

University of Miami Law Review

Volume 33
Number 1 *The Third Annual Baron de Hirsh
Meyer Lecture Series*

Article 6

11-1-1978

The Judging Class

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Recommended Citation

Kenneth M. Casebeer, *The Judging Class*, 33 U. Miami L. Rev. 59 (1978)
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COMMENTARY

The Judging Glass

KENNETH M. CASEBEER*

The author traces the common thread running through the analysis of judicial review by the symposium speakers. He posits that while all three speakers support equally activist positions, their allegiance to divergent values and political theories results in their opposed statements on the activist debate. He compares the dialogue in this symposium to that of the Justices in the 1940's, which discourse explicitly was grounded in a struggle over values. The author concludes that courts must structure the form of their opinions in a manner which clearly demonstrates the relationship between the chosen social values and the resulting decision.

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" " "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less." " "

—Burger, C.J. (1978)†

" " "The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all." " "

—Frankfurter, J. (1948)††

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† *TVA v. Hill*, 98 S. Ct. 2279, 2291 n.18 (1978) (Burger, C.J.) (quoting L. CARROLL, *Through the Looking-Glass*, in *LOGICAL NONSENSE* 205 (1934) [hereinafter cited as *LOGICAL NONSENSE*]).

†† *Shapiro v. United States*, 335 U.S. 1, 43 n.5 (1948) (Frankfurter, J., dissenting) (quoting *LOGICAL NONSENSE* *supra* note †, at 205).

I. INTRODUCTION: "WHEN I USE A WORD"

Twice during the last term,¹ Supreme Court Justices hurled Lewis Carroll² at a brother Justice for inventing statutory constructions with which they disagreed. Certainly, the motivation behind the familiar accusations provokes little surprise. The accusers perceived that the judiciary had displaced another, more appropriate, policymaker by abusing the linguistic interpretation necessary in the judicial function. Little more appears remarkable in the selection of literary epithet.³ Indeed, the debate over the propriety of judicial autonomy in its decisionmaking function may be ever-present, and the recourse to childhood favorites periodic. However, the selection of Humpty Dumpty's wisdom chosen by Justices Burger and Frankfurter as their respective foils should arouse more curiosity, for the passages themselves symbolize a difference in the periods of time within which these men wrote. Chief Justice Burger, in 1978, implied that Humpty Dumpty and those who think like the egg are unfit to assume judicial robes; Justice Frankfurter, in 1948, implied only that the judge, like the egg, should not lose his or her balance from bench or wall. In the contexts from which the quotations are taken, it appears that more than literary taste underlies the distinction in selections. Justice Frankfurter's judges must consciously refrain from overreaching their sphere of mastery; they cannot deny that their actions can only be chosen by *individuals* with subjective perceptions of reality.⁴ Chief Justice Burger assumed that

1. *TVA v. Hill*, 98 S. Ct. 2279, 2291 n.18 (1978) (Burger, C.J.); *Adamo Wrecking Co. v. Bell*, 98 S. Ct. 566, 572 (1978) (Rehnquist, J.).

2. Lewis Carroll was the *nom de plume* of Charles Dodgson. While Carroll maintained that his books "meant" nothing, he once remarked: "Still, you know, words mean more than we mean to express when we use them; so a whole book ought to mean a great deal more than the writer means." *ASPECTS OF ALICE* xxi (R. Phillips ed. 1971). More recently, however, some critics have come to regard Carroll's works as an antiestablishment commentary. *Id.* at xxii.

3. For a few instances in which Supreme Court Justices have alluded to or relied upon the words of Humpty Dumpty to support their arguments, see *TVA v. Hill*, 98 S. Ct. 2279, 2291 n.18 (1978); *Adamo Wrecking Co. v. Bell*, 98 S. Ct. 566, 572 (1978); *Zachernig v. Miller*, 389 U.S. 429, 435 n.6 (1968) (quoting 55 CALIF. L. REV. 592, 594-95 n.10 (1967)) (comparing a leading Soviet jurist's construction of a statute with Humpty Dumpty's advice on the use of words).

4. Justice Frankfurter stated his view thusly:

Construction, no doubt, is not a mechanical process and even when most scrupulously pursued by judges may not wholly escape some retrospective infusion so that the line between interpretation and substitution is sometimes thin. But there is a difference between reading what is and rewriting it. The Court here does not adhere to the text but deletes and reshapes it. Such literary freewheeling is hardly justified by the assumption that Congress would have so expressed it if it had given the matter attentive consideration.

Shapiro v. United States, 335 U.S. 1, 42-43 (1948) (Frankfurter, J., dissenting).

courts possess a method or benchmark enabling them to discharge their decisionmaking function divorced from personal proclivities.⁵

The Justice of thirty years earlier faced the pitfalls of linguistic argument and divined only the need to justify his power to reach his conclusions, while the Justice of today perceives the same manipulation of language as political interloping and as an occasion to imitate the Red Queen.⁶ Perhaps this difference of statement marks Chief Justice Burger's attempt to learn from his perception of the errors of the past. Whether that is his intention or not, the progression from Frankfurter to Burger obscures an insight into the judicial process which Justice Frankfurter recognized and Chief Justice Burger overlooked. Burger masks the actual workings of the judicial institution by defining an artificial and impossible ideal role for those who would be judges.

The Third Annual Baron de Hirsch Meyer Lecture Series presents a contemporary opportunity to examine the judicial role and the differences in judicial norm implied by Justices Burger and Frankfurter. While the topic may suggest that modern society assumes the necessity of some litigation over individual rights, none of the speakers treated as entirely settled the appropriate occasions for conducting adversary proceedings. On the surface, their differences reflect divergent assumptions about the degree of necessity for and utility of judicial framing of social policy. No speaker began by *assuming* that judges always make policy—that the techniques which set policy within the interpretation of law and the justification of policies thus authored were more interesting than the aged question of “judicial activism.” One speaker, Justice Rehnquist, denied an intention to address “activism,” although the assumptions implicit in his presentation logically lead toward a position on the issue.

Since the topic of judicial activism continues to dominate legal consciousness after more than thirty years of argument, one immediately wonders whether the judicial statements of an earlier day, like Justice Frankfurter's rehearsal of Carroll's tale, were also two lines ahead of the discussion at this symposium.⁷ Perhaps the ne-

5. This assumption is implicit in Chief Justice Burger's statement that: “Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute.” *TVA v. Hill*, 98 S. Ct. 2279, 2302 (1978).

6. The Red Queen's universal panacea was: “Off with his head.” *E.g.*, LOGICAL NON-SENSE, *supra* note †, at 119.

7. See note 93 and accompanying text *infra*. Justice Frankfurter's selection of Humpty Dumpty's wisdom immediately follows the sentence chosen by Chief Justice Burger in the Carroll story.

cessity to construct a new workable judicial methodology to meet the shifting social and political demands occasioned by the "Great Depression" forced Justice Frankfurter and his colleagues to a closer experience of the essential *craft* of judgment. Perhaps public pressure for new interpretations of legal text sensitized justices, already under public scrutiny in the aftermath of Roosevelt's Court-Packing Plan, to an acute awareness of the limits of justifiable interpretation and to an emphasis on justification in their decisions. But more than the recovery of the perspective of a more sensitive past era, perhaps any resort to Lewis Carroll points to a deeper concern than that intended by Justices Frankfurter and Burger. Ultimately of greater significance than the difference between Justices Burger and Frankfurter in their brief examination, through the words of Humpty Dumpty, of the propriety of broad, "active" interpretation, the opportunities of language about which Humpty Dumpty pontificated to Alice suggest that the "activism" debate misleads those who engage in it by the simplifying assumptions of its very terms.⁸ The debate assumes that judges can minimize the degree of their interpretation of legal text and, therefore, that the notion of "a little bit of interpretation" has some conceptual significance. Unlike the Justices who quote him, Humpty Dumpty lectures Alice that the question of interpretation must be the potential meaning of the text and not the meaningless notion of the degree of interpretive exercise. In judicial opinions, any controversial judgment, from characterizing a factual report to reading precedent, from statutory construction to constitutional interpretation, embodies phenomena transformed into a set of symbols, a linguistic form suitable for legal reasoning. As if caught precariously under a *judging glass*, dynamic experience, life, forced into static word pictures squirms while each justice, with his or her subjective focus, strives to determine the positioning of the glass.

