th Cir. 1986) (Easterbrook, J., dissenting).

in the language or history of the Constitution. The language speaks of process, not substance."⁵³⁹ Sounding somewhat like Attorney General Edwin Meese, Easterbrook noted that "rightly or wrongly" the fourth amendment had been incorporated through the fourteenth amendment to apply to the states.⁵⁴⁰ He then reduced existing substantive due process cases to their facts. *Moore v. City of East Cleveland* concerned "the use of substantive due process to vindicate 'traditional family values.'"⁵⁴¹ *Griswold*, *Eisenstadt*, and *Roe* only protected "bodily integrity."⁵⁴² Nor can the plaintiff allege a deprivation of "liberty" because citizens have no liberty interest to be free from state action that "shocks."⁵⁴³ Easterbrook supported this startling conclusion by stating that the Constitution does not provide as much protection as tort law. The plaintiff may have a remedy in state court for random deprivations, but can only win in federal court if he or she can prove that state law authorized the challenged activity.⁵⁴⁴

Easterbrook's reservations about incorporation are disturbing. Without incorporation, the Supreme Court erred in holding that the District of Columbia violated due process by segregating schools.⁵⁴⁵ If the Court should not have incorporated the fourth amendment, perhaps it also made a mistake in applying the first amendment to the states. Attorney Floyd Abrams recently presented some potential repercussions if the Court were to adopt the Meese/Easterbrook theory opposing incorporation of the Bill of Rights into the fourteenth amendment via the due process clause: "[T]he Constitution [would permit] New York to ban newspapers, California to establish a state religion and Kansas to deny its citizens the right to assemble for the purpose of protesting governmental misconduct."⁵⁴⁶ This already lengthy article is, however, not the place to wage that major war. I primarily wanted to demonstrate how Easterbrook varies his analysis depending upon the underlying substantive issues. In other words, he has been as "result-oriented," "unprincipled," and "nonneutral" as the liberals he and his colleagues have so often criticized on those very grounds. He is not thereby guilty of improper methodology; judges should sometimes use balancing tests and at other times draw bright

539. *Gumz*, 772 F.2d at 1405.

540. *Id.* at 1406.

541. *Id.* at 1405.

542. *Id.* ("[T]he Court resurrected [substantive due process] to protect a new constellation of values, . . . family, procreation, and privacy.").

543. *Id.* at 1408.

544. *Id.* at 1409.

545. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

546. Abrams, *Mr. Meese Caricatures the Constitution*, N.Y. Times, July 25, 1986, at A23, col. 2.

lines.⁵⁴⁷

VII. WINTER

Judge Winter's opinions have been mercifully short; they are not filled with elaborate constitutional theorizing. Although his opinions on civil rights have been quite "conservative," he has been remarkably sympathetic to criminal defendants. It is hard to imagine any of the other four judges writing the following statement while ruling in favor of a criminal defendant: "Whether because of the imperatives of the adversary system or *intuitive judgments about fairness*, acts or statements of parties, when offered by their adversaries, are not subjected to tests uniformly imposed upon non-party witnesses."⁵⁴⁸

A. *Access to Courts*

A group of social security recipients challenged termination of their benefits by arguing that the government had not determined that their condition had improved, although it was legally required to do so. Even though they were receiving interim benefits, they sought immediate relief in federal court while their claims were pending in the administrative process. Winter held that they first had to exhaust those administrative procedures: "We affirm on the ground of lack of jurisdiction because neither the named individuals nor the certified class have had their benefits terminated and exhausted the available review procedures."⁵⁴⁹ Because they were receiving interim benefits, the plaintiffs were not being irreparably injured.⁵⁵⁰ Nor could the plaintiffs claim that the administrative proceedings were totally futile. They could not claim jurisdiction under § 1343 because the Social Security Act is not legislation that secures "equal rights."⁵⁵¹ Finally, requiring the plaintiffs to exhaust their administrative remedies was appropriate because the issue would be less abstract if presented to the court after administrative proceedings and all parties would have a better idea of what "improvement" meant.⁵⁵² Winter's analysis seems reasonable, given the lack of immediate injury to the plaintiffs.

547. See, e.g., Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431 (1985).

548. *Brink's Inc. v. City of New York*, 717 F.2d 700, 718 (2d Cir. 1983) (Winter, J., dissenting) (emphasis added).