The overarching object of inquiry in this comment is to explicate the metaphor, the judging glass: to take its measure from different angles, as if turning the glass to catch the changing light; to determine the centrality of its functioning to the judicial institution.

Methodologically, the argument will always proceed at simultaneous levels. While the search for the judging glass constitutes the unifying theme of this comment, there are three different angles of view progressively focused on the glass which are presented in separate sections of the article and which can be read independently as

8. See Tribe, *Seven Pluralist Fallacies: In Defense of the Adversary Process—a Reply to Justice Rehnquist*, 33 U. MIAMI L. REV. 43 (1978).

well. These three subordinate themes: (1) explain the common relationship among the three symposium participants, concluding that only Judge Friendly passes beyond the traditional argument about activism and suggesting the reasons for Justice Rehnquist's and Professor Tribe's less fruitful focus; (2) compare Justice Rehnquist's and Professor Tribe's disagreement to the modern beginnings of the judicial activism debate in the 1940's through the vehicle of *West Virginia State Board of Education v. Barnette*⁹ in order to recover an earlier model of the judiciary; and (3) suggest that clarity and improved decisionmaking would result from recapturing one of the unanswered problems left by the 1940's statement of the debate, specifically, the need to explain and justify the level of generality with which the situation *and* interests of the litigants are transformed into legal propositions or putative rights.¹⁰ Read together, the subordinate themes assert that correct understanding of the Humpty Dumpty metaphor eliminates the empty epithet of activism and identifies the judging glass as the touchstone of judicial method. When judges exercise their role of pronouncing "judgment," when they operate as appropriate "masters" of their craft, they *simultaneously* justify the making of social policy inherent in the interpretation of legal standards and explain the manipulation of the facts taken by them to represent the underlying dispute. Judges as individuals may decide to terminate litigations on the basis of gut reaction, random chance, political payoffs, formal deductions or their breakfast menus; judges as judges arbitrate the meaning and thus the values a *society* at any given point will discover in the society's notion of law.

The interesting question for the Third Annual Baron de Hirsch Meyer Lectures should have been the adequacy of the social values articulated through this judicial *process*, not the degree of governmental activity identified as intrusion into another actor's domain. This commentary puzzles about this failure and the legal, political and social assumptions behind the foregone opportunity to move beyond the activism debate.

As a commentary, the article engages in speculation more than it proclaims any tightly proven propositions or final definitions. The shortcuts, overstatements and hindsight which result from these speculations surely cheat the main speakers of the same luxury of selective focus. However, their indulgence and that of the reader will be asked in the name of dialogue and with a great deal of admiration

9. 319 U.S. 624 (1943).

10. See text accompanying notes 93 to 108 *infra*.

for the skill and learning illustrated by all three speakers. Particular appreciation should be expressed to Justice Rehnquist for the candor and sophistication with which, as a sitting Justice, he articulated his juridical beliefs and opened himself to public view.

II. JUDICIAL HUMILITY AND THE SCORNFUL TONE—A COMMON GROUND

All the participants began their presentations by voicing discomfort over the ambiguity and breadth of the symposium's title.¹¹ Attempting to find a common link among the three, therefore, requires doing each an injustice by failing to emphasize important contributions made by the individual speakers, by generalizing specific arguments into a common level of discourse on points which were not addressed by all and by seeking shared social and political assumptions. Justice Rehnquist, however, sets a tone for the symposium discernible in all three lead articles: "[S]omething can be gained by looking at the subject in a purely jurisprudential way. . . . I will try to take the measure of our adversary system as a useful tool in the maintenance of a good society or the building of a better society."¹²

Given the topic of the symposium, this passage suggests: first, that the judiciary functions as a branch of government primarily to resolve personal disputes, disputes between private parties or a person and government; and second, that the instrumental value of this method of disposing of social disputes as a problem for government should be the measure of both what kinds of disruptions of order are appropriately cast as adversarial, and how well judges do their jobs. Surely, these are rather standard assumptions.¹³ Yet, while the societal need for some dispute resolution machinery defines a role for the judiciary, in that judges only act at the request of specific disputing parties (a formal requirement reflected in jurisdiction or justiciability doctrine¹⁴), the judicial function potentially comprehends

11. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21; Rehnquist, *The Adversary Society: Keynote Address of the Third Annual Baron de Hirsch Meyer Lecture Series*, 33 U. MIAMI L. REV. 1; Address by Professor Laurence Tribe, Third Annual Baron de Hirsch Meyer Lecture Series 40 (February 2, 1978) (transcript on file at the University of Miami Law Review).

12. Rehnquist, *supra* note 11, at 2.

13. See generally E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-8, 102-04 (1970); K. LLEWELLYN, THE BRAMBLE BUSH 11-24 (1973); Llewellyn, *Law and the Social Sciences—especially Sociology*, 62 HARV. L. REV. 1286, 1291-92; H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1-9, 112-29 (Tent. ed., 1958) (Harvard Law School).

14. By these formal requirements, I refer to the procedural requirements a litigant must meet in order to have his case heard in federal court, for example, the "case or controversy" requirement imposed by article III of the Constitution. I mean to take no stand on the actual

more than the resolution of a particular dispute.¹⁵ Two questions immediately arise. First, to what extent did each speaker understand his argument, as did Justice Rehnquist, as an instrumental evaluation¹⁶ of the adversary process? Second, to what extent does this potential parallelism of critical attitude towards the actions of judges imply a preoccupation with judicial activism in all jurisprudential analysis of the judicial institution? Answers to these questions require a considerable reconstruction of the lead articles, but once their ideas can be juxtaposed at the same level of discourse, the speakers evince a richly disparate and sophisticated controversy.

A. *Judging the Value of What Judges Do*

Justice Rehnquist explicitly evaluated the adversary process in instrumental terms. He would weigh the costs and benefits of recourse to an adversary process in each case as a sufficient consideration to restrict the use of litigation in contexts which otherwise meet all the formal prerequisites of the adversary process.¹⁷ What then defines the elements or variables of this cost-benefit calculus?

First, although he noted a distinction between disputes about social problems "the dimensions of which exceed the importance of the resolution of the particular controversy to those immediately embroiled in it,"¹⁸ and purely two-party litigation,¹⁹ Justice Rehnquist saw no reason categorically to exclude social problems from courts.²⁰ Rather, his concern lay with the costs of using the judicial

requirements or the extent to which such procedural prerequisites can be, or should be, manipulated.

15. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 459-543 (1961) (Frankfurter, J., dissenting) (discussing the relationship of social mores and legislation as reflected in constitutional litigation).

16. I use the term "instrumental" to mean purpose or goal-oriented or, as Professor Tribe expressed it, "that form of rationality [in this case, evaluation] which seeks to discriminate among alternative actions by assessing their comparative tendency to advance or to retard the achievement of the actor's goals or values." Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 618 (1973) (emphasis omitted).

17. "I am suggesting that the 'adversary system' with its use of litigation is not capable of being valued in gross, and that its uncritical expansion is demanded neither by Bracton's maxim nor by the general principles we associate with a government of law." Rehnquist, *supra* note 11, at 3.

18. *Id.* at 2.

19. Of course, even two-party disputes, given the force of precedent, decide issues for the classes of individuals of which the parties are representatives and to that extent always concern "social problems." See Fuller, *Adjudication and the Rule of Law*, in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1-8 (1960).

20. See Rehnquist, *supra* note 11, at 15, 18. But see Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 *passim* (1976) [hereinafter cited as *Living Constitution*].

institution at all, regardless of the particular legal question. "The adversary system is best viewed as an expansive continuum."²¹ But the continuum does not stretch from easy to hard cases, or from purely private disputes to those of social interest. The continuum relates to a ranking of cases by the importance of ending the legal controversies as discounted by the costs of crystalizing the disputes in any formal way: "[M]y hypothesis is not that an individual's claim for redress of wrong would be better vindicated in a non-adversarial system, but that in some situations it is best not vindicated at all."²² The cost of adversarial litigation often includes irreversible damage to private institutions caused by a member fighting against the institution's authority or by members fighting amongst themselves.²³ Adjudication and solution of the dispute may be worth the cost, but "we ought to judge each situation carefully to make sure that the game is always worth the candle."²⁴

Second, Justice Rehnquist argued by example that all branches of government can appropriately decide within their competence that some disputes are not worth servicing in an adversary context, regardless of whether the claim seeks a constitutionally,²⁵ legislatively,²⁶ or judicially²⁷ defined remedy.

Third, selective limitations on access to adversary proceedings can be justified independently of whether the same individuals would have enforceable rights and correlative duties in a different institutional context,²⁸ "the very concept of government means the rejection, albeit by a democratic process, of certain claims to individual liberty."²⁹

In sum, the structure of modern society depends upon creating a government which is designed to protect traditional institutions as a prior context for liberty, rather than to guarantee individual choice as the condition of liberty in the building and changing of private or public institutions.³⁰ Servicing a hypothetically provable claim of individual right *inherently* involves an instrumental social choice. At least in a society whose government rests not simply on

21. Rehnquist, *supra* note 11, at 3.

22. *Id.* at 10.

23. *See id.*, at 4.

24. *Id.* at 16.

25. *Id.* at 5 (discussing Serbian E. Orthodox Diocese for the United States & Canada v. Milivojevich, 426 U.S. 696 (1976), *rehearing denied*, 429 U.S. 873 (1976)).

26. Rehnquist, *supra* note 11, at 7 (discussing Vaca v. Sipes, 386 U.S. 171 (1967)).

27. *Id.* at 10-12 (discussing Sherlock v. Stillwater Clinic, ____ Minn. ____, 260 N.W.2d 169 (1977)).

28. Rehnquist, *supra* note 11, at 7.

29. *Id.* at 8.

30. *See id.*

an aggregation of atomistic individual preferences,³¹ demands for governmental services like dispute resolution must be measured by the contribution of those services to the social good. Such a measure includes the negative costs to social welfare caused by weakening the ordering function performed by private institutions in a pluralistic society. Government, including the judiciary, functions for Justice Rehnquist as a semi-autonomous center of authority to reconcile order and liberty. Quoting from E.H. Carr, Justice Rehnquist argued: "In short, government is a process by which some people exercise compulsion on others. This is as true of democracy as of other forms of government; the criteria are by whom, by what means, and for what, the compulsion is exercised." ³² Whatever balance of interests legitimates other governmental distributional decisions, such as the provision of welfare benefits, also legitimates the provision or withholding of the governmental service of access to the judiciary. By logical extension, Justice Rehnquist *must* argue that courts should take account of their own power to compel others as a branch of government and must, therefore, enjoin judges to self-consciously balance the potential social impact of their decisions as part of their methodology.

Professor Tribe supports a strong role for adversary resolution of rights disputes at least in part on an instrumental, critical stance; "[t]he real question is whether the virtues and vices . . . of [a pluralistic] democracy are consistent with assigning a large and active role to the adversary process."³³ He identified seven fallacies in arguments for restraint of judicial decisionmaking in order to prevent overemphasizing the relative costs of judicial decisionmaking and undervaluing the need for access to the judicial institution.³⁴ Professor Tribe concluded that access to the judicial institution ranks as fundamental, seemingly not because of an assumption about the necessity of judicial resolution of disputes but rather because of its critical *value* as a matter of policy.³⁵ However, Professor Tribe saw the judiciary more as a function, integral to the

31. *Id.* at 17.

32. *Id.* at 7 (quoting from E. CARR, *THE SOVIET IMPACT ON THE WESTERN WORLD* 10-11 (1947)).

33. Tribe, *supra* note 8, at 43.

34. *See id.* at 46-57.

35. *See, e.g., id.* at 56-57. Professor Tribe's conclusion is consistent with that of Judge Friendly. *See* note 226 *infra*. Professor Tribe implied that he agrees with Justice Rehnquist on the incorrectness of the wrongful life case set forth in *Sherlock v. Stillwater Clinic*, ____ Minn. ____, 260 N.W.2d 169 (1977). However, Professor Tribe questioned whether "recognition of the cause of action by the Minnesota Legislature [would] have been any sounder." Tribe, *supra* note 8, at 56 n.59.

notion of government, than as a service which can be withheld upon mere rationality.

In fact, the legitimacy of our system of government requires relatively unimpeded access to litigation to do two distinct things: first, to articulate the underlying framework of rights within which pluralistic bargaining is to occur; and second, to provide an avenue of participation for those individuals and groups that have not yet been effectively absorbed into the mainstream coalitions of pluralist politics.³⁶

One must separate the view, therefore, that government should instrumentally assign a role in governance to litigation from the view which restricts the judicial method in the use of policy to carry out that role based on the fear of unjustified activism.³⁷ Professor Tribe contributed to potential confusion by drawing a sharp if ambiguous conceptual break between his description of the judicial institutions and their operation, on the one hand, and his critique of the seven fallacies, which assumes the terms of the traditional activism debate, on the other.

Perhaps Judge Friendly evinced the least instrumental analysis of the judicial function in the symposium. Contrary to Justice Rehnquist's assumption that the rule of law notion (a society's distribution via enforceable rules of burdens and benefits, rights and duties) can be separated from the *adversarial* enforcement of rights (a governmental service which can be distributed by instrumental policy choices),³⁸ Judge Friendly assumed that access to the judiciary for the resolution of disputes about law rests on a fundamental premise of democracy. Legislative decisions both aim at and presuppose the enforcement of individual liberty³⁹ in a format which cannot be parsed instrumentally. The legitimacy attached to democracy, and thus the preference for legislated policy implied by Judge Friendly, depends upon a belief that the governmental process evenhandedly protects the input of individuals to the political process through, for example, voting, lobbying and public speaking. This belief in turn depends on the actuality of prior equal protection of

36. Tribe, *supra* note 8, at 45-46. See also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

37. "But we fool ourselves if we forget that any judicial decision either alters the status quo or ratifies it. We'd be far better served by candid recognition that these are the stakes not *whether* courts should act, but *what* they should decide." Tribe, *The Myth of the Imperial Judiciary*, Wash. Post, March 29, 1978, § A, at 23.

38. This characterization of Justice Rehnquist's implicit assumption follows from the reconstruction of his discussion supplied above. See text accompanying notes 30-32 *supra*.