549. *Smith v. Schweiker*, 709 F.2d 777, 779 (2d Cir. 1983).

550. *Id.* at 781.

551. *Id.* at 780.

552. *Id.* at 780-81.

B. *First Amendment*

A cable television company argued that it should be able to broadcast the trial of General Westmoreland's libel suit against CBS. The Second Circuit held that a television company had no right to broadcast trials in federal court, even if all parties consented: "[T]elevision coverage of federal trials is a right created by consent of the judiciary, which has always had control over the courtrooms"⁵⁵³

Winter, in a concurring opinion, explained why the parties' consent was insufficient: "Even a request . . . might put unfair pressure on them lest opposition to television be revealed to the jury, which might then draw an improper inference."⁵⁵⁴ The courts need not prove that injury will occur; they can implement time, place, and manner *per se* exclusions because "the potentially undesirable effects of television cannot be detected, or detected in a timely fashion . . . on a case-by-case basis"⁵⁵⁵ This decision, like Judge Scalia's refusal to grant reporters access to pretrial documents, is consistent with Professor Dworkin's theory that the media has no unique right to access to courts.⁵⁵⁶

Although he decided the case on statutory grounds, Winter wrote an opinion in favor of union dissidents which reveals his sympathy for values underlying the first amendment. He held that the union cannot itself decide to suspend someone for disruption and slander:

We believe that a union may not validly discipline a member upon charges and a record which include accusations against union officers as an essential element. To hold otherwise would seriously undercut the protection offered by *Salzhandler v. Caputo* and substantially chill the exercise of union members' rights by increasing the danger of subterfuge.⁵⁵⁷

C. *Due Process*

The proprietors of a nursing home, in *Oberlander v. Perales*, argued that they had a due process right to a hearing before the state could alter their Medicaid reimbursement rates.⁵⁵⁸ Judge Winter used

553. *Westmoreland v. Columbia Broadcasting Sys., Inc.*, 752 F.2d 16, 24 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 3478 (1985).

554. *Id.* at 26 (Winter, J., concurring).

555. *Id.*

556. *See supra* note 89 and accompanying text.

557. *Petramale v. Local No. 17 of Laborers Int'l Union*, 736 F.2d 13, 18 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 593 (1985).

558. *Oberlander v. Perales*, 740 F.2d 116 (2d Cir. 1984).

a variety of arguments to repudiate the plaintiffs' theory. First, the plaintiffs had no property interest in future reimbursements.⁵⁵⁹ Second, they had received adequate notice, had had a chance for an administrative proceeding before any final set-off, and had the right to state judicial review.⁵⁶⁰ Winter then added a fourth prong, deference, to the *Mathews v. Eldridge*⁵⁶¹ three-prong balancing test, which weighs (1) the plaintiff's interest, (2) the risk of erroneous deprivation under existing procedures and probable value of additional safeguards, and (3) the interest of the government. "*Mathews* cautions that 'substantial weight must be given to the good-faith judgments of the individuals charged . . . with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.'"⁵⁶²

Winter also dismissed a doctor's due process attack on notice he received questioning his Medicaid reimbursement requests: "The Constitution does not require the detailed notice of a common law pleading."⁵⁶³ Sounding like Judge Easterbrook, Winter applied an "objective" test to the administrative notice: "[A]ny reasonable person in Dr. Rand's position would have instantly recognized that pending reimbursement claims might be affected"⁵⁶⁴ Winter wittily observed that the doctor, who may have admitted fraud, was really upset about the underlying investigation: "[T]he prospect of testifying in an administrative inquiry about some of the claims which he now wraps in the Constitution must have seemed to Dr. Rand at the time too much process rather than too little."⁵⁶⁵

Winter had little patience for a plaintiff who had previously filed over 250 suits on his own behalf and had frequently made vicious, anti-Semitic claims. The plaintiff failed on his due process claim because he had had adequate notice, and thus no excuse for failing to attend a hearing where the trial judge ruled against him.⁵⁶⁶ Winter concluded that such a plaintiff could be enjoined from suing in fed-

559. *Id.* at 120. Winter noted that other plaintiffs would receive more protection because of the nature of their interest: "Absent an emergency, a hearing is required prior to the final destruction of tangible property." *Id.* at 122. He also explained why welfare recipients were entitled to more relief: "In both *Mathews* and *Goldberg* the private parties faced complete termination of the income stream at issue." *Id.* at 121.