39. See Friendly, *supra* note 11, at 21.

rights to the product of legislative choices, past benefit distributions.⁴⁰ In fact, the resolution of claims of right is sufficiently fundamental that while legislative institutions should be preferred as policymakers, if jurisdictionally appropriate litigation requires, "courts must address themselves in some instances to issues of social policy, not because this is particularly desirable, but because often there is no feasible alternative."⁴¹ Since courts must use policy at times, criticism should be deflected from the fact of use to the occasion and manner in which judges use policy. In speaking of the instrumental value of courts, then, the teleology must be that of conformance to democratic protection of individual liberty.⁴² Judge Friendly's stance, because it rests on conventional democratic assumptions,⁴³ becomes more critical, therefore, when answering the second question concerning the speakers' attitudes toward judicial power: Will the difference in assumptions about the relation of the individual to social organization lead Judge Friendly to a greater or lesser commitment to the terms of the traditional activism debate which began with the norm that social policy should be made by elected representatives?

B. *Judging the Values Which Judges Should Use*

The second question posed for all three speakers is the extent to which the instrumental perspective of each logically leads to a position on judicial activism. Professor Tribe explicitly acknowledged that "we must ultimately come to terms with the general question of whether we should assume a welcoming or a hostile attitude toward . . . judicial activism."⁴⁴ Clearly, Judge Friendly, viewed the question as "natural"⁴⁵ in that he asked whether courts should decide issues of social policy,⁴⁶ and noted both the extent to which policy has been used in defining private law rights,⁴⁷ and the difference in critical reaction when relying on policy in public law

40. See also Tribe, *supra* note 8, at 48.

41. Friendly, *supra* note 11, at 21.

42. In this sense, Judge Friendly appears to follow the tradition begun by Hobbes, Locke and Paine. The significant differences between the political philosophies of Hobbes, Locke and Paine are not crucial to this point. See Rehnquist, *supra* note 11, at 19-20 n.47.

43. "Mr. Justice Rehnquist has approached the subject from a novel and thoughtful angle; I shall approach it from a more conventional one." Friendly, *supra* note 11, at 21.

44. Tribe, *supra* note 8, at 43.

45. Friendly, *supra* note 11, at 27. Judge Friendly considered natural the criticism of courts that use social policy to invalidate action taken by other branches of government. He did, however, qualify his view as to those constitutional rights which must be substantively defined by the judiciary. *Id.* at 27-28.

46. *Id.* at 21.

47. *Id.* at 24-26.

adjudication.⁴⁸ "If policymaking authority has been vested in another body, by what warrant does a court substitute its own contrary views?"⁴⁹ Only Justice Rehnquist insisted his analysis does not depend upon taking a position respecting judicial activism.⁵⁰ Yet, his assumptions belie this possibility in a curious way: his belief in traditional "institutions," whether public or private, argues for judicial "deferral";⁵¹ but his instrumental view of the costs of litigation assumes, if not demands, an active and independent judicial setting of protective policies toward those institutions.⁵² The Justice's intricate reasoning leads to an inexorably activist end point, perhaps not as a matter of separation of powers, but as a matter of the fulfillment of the judiciary's role in interpreting legal language. In order to avoid misstatement, consider his own words:⁵³

48. *Id.* at 27.

49. *Id.*

50. We all know there has been a great deal spoken and written about the use of courts and of the law as a vehicle for social reform Because so much has been spoken and written on this particular aspect of the subject of today's forum, I have chosen to go at the matter from another angle.

Rehnquist, *supra* note 11, at 2.

51. See Rehnquist, *supra* note 11, at *passim*; Witsotsky, *Beyond Legitimacy*, 33 U. MIAMI L. REV. 175, 176 (1978); text accompanying note 30 *supra*.

52. See Rehnquist, *supra* note 11, at 12 (discussing *Sherlock v. Stillwater Clinic*, ___ Minn. ___, 260 N.W.2d 169 (1977)). Justice Rehnquist was troubled by the court's apparent failure to consider that allowing an adversary proceeding for "wrongful birth" could severely damage the institutional value of the family. He concluded that the court "arguably should have refused to have an adversary hearing on the merits of [the] claim because of some overriding public policy which outweighed the virtues of an adversary hearing." *Id.* at 13. See also text accompanying notes 17-32 *supra*; Rehnquist, *supra* note 11, at 12-13 (discussing the legislative abolishment of "heart balm" actions because of their associated abuses and damage to social values, and the propriety of a hypothetical parent-child adversary hearing to determine whether children should be forced to undergo surgery against their wishes).

53. The nine quotations following this note in text, all from Justice Rehnquist's article, can be reduced to demonstrate the formal logical progression to the activist conclusion. The order corresponds to that of the statements given in the text:

- (1) Litigation is a mechanism which defines social relationships as rights.
- (2) A mechanism which defines rights may be a threat to institutional relationships.
- (3) Therefore, litigation may be a threat to institutional relationships.
- (4) Claims of individual rights, when they threaten the species must yield to the claims of the species.
- (5) Therefore, when a mechanism *defining* rights threatens the species, it should yield to the claims of the species.
- (6) Claims of the species are appropriately considered by judges in determining whether to decide an adversary proceeding.
- (7) Thus, when claims of individual right are asserted, the appropriate exercise of the judicial function requires recognition of institutional priority and interdependence.
- (8) The maintenance of social cohesion is the object of government.

- (1) "[L]itigation to solve social problems, or even disputes of far less moment, necessarily assumes correlative rights and duties as between one individual and another and as between the individual and the government."⁵⁴
- (2) "[T]he very crystallization of the parties' differences [over rights and duties] in the adversary process may threaten the future of the institutional relationship."⁵⁵
- (3) "[A]t a minimum, I think we must be aware of the societal interests being sacrificed in pursuit of providing an adversary forum for the vindication of what we perceive to be meritorious claims of individual right."⁵⁶
- (4) "There are times when the claims of the individual should be subordinated to those of the 'species,' even if the species is not government itself but a private institution which serves a useful purpose."⁵⁷
- (5) [This is a matter of substantive law.⁵⁸] "The refusal of the courts to review these claims [individual liberty versus private institutions] as they would claims of individual rights made by members of other voluntary associations means that the law in these particular cases is attaching special weight to the institutional decision."⁵⁹
- (6) "Each of the examples I have mentioned involved situations in which courts either have, or arguably should have, refused to have an adversary hearing on the merits of a claim because of some overriding public policy which outweighed the virtues of an adversary hearing."⁶⁰
- (7) [Judges, within their ability to interpret claims for relief (questions of law)] "serve us poorly if they do not recognize that the world in which we live is an intricate web of relationships between people, private institutions and government at its various levels."⁶¹
- (8) [L]et me freely admit there is an element of authoritarianism in the views that I have advanced this morning . . . ,⁶² [just as there is an element of authoritarianism in the very concept of government itself.]

(9) Therefore, the appropriate judiciary is government acting to preserve social cohesion. Social cohesion, according to Burke, is dependent on natural law. Thus, the judiciary must resort to natural law to maintain social cohesion.

54. Rehnquist, *supra* note 11, at 3.

55. *Id.* at 14.

56. *Id.* at 16.

57. *Id.* at 18.

58. *See id.* at 3.

59. *Id.* at 8.

60. *Id.* at 13.

61. *Id.* at 18.

62. *Id.* at 17.

(9) [Judges recognize and legitimize the proper balance of social interest and individual claim by resort to a form of natural law, since, as quoted by Justice Rehnquist from Edmund Burke], " 'Each contract of each particular state is but a clause in the great primaevael contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by inviolable oath which holds all physical and all moral natures, each in their appointed place.' " ⁶³

Justice Rehnquist, in fact, believed that he could do no better than to ascribe to Burke's view.⁶⁴ He thus *both* evaluated judicial performance and instructed judges to act by reference to a calculus of social and individual interest in litigation in deciding any particular dispute. Judges *must* set policy in the name of social good.

But, it might be replied, the *degree* of activism involved may be low if the direct substantive balancing done by courts takes place only in purely judicial spheres of authority, such as equity, remedy or common law. Indeed, previously, the Justice has strongly disapproved of interpretation of law "based upon the proposition that federal judges, perhaps judges as a whole, have a role of their own, quite independent of popular will, to play in solving society's problems."⁶⁵ This aversion, however, rested on a particular positivistic view of social organization:

[T]he laws that emerge after a typical political struggle in which various individual value judgments are debated likewise take on a form of moral goodness because they have been enacted into positive law . . . [Safeguards for individual liberty] assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone's [Burke's?] idea of natural justice but instead simply because they have been incorporated in a constitution by the people.⁶⁶

Significantly, Justice Rehnquist abandoned this traditional anchor for judicial deferral in this symposium, thus removing the logical brake on judicial use of the policy favoring private institutions as long as the judge acts in service of the correct Burkian natural principle.⁶⁷

Justice Rehnquist repudiated his prior, positivist view in four instances. First, he separated the notions of just claims and access

63. *Id.* at 19 (quoting E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 93-94 (E. Rhys 1910)).

64. *See id.*

65. *Living Constitution*, *supra* note 20, at 698.

66. *Id.* at 704.

67. *See* note 53 and text accompanying notes 54-63 *supra*.

to litigation and, in fact, allowed judicial balancing of the two concepts.⁶⁸ Second, by embracing Burke at the end of his discussion, he rejected the political theory of *The Notion of a Living Constitution* by rejecting Locke and Paine.⁶⁹ Third, he rejected the notion of society as an aggregate of atomistic individuals in favor of a principle of interdependence; for Justice Rehnquist, society consists of a fabric of institutions necessary to secure liberty but prior to liberty which it is the object of *all* governmental institutions to secure in the common interest.⁷⁰ Fourth, and most telling of all, in an exchange during the question and answer period at the Third Annual Baron de Hirsch Meyer Lectures, Justice Rehnquist admitted that room existed within judicial interpretative functions to apply the judge's understanding of the good or liberty: "As you say it boils down to a question of degree. And just how much do you read in the clauses, they are by no means clear, that may turn out in retrospect to be your own ideas rather than perhaps more objectively based ones?"⁷¹

68. Justice Rehnquist concluded that potential harm to institutional values must be weighed against individual claims of right, and where such harm outweighs the asserted right, the claim may be barred by the judiciary. See text accompanying note 52 *supra*.

69. Justice Rehnquist wrote of Burke:

He abhorred the idea, espoused in turn by Hobbes, Locke and Paine, that the relationship between individual citizens and their government was essentially that of master and servant to be governed by the law of agency. While he approved of many institutions and ideas which are totally anachronistic in our time, he did demolish, for me at least, the idea that society is based on nothing more than an implied contract between the citizens and their current government. Society for him included not only citizen and government, but institutions as well; it was bequeathed by our forefathers to us in trust for generations yet unborn.

Rehnquist, *supra* note 11, at 18 (footnote omitted).

In contrast to this natural law view, Justice Rehnquist earlier had expressed a positivistic view of the source of values:

The laws that emerge after a typical political struggle in which various individual value judgments are debated likewise take on a form of moral goodness because they have been enacted into positive law. It is the fact of their enactment that gives them whatever moral claim they have upon us as a society, however, and not any independent virtue they may have in any particular citizen's own scale of values.

Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments.

Living Constitution, *supra* note 20, at 704.

70. See Rehnquist, *supra* note 11, at 17.

71. The entire exchange was as follows:

JUSTICE REHNQUIST:

I think the place where probably you and I disagree most [is on] . . . [y]our . . . elitist fallacy, and I think this probably stems from something that is incapable of inter-subjective demonstration. It has always seemed to me that if you've got a party of ten going somewhere and you come to a fork in the trail and the

In his mixture of Burkian conservatism and organic communitarianism,⁷² Justice Rehnquist does truly differ from Professor Tribe only in degree, but the tone of the traditional tug of war between individualistic democracy and judicially enforced rights shifts dramatically. The denial of a Thomistic vision⁷³ which usurps legislative social policy found in his exchange with Professor Tribe, and the positivism of *The Notion of a Living Constitution* appear entirely inconsistent with Justice Rehnquist's reliance on Carr and Burke.⁷⁴ Traditional institutions shape a context for liberty which, for Justice Rehnquist, decides the content of those limitations of right which restrict the operation of legislative choice.

True, Justice Rehnquist's activism relates less to the separation of powers notion of correct interaction of judges and legislatures, than to choice of alternative interpretations of disputed legal language. Yet, although Justice Rehnquist finds the source of his vision of the just society in historically important traditional institutions,⁷⁵

party has agreed to stay together, yet six want to take the right fork and four want to take the left fork, you go the way the majority wants to go. And that, to me, any right that is going to be recognized in a society that pretends to be democratic has to have some sort of imprimatur like that on it. I simply cannot concede that there are a sort of thomistic world of rights that judges, although they may have far higher IQ's and better understandings of jurisprudence and legislation perhaps than lawmakers, are free to . . . override the legislature.

PROFESSOR TRIBE:

I think that our difference may be more one of degree than anything else, as I am also skeptical of the capacity of philosopher kings to offer answers that will endure forever. But I see the problem of the ten travelers a little differently. It is as though the ten had decided in the beginning that there are certain matters, perhaps the right of any one of the travelers not to be sacrificed by a majority vote of the others, that they would entrust to neutral arbiters, if not philosopher kings. If the six travelers should then say that, all things considered, it would be better if a seventh were to be sacrificed, or if one were to be silenced, shouldn't those who had been delegated the task of defending basic principles intervene even though it would mean overriding the majority?

JUSTICE REHNQUIST:

Well, no one, certainly least of all I, doubt that if the Constitution says in so many words that Congress shall not have the power to do this, the courts ought to firmly back it up. As you say, it boils down to a question of degree. And just how much you read into the clauses, that are by no means clear, what may turn out in retrospect to be your own ideas rather than perhaps more objectively based ones?

Panel Discussion, Third Annual Baron de Hirsch Meyer Lecture Series at 8-9 (Feb. 2, 1978) (question and answer transcript on file at the *University of Miami Law Review*).

72. Professor Tribe described organic communitarianism as the antithesis of liberal individualism. Tribe, *supra* note 8, at 1.

73. Justice Rehnquist denied any reliance on a theory of natural law in his discussion with Professor Tribe because of the inability of any individual to claim his or her version of natural law is the only correct one.