560. *Id.*

561. 424 U.S. 319 (1976).

562. *Oberlander*, 740 F.2d at 121 (quoting *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

563. *Rand v. Perales*, 737 F.2d 257, 260 (2d Cir. 1984).

564. *Id.*

565. *Id.* at 261.

566. *In re Martin-Trigona*, 737 F.2d 1254, 1260 (2d Cir. 1984), *cert. denied*, 106 S. Ct. 807 (1986).

eral court because “[f]ederal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions.”⁵⁶⁷ The court, therefore, could protect from additional litigation those who had participated in prior cases against the plaintiff, whose tactics “chill litigants from seeking relief to which they are entitled.”⁵⁶⁸ Nevertheless, the trial judge should not have enjoined the plaintiff from using state courts, although the judge could require him to give those courts notice of the federal injunction.⁵⁶⁹ Winter also provided the plaintiff with a small loop-hole; the plaintiff could still use 28 U.S.C. § 372 to appeal complaints relating to judicial misconduct.⁵⁷⁰

D. *Equal Protection*

Like Judge Posner, Judge Winter has expressed judicial reservations about aggressive use of affirmative action. In *EEOC v. Local 638*,⁵⁷¹ he dissented from an opinion which affirmed a trial court decision to hold a union in contempt for failing to comply with an affirmative action plan. The union had not met a goal of twenty-nine percent minority membership. Winter complained that “[t]his holding transforms the 29% figure from a goal guiding the administrator’s decisions into an inflexible racial quota.”⁵⁷² He added that the union’s behavior was not very contemptuous because an administrator had been primarily responsible: certain classes of workers included many minority members; the trial court misunderstood the statistics; and “[t]he claim of under utilization was not even raised by the plaintiffs in their motion for contempt.”⁵⁷³ Winter elaborated on the significance of lack of demand for union workers: “[I]n light of the facts that large numbers of journeymen did not work during the period in question or worked only meager hours, reactive finger pointing at Local 28 is a faintly camouflaged holding that journeymen should have been replaced by minority apprentices on a strictly racial basis.”⁵⁷⁴

Winter explained that the Supreme Court had found such quotas were “of questionable constitutional validity” and were not appropri-

567. *Id.* at 1261.

568. *Id.*

569. *Id.* at 1263.

570. *Id.*

571. *EEOC v. Local 638 . . . Local 28 of Sheet Metal Workers*, 753 F.2d 1172 (2d Cir. 1985) (Winter, J., dissenting).

572. *Id.* at 1189.

573. *Id.* at 1191.

574. *Id.* at 1193.

ate remedies under Title VII.⁵⁷⁵ Even if one disagrees with his decision, Winter's holding seemed consistent with existing Supreme Court precedent, particularly Justice Powell's rejection of racial quotas in *Bakke*.⁵⁷⁶ The Supreme Court, however, has recently decided that the district court had acted within its remedial discretion in instituting racial preferences to remedy past discrimination.⁵⁷⁷

In *Parent Association of Andrew Jackson High School v. Ambach*,⁵⁷⁸ Winter faced the ticklish constitutional issue of setting racial quotas to prevent whites from leaving schools that become heavily populated with minorities. In his dissent from an opinion holding that the case should be remanded to determine if such a quota was needed, Winter complained that the School Board should prevail because the plan was voluntary.⁵⁷⁹ He stated that the majority's decision to remand was based upon the false premise that any plan had to be the best possible plan. In fact, the school board did not have to offer the best plan because it had never acted unconstitutionally.⁵⁸⁰ The Board, because it had never acted illegally, did not have to meet rigorous burdens of proof. The Board satisfied its burden of proof in this case because it is so difficult to predict "tipping points."⁵⁸¹ Furthermore, reviewing such voluntary plans will deter other school boards from initiating similar efforts to better integrate their schools.

The "tipping" issue is a fantastically complex problem, one that cannot be adequately explored in a survey such as this. For instance, the constitutionality of the "tipping" may vary depending upon the institution; Professor Bell hypothesized that the Supreme Court might defer to a law school faculty which limited the number of black law professors after the faculty already had a greater percentage of black academics than the percentage of blacks in the general population.⁵⁸² Can or must blacks have it both ways: gaining access to positions even if they are not the best qualified under existing criteria, but having a right to such positions whenever they meet those criteria?

Even if one agrees that because of this country's history of slavery and racism, blacks should have special access to skilled positions,

575. *Id.* at 1194 (citing *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984)).

576. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

577. *Local 28 of Sheet Metal Workers' v. EEOC*, 106 S. Ct. 3019 (1986); see also *Local Number 93 v. City of Cleveland*, 106 S. Ct. 3063 (1986); *Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F.2d 705 (2d Cir. 1979); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973).

578. 738 F.2d 574 (2d Cir. 1984).

579. *Id.* at 584 (Winter, J., dissenting).

580. *Id.*

581. *Id.*

582. Bell, *Foreward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 39-57 (1985).

one need not accept the same argument with respect to the racial mix of schools. We cannot fully evaluate Winter's decision without determining whether the Constitution requires integration, quality education, equal access, colorblindness, and/or quality integrated education. Should courts ignore the predictable effects of battling racism—white flight—particularly when an “innocent” school board is voluntarily increasing integration? We also have to reconsider the “intent” element in the equal protection doctrine. What is the duty of those who thereby cannot be proven to have acted illegally because of the intent doctrine, but who may in fact have been participants in a racist process? Winter may be correct to defer to a school board that does not need to integrate further but has been willing to increase integration so long as schools do not “tip.” Regardless of whether he is right or wrong, analysis of the problem is not simplified by the conservative platitude that the Constitution is “colorblind.”⁵⁸³ Winter has to explain how he can oppose affirmative action on the grounds that it is not colorblind,⁵⁸⁴ but support integration quotas, which also are not colorblind. The question of race, thus, is not one of blindness, but of vision.

E. Government Structure

Winter has not been extremely deferential to state power. He dissented in *Battipaglia v. New York State Liquor Authority* from a decision, partially relying upon the twenty-first amendment, which held that states can require that liquor prices be published, and that the level of prices be maintained for thirty days.⁵⁸⁵ Winter began his rebuttal by noting that such price maintenance would be illegal if done by a private party.⁵⁸⁶ He found there was no “state action” defense because the state did not actively supervise the lists.⁵⁸⁷ He dismissed the constitutional argument on historical grounds: “Since the twenty-first amendment was plainly designed only to allow the

583. This word is lifted from Justice Harlan's famous dissent in *Plessy v. Ferguson*. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

584. As an academic, Winter attacked affirmative action: “[P]ursuit of equality in the modern sense undermines social stability, threatens the democratic political process, and imposes unacceptable economic costs.” Winter, *Changing Concepts of Equality: From Equality Before the Law to the Welfare State*, 1979 WASH. U.L.Q. 741, 741.

585. *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166 (2d Cir. 1984), cert. denied, 105 S. Ct. 1393 (1985).

586. *Id.* at 179 (Winter, J., dissenting). Winter cited Bork to help explain the scope of antitrust law: “[T]o hold otherwise is to forbid states from authorizing resale price maintenance, the anticompetitive effect of which is the subject of great controversy, but to allow them to authorize horizontal price fixing, about which all agree.” *Id.* at 179 (citing R. BORK, *THE ANTITRUST PARADOX* 289-91 (1978)).

587. *Id.* at 180.

states to legislate against the evils of intoxicating liquors rather than to reward its purveyors, I see no room for its application in the present case."⁵⁸⁸

Winter did hold that a state can regulate out-of-state debt collectors without violating the dormant commerce clause in *Silver v. Woolf*.⁵⁸⁹ The collectors were not enforcing their own contracts; their activity resembled unauthorized practice of law.⁵⁹⁰ The Supreme Court has not created a *per se* rule against licensing of interstate business; this regulation was a narrow standard under an already heavily regulated business.⁵⁹¹ But most importantly, the state was operating under authorization by federal law: "A state law which a federal court might invalidate where Congress is silent will thus be upheld where Congress has indicated its desire to allow the states to act."⁵⁹² Winter dismissed as "totally speculative" the plaintiff's alternative argument that the regulations violated the dormant commerce clause by being too burdensome.⁵⁹³