74. Rehnquist *supra* note 11, at 7, 19.

75. *Id.* at 18-19.

while Professor Tribe locates the source of his fundamental values in the requirements of a workable social rationality,⁷⁶ both recognized the interpretative function will be ruled by subjectively *recognized* values lexically prior to politics⁷⁷ and one's perception of institutional capacity.⁷⁸

Thus, separation of powers depends on the inherent characteristics of both the judiciary and the legislature, regardless of the desideratum that social policy must be set by democratic institutions. As Professor Tribe stated: "Unless we are prepared to argue that the fourteenth amendment protects no substantive liberty at all . . . we are committed to the position that part of the Supreme Court's proper role is defining the substantive content of human freedom."⁷⁹ Justice Rehnquist cannot reject the preceding statement after consciously embracing the jurisprudence he so coherently outlined, and grounded, in this symposium.⁸⁰

Professor Tribe recognized the claims for legitimacy of legislatively assigned burdens and benefits within an interdependent pluralism, but argued, as did Justice Rehnquist, that the distribution of legislated rights and duties based on a policy of increased social welfare does not exhaust the purpose or product of government.⁸¹ He

76. Tribe, *supra* note 8, at 45.

77. See Rehnquist, *supra* note 11, at 18-19 (values endure over the ages); Tribe, *supra* note 8, at 45 (the legitimacy of values rests not in popular support, but in the "persuasiveness of the reasons that can be adduced for them").

78. See Rehnquist *supra* note 11, at 2-3 (potential of adversary procedure to damage institutional value); Tribe *supra* note 8, at 52-53, 54-57 (the fallacies of "undue modesty" and "institutionalism").

79. Tribe, *supra* note 8, at 55. Justice Rehnquist took a similar position in his dissenting opinion in *Roe v. Wade*, 410 U.S. 113 (1937): "I agree [that] . . . the 'liberty' against deprivation of which the Fourteenth Amendment protects embraces more than the rights found in the Bill of Rights." *Id.* at 173. Justice Rehnquist proceeded to discuss the constitutional test used in due process challenges: "But that liberty is not guaranteed absolutely against deprivation, but only against deprivation without due process of law. The test traditionally applied . . . is whether or not a law such as that challenged has a rational relation to a valid state objective." *Id.* at 173. While the Justice's qualification seems to undermine his expansive statement about liberty, the effect is illusory. As Professor Tribe pointed out, "judicial authority to reject the legislature's accommodation of conflicting values is no less substantive because its exercise is justified by 'extreme' cases, or because it is invoked in the name of rationality." Tribe, *supra* note 8, at 55. In both cases a court is acting to override majority will. Thus, once the judge draws any line, the intrusion on legislative interests, and the judicial definition of the contents of rights, must be acknowledged as equally substantive regardless of where the line is drawn.

80. "I hope it will become evident that while my position on this issue cannot easily be labeled 'conservative' or 'liberal' according to any modern day understanding of those terms, I do find myself in very good philosophical company when I express some skepticism about the desirability of adversary proceedings in a number of situations.

Rehnquist, *supra* note 11, at 3.

81. See Tribe, *supra* note 8, at 44.

argued: first, a political role for the judiciary exists to create access to the governmental process for groups of perennial political outsiders and to address basic questions of social value which underlie the bargaining over burdens and benefits of pluralistic interest groups.⁸² In this sense, litigants, especially groups powerless in the legislative process, go to court not simply to settle an academic interest in the meaning of a legal rule but to gain their share of the distributed benefits which *result* from a judicial clarification of a disputed legal rule. "[A]djudication is not a threat to the integrity of our form of government. In fact, . . . [it] is indispensable to its legitimacy."⁸³ Second, to admit *any* substantive role for the judiciary, particularly a duty to preserve traditional institutions over individual rights, makes all decisions a matter of substantive policy as either ratifications or rejections of legislative policy.⁸⁴ Rather, "[a]t stake is a dialogue between the various components of the political system, not a selection among political alternatives. The question is whether we should be distressed when courts are given a large voice in that dialogue."⁸⁵ While we may be distressed with particular judicial or legislative decisions, the question of activism evaporates. Activism is simply government, the judiciary doing its job whether or not in passive voice.

Thus, on either Professor Tribe's or Justice Rehnquist's assumptions, if not their statements, constitutional democracy cannot be normatively defined or restricted justifiably by an external critic's instrumental evaluation. Only the government institutions themselves, in dialogue and internally in their decisions, can make such instrumental choices. The legitimate concern that government will overreach its rationale of limiting individual conduct in the name of public interest can only coherently surface as a demand for justification of each branch of government's pronouncements in the governmental dialogue.⁸⁶ Legislatures ground in elections, judiciaries in their argument, "the legitimacy of any starting point of basic values or basic rights must rest in the persuasiveness of the reasons

82. *Id.*

83. *Id.* at 46.

84. *See id.* at 55; note 79 *supra*. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 8-13, 47-52 (1977); Wisotsky, *supra* note 51, at 187-88.

85. Tribe, *supra* note 8, at 54.

86. [T]he difficulty with such conventional wisdom about the political limits of constitutional law is that it undervalues the place of constitutional discourse and decision in political dialogue. By debating our deepest differences in the shared language of constitutional rights and responsibilities, we create the possibility of persuasion and even moral education in our national life.

L. TRIBE, *supra* note 84, at 13 (footnote omitted).

that can be adduced for them."⁸⁷ Professor Tribe might as well have been quoting Justice Rehnquist as Hegel in concluding, "[a] constitution is not just something manufactured, it is the work of centuries, . . . the consciousness of rationality so far as that consciousness is developed in a particular nation. No constitution, . . . is just the creation of its subjects."⁸⁸

But what of the nearly forgotten Judge Friendly? Despite his statement of the "activism" issue in traditional terms, Judge Friendly fundamentally understands the defining characteristic of the judicial function to be not litigation per se, but a decision which survives only if legitimated.⁸⁹ These justifications, regardless of whether the rationale rests on policy, principle or natural right, and embodied in written linguistics, take a particular form: "[U]nlike legislatures, which may properly frame pragmatic rules having no relation to strict logic, courts should render a principled decision that will apply to a great sweep of cases."⁹⁰ A semantic surface confusion wrought by the historical statement of the false activism debate favors decision by jural principle rather than desirable notions of policy. But Judge Friendly himself noted "acut[e] conscious[ness] of the question-begging character" of such principles.⁹¹ Judge Friendly questioned the use of policy unalloyed with

87. Tribe, *supra* note 8, at 45.

88. *Id.* (quoting G. HEGL, *PHILOSOPHY OF RIGHT* 286-87 (T.M. Knox trans. 1967) (emphasis added)); see Rehnquist, *supra* note 11, at 12 (quoting E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 93-94 (E. Rhys 1910)). In his criticism of *Sherlock v. Stillwater Clinic*, ___ Minn. ___, 260 N.W.2d 169 (1977), Justice Rehnquist observed: "But equally troubling is the fact that this decision was apparently made without careful acknowledgement and weighing of the values being undercut by the introduction of adversary proceedings into the family setting." Rehnquist, *supra* note 11, at 12. Thus, both Justice Rehnquist and Professor Tribe recognized the significance of long-standing social values.

89. "A constitutional decision derived from the Justices' notions of good social policy will fare badly, . . . unless the public policy considerations are clearly stated and the decision embodied in some rational statement of principle." Friendly, *supra* note 11, at 42.

90. *Id.* at 3. For a discussion of "neutral principles," see Wisotsky, *supra* note 51 at 183, 185-88.

91. Friendly, *supra* note 11, at 21 n.2.

Thus, whether Judge Friendly, on the jurisprudential level argued by Justice Rehnquist and Professor Tribe, could be characterized as noninstrumental, or whether he encourages or discourages a broad use of the judge's political powers of choice, he nonetheless recognized that constitutional adjudication is inherently active in a way to which the concept of degree cannot be applied.

There seems to be a kind of spontaneous generation about the federal constitution; the more questions about it are answered, the more there are to be answered.

Although this was hardly their prime purpose, the framers of our constitutions did stake out a preserve where American judges need not accept the subordination to the legislature that is the lot of their counterparts in England, perhaps here lie the seeds of a Freudian explanation of judicial activism in constitutional law.

Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 788 (1963) (footnote omitted).

principle as the justifying rationale, *not* the inherent necessity of policymaking in the framing of jural principles for which logical rationales can be offered. But the forming of principle depends upon more than manipulation of static rules. Rather than engaging in sophisticated fencing about the terms of an irrelevant debate, Judge Friendly puzzled about how claims of right versus public and/or private institutions (no matter how democratic) can be transformed from their dynamic, existential context into a static written form which permits the judges to articulate and justify basic values or rules of conduct evolved through an ongoing process. "Ultimately, however, one must face the question of how a case of such overwhelming social import could be translated into a principle of constitutional law" ⁹² Only Judge Friendly, therefore, leads the way through the judging glass to focus on the importance of the articulation of the claim as an integral part of justifying the inherent substantive policy involved in the judicial component of constitutional government.

III. ALICE'S QUESTION AND *Barnette*—SOME OLD ANSWERS

Taken to its logical conclusion by these participants, the activism debate becomes circular and thus intractable. Perhaps the continuing fascination with judicial activism in the forty years since the supposed decline of the formalistic method and economic due process and the rise of pluralistic positivism, ⁹³ relates to the Holy Grail

92. Friendly, *supra* note 11, at 33 (discussing *Roe v. Wade*, 410 U.S. 113 (1973)). Judge Friendly believed that this problem of judicial translation arises in the interpretation of legislative enactments and common law and principles as well as in constitutional interpretation.

93. The substantive interpretation of the due process clause changed radically in the period following the economic depression of 1929 from broad judicial protection of an individual's freedom to contract to benign examination of regulatory policies established by New Deal legislation. The epitome of pre-depression era substantive due process philosophy was articulated in *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner* the Court invalidated a New York statute which provided that bakery employees work no more than 60 hours per week or 10 hours per day on the basis of the individual's right to contract. The protection of common law or natural law rights at the federal level was implemented through the vehicle of the fourteenth amendment: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution The right to purchase or to sell labor is part of the liberty protected by this amendment" *Id.* at 53 (citation omitted).

The Court recognized the power of the state to prevent the individual from entering certain kinds of contracts involving the "safety, health, morals and general welfare of the public." *Id.* at 53. But in cases where the state exercised its police power in a way which limited the private individual's common law right to contract or right to labor, the Court severely restricted the state's ability to exercise that power. *Id.* at 54-56. The *Lochner* technique proceeded by culling the substantive content of the due process clause from a natural law tradition which had been built upon particular philosophical and economic assumptions.

quality of each attempt to solve the debate. How then did the debate go wrong? Why did the debate cease to progress beyond increasingly formalized, albeit sophisticated and philosophically grounded, restatements?

The answer hides in the statement of the debate, namely "when can judges be politically active?" The assumption that judges have a choice not to be active ultimately depends upon an epistemology

The *Lochner* Court could rely on precedent for this technique. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) discussed in L. TRIBE, *supra* note 84, at 450. The Court thus used the fourteenth amendment as a vehicle to overcome political majorities, "[o]therwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power. . . ." 198 U.S. at 56.

During the 1920's, the internal structure of the *Lochner* doctrine began to erode and commentators called for the abandonment of the doctrine. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (Holmes, J.).

[R]ather than invalidating statutes in which the public character of the benefit was unclear while the private harm was both evident and focused, the Court in effect forced the public to internalize private costs in ambiguous cases by requiring government to compensate private parties for what they were being forced to lose. This approach obviously infringes on *Lochner*-recognized private property and contract rights and blurs the distinction between private and public purposes which lies at the heart of the *Lochner* philosophy.

L. TRIBE, *supra* note 84, at 445 (footnote omitted).

This distinction was further blurred six years later in *Miller v. Schoene*, 276 U.S. 272 (1928). In *Miller*, pursuant to a Virginia statutory scheme to control tree disease, red cedar trees infected with a disease were ordered to be destroyed so that the commercial value of nearby apple orchards would be preserved. Based on the importance of the apple orchards to the state's economy, the Court upheld the statute without requiring compensation for the cedar owners. *Id.* at 279. Under the *Lochner* doctrine, however, the statute infringed on the property rights of cedar owners in favor of apple orchard owners. Justice Stone's opinion for the Court recognized the public and private interests as virtually identical:

When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. . . .

[F]or it is obvious that there may be and here there is, a preponderant public concern in the preservation of one interest over the other.

Id. at 279. The common law roots of the police power boundaries, the line between the public and private spheres, was eroded in these eminent domain cases. The Court could no longer prevent states from redressing economic inequalities in the name of economic growth.

In 1937, the Court broadsided the *Lochner* philosophy in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), when it upheld a Washington minimum wage law for women. Chief Justice Hughes, for the Court, argued that "liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." *Id.* at 391. The Supreme Court's recognition that a state may legitimately defend an economically exploited class of persons from conditions that would otherwise deprive the class members of benefits and that a state may defend such an exploited class by restricting the selfishness of the economically dominant producers, must be seen as symptomatic of a general retreat from a judicial attempt to define the limits of the political process of government. Because the Court used the technique of deferral in abandoning *Lochner*, the Court's limited scrutiny gave way to virtual judicial abdication. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). See generally Tribe, *supra* note 8, at 56-57 (fallacy of institutionalism).

perhaps available to the Framers of the Constitution⁹⁴ but implausible today. The inherently subjective political leeway in the interpretative formulation and application of rules to a dispute, which results in a reasoned extension of past decisions to a new, more particularized statement of principle, makes even the most narrow and precise legal language open-ended in content.⁹⁵ At most, constitutional definitions and legislated statutes communicate a rough purpose or model.⁹⁶ Regardless of the underlying tension between those who emphasize the values in broad rights of the individual as opposed to those who emphasize the democracy of majority rule, an airtight division between what judges do and what legislators choose can no longer be maintained.⁹⁷ Once it is recognized that the activism issue cannot believably be a dichotomy between purely deductive, objective judgment versus political policy manipulation,⁹⁸ the question becomes perceived as simply a matter of degree in the judicial choice of policy.

At this second stage of argument, those who debate judicial activism then polarize the question of degree through their understanding of the relative institutional adequacy, accountability or legitimacy of the legislature and judiciary to make policy. But they choose their institutional positions via the same value assumptions of "democratic legitimacy" or "neutral protection of fundamental principles" behind the first stage of the debate.⁹⁹ Opposed institutional norms, such as decision by jural principle versus decision by intended legislative policy, relabel but do not change the ultimate resort to a difference in social values which gain legitimacy as part of a system of *political* organization.¹⁰⁰ When jural principles become as open-ended in the practice of judging as the legal rule they interpretively define, the dichotomy reaches the Tribe-Rehnquist stage. Under the surface of their argument of "degree,"¹⁰¹ the debat-

94. The judiciary "may truly be said to have neither force nor will, but merely judgment." Hamilton, *The Federalist* No. 78, in *THE FEDERALIST* 504 (E. Earle ed. 1937).

95. "[I]n most cases when courts say that a statute is plain and therefore needs no interpretation, they do so in the inverted fashion which marks so much of the judicial process. They have already interpreted, and they then declare that so interpreted the statute needs no further interpretation." Radin, *Statutory Interpretation*, 43 *HARV. L. REV.* 863, 869 (1930).

96. *Living Constitution*, *supra*, note 20, at 704. See also, Freund, *Individual and Commonwealth in the Thought of Mr. Justice Jackson*, 8 *STAN. L. REV.* 9 (1955). "The judge's emancipation, so far as it is proper, reflects the fact that the crucial terms of the Constitution are open-ended, as, for example, due process and equal protection of the laws, or ambiguous, like the first amendment guarantees. . . ." *Id.* at 9.