VIII. CONCLUSION

Many legal scholars have recently turned to literary theory and literature for a richer understanding of the law. For instance, Professor Robin West argued that Judge Posner's glorification of choice leads to the tragic universe portrayed by Franz Kafka in his novels and short stories.⁵⁹⁴ Professor Ronald Dworkin has written that the starting points of any legal opinion—constitutions, statutes, and/or precedents—are "texts" that the judge must "interpret." A judge therefore cannot and should not, be bound by the words of the text and the author's intent; the judge must try to turn the text into the best possible interpretation of the law.⁵⁹⁵ Professor Clare Dalton has "deconstructed" contract law.⁵⁹⁶

I have no quarrel with such enterprises—our legal system will atrophy if it does not continually incorporate a fuller understanding of the human condition. But such inquiries have the potential to obscure a fundamental difference between law and art. In law, people

588. *Id.*

589. *Silver v. Woolf*, 694 F.2d 8 (2d Cir. 1982).

590. *Id.* at 12.

591. *Id.* at 11.

592. *Id.* at 13.

593. *Id.* at 14.

594. West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

595. R. DWORKIN, *LAW'S EMPIRE* (1986).

596. Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

are hurt. We thus should devise different standards for legal decisions than for aesthetic masterpieces. I find much to admire in *Birth of a Nation*. *Plessy v. Ferguson*,⁵⁹⁷ however, is an unmitigated disgrace.

We also need to remember that law review articles fall somewhere between legal opinions and art. On one level, they are aesthetic, philosophical inquiries into the nature of the "good." But they are far closer than art to the law and to the pain it distributes and regulates. They usually advise the judges on how to decide specific issues. Thus, I did not react severely when I finished my first article comparing the academic writings of these five judges with the views of Edmund Burke. Although I frequently disagreed with the five judges, I admired their analytical and rhetorical skills. Sometimes they wrote quite well, and occasionally they made me change my opinion or at least lessened the intensity of my previously held beliefs. I also could chuckle at trying to out-manuever them by using one of their intellectual leaders, Edmund Burke, as a foil. Obviously we were playing with more than glass beads, but at least nobody was being immediately injured. Only a mood was being set.

Working through the opinions in this sequel has been another story—a slow, depressing survey of the continued withering of the Constitution. The conservatives are winning the constitutional debate where it matters—in the regulation of the daily lives of the citizenry.

So why was the article entitled "*Constraints of Power*"? First of all, to remind anxious liberals that these five men have not been alien monsters, laying waste to all rights. None of them criticized *Brown v. Board of Education*,⁵⁹⁸ for instance. All of them have rejected some state regulations of the content of speech. In short, we had better hope that these judges, along with all the others, are somewhat constrained, internally and externally. Although they continue to use many of the same analytical tools they applied while in the academy, they have altered those views in the face of Supreme Court precedent.

We liberals should also take some comfort from the differences among the five jurists. After all, these modern conservatives have not resolved the proper relationship between freedom and authority any more successfully than liberals. They are torn between moralism, free marketeering, statism, positivism, libertarianism, and historicism. Bork may be a positivist, but he provided some significant first amendment protection. Posner expressed disturbing views about families, but offered a powerful foundation for procedural due process.

597. 163 U.S. 537 (1896).

598. 347 U.S. 483 (1954).

Winter was willing to protect criminal defendants from excessive prosecutorial discretion. Scalia at least joined Bork in requiring a satirical poster to be displayed in a subway. Easterbrook struck down an antipornography statute for being content-based.

The opinions are not uniformly hostile to contemporary liberal values. At least as circuit court judges, the five jurists have usually acted within existing precedent, although they have occasionally expressed regrets. Many of their decisions were properly decided—not every constitutional plaintiff should win. Sometimes they creatively expanded or redefined rights.

The overall direction of these opinions, however, is clear: individual constitutional rights are the exception, grudgingly given. After all, these men believe that judicial review is presumptively illegitimate. On a more political level, they have been powerful advocates for the contemporary right-wing. As stated in the Introduction, President Reagan has to be pleased with the overall record of these five men. One need only look at the recent appointment of Judge Scalia to the Supreme Court of the United States.