97. See Wisotsky, *supra* note 51, at 197-98.

98. *Id.*

99. See, *id.* at 179-80, 184-85.

100. See *id.* at 197.

101. See note 71 *supra*.

ers misperceive their institutional differences. Their dispute is defined by a *categorically* different set of social values. These values distinguish social *situations* which justify judicial policymaking in the form of interpretation of open-ended legal language and social situations which demand policymaking in the form of ratifications of legislative policy under the rubric of "deferral."¹⁰² Both stances are *equally* activist.

What the statement of the debate in activist-passivist terms ignores by arguing about institutions is the inherent nature of the articulation of basic organizational values found in any question of law and the corresponding distributional effects of the chosen or constructed opinion. Professor Tribe and Justice Rehnquist, having pushed the debate to its final form, stated but did not examine a difference which they characterized as one of degree,¹⁰³ but which is actually an ideological divergence in attitudes toward natural law or political theory.¹⁰⁴ Perhaps, as indicated by Professor Radin, this categorical distinction between the debaters' positions reflects an epistemological problem inherent in the process of justification.¹⁰⁵

"The question will accordingly be in every case, not whether or not the expression of one thing excludes everything else, but whether we are to deny or affirm it for some other reason than its axiomatic force, and it will be necessary to search for that other reason."¹⁰⁶ In all analysis of the judiciary's performance, therefore, the chief concern should be the sufficiency of the justification for the judicial version of the reconciliation of order and liberty based on full explanation of the judges' assumed values.

Did the problem of activism always appear intractable? If so,

102. L. TRIBE, *supra* note 84, at 891. For the application of this argument to statutory interpretation, see Radin, *supra* note 95. See also Wisotsky, *supra* note 51, at 187.

103. See note 71 *supra*.

104. See Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 293-307 (1976). Professor Shapiro's review of Justice Rehnquist's votes and opinions revealed the Justice's strong ideological commitments, apparent in his decisions. Professor Shapiro found, however, that Justice Rehnquist's theory of constitutional interpretation was not always applied in practice. Through examination of three opinions by Justice Rehnquist, the commentator suggested that instead of his strongly professed positivism, the Justice demonstrated an extensive interventionist perspective based on states' rights. *Id.* at 293-99. In the opinions, the Justice departed from a strict constructionist approach and instead relied on policy considerations. Shapiro found this reliance on policy difficult to reconcile with the Justice's professed distaste for government by an activist judiciary. *Id.* at 293-307. See also notes 36-46 and accompanying text *supra*.

105. *Living Constitution*, *supra* note 20, at 698. See also Radin, *supra* note 95, at 865: "[S]ince what might be called judicial epistemology has a real importance in itself, the technique of interpretation is never negligible." For an extended discussion of my assumptions, see Casebeer, *Escape from Liberalism: Fact and Value in Karl Llewellyn*, 1977 DUKE L. REV. 671.

106. Radin, *supra* note 95, at 864.

how did early antagonists reformulate the question? Much irreversible history and clarifying doctrine has passed since the early 1940's with inevitable embarrassments for those writers who lacked the benefit of hindsight which modern writers enjoy. Yet, the void in judicial theory left by the drastic change in the Court during the depression era demanded the creation of a new methodology for justifying interpretations of law.¹⁰⁷ The Justices of the Supreme Court in the early 1940's, like shipwrecked sailors, built their raft as the necessity of the surrounding seas dictated. The framework they seized still governs contemporary constitutional construction.

During the early 1940's, numerous claims of constitutional liberty as a limit on the enforcement of majoritarian policy came before the Supreme Court, producing some of the most heated and most inspiring prose in American letters.¹⁰⁸ Perhaps in a later time these Court opinions performed functions similar to the *Federalist Papers* in crystalizing public debate on the future of American government. One need only read a brief sequence of the cases involving constitutional rights decided during this period to recognize the vital intellect and power of a Court which senses the times of its deliberations and the necessity of its own competence.¹⁰⁹ Even cautious men like Felix Frankfurter recognized the immense stakes

107. See note 93 *supra*.

108. We can see now what we could not have seen then, that from Jackson's point of view, the moment of his accession was a crucial one. Holmes, Brandeis, and Stone had triumphed. The Court had accepted the power of the legislature to fashion popularly conceived solutions to passing economic problems . . . There can be no doubt that the great men who composed this group still held fast to a conception of a broad underlying constitutional structure. But what most appeared at the time was the erosion of concepts, and the philosophy under the aegis of which the erosion was taking place. It was a philosophy which had finally become dominant in the schools, one which saw the law as a process which set itself the task of continuously accommodating conflicting interests. Indeed, it is nearly impossible for us today to think of the law in any other way.

Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940, 941-42 (1955).

But while Justice Jackson caught the times, Justice Frankfurter did not.

[T]o assert that the court had no larger function in the protection of civil liberties than of property rights was a fateful refinement in Frankfurter's position, a departure from the view that he had appeared to endorse in his lectures, that some rights stood higher than others in the hierarchy of values to be protected by the Court. In this writer's view this refinement uncoupled him from the locomotive of history. . . . Invoking the hallowed name of Holmes he pushed the doctrine of judicial restraint to an extreme that violated the spirit of Holmes and separated him from the most innovative members of the court.

Lash, *A Brahmin of the Law*, in FROM THE DIARIES OF FELIX FRANKFURTER 73 (1975).

109. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (equal protection); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (first amendment); *Chambers v. Florida*, 309 U.S. 227 (1940) (due process).

involved in the decision of "which was to be master."¹¹⁰ Early suggestions for a new method floated as dicta, the most famous being Justice Stone's footnote four in *United States v. Carolene Products Co.*¹¹¹ Tension and conviction saturated the pages of one such epic battle, *West Virginia State Board of Education v. Barnette*.¹¹²

In *Barnette*, a father, who was a Jehovah's Witness, sued on behalf of his children who were forced to participate in a flag salute each day, subject to expulsion from public schools, despite the students' belief that to do so violated their understanding of Biblical commands and risked their personal salvation. The State of West Virginia argued that the need to instill national pride during World War II justified mandatory flag salute regulations. While not the only example, the *Barnette* case serves well as a proxy for the early arguments about judicial activism for a number of reasons connected to this symposium.

First, the case is an important landmark in its own right. Justice Jackson for the majority and Justice Frankfurter in dissent, while both considered judicial conservatives,¹¹³ presented classic and self-conscious statements of the activism issue. "The whole court is conscious that this case reaches ultimate questions of judicial power and its relation to our scheme of government."¹¹⁴

110. See note 4 and accompanying text *supra*.

111. 304 U.S. 144, 152 n.4 (1938).

112. 319 U.S. 624 (1943).

113. For the best and most complete compilation and distillation of Justice Jackson's judicial arguments, see Jaffe, *supra* note 108. Compare Kurland, *Justice Robert H. Jackson Impact on Civil Liberties*, 1977 U. ILL. L.F. 551, 555-59 (arguing that on the basis of the *Barnette* opinion, Justice Jackson should be considered as a philosophical liberal rather than a libertarian) with Fennel, *The "Reconstructed Court" and Religious Freedom: The Gobitis Case in Retrospect*, N.Y.U. L.Q. 31 (1941) (characterizing Justice Jackson as a "liberal constitutionalist," as opposed to Justice Frankfurter as a "liberal democratic jurist"). See also Freund, *supra* note 96; Kurland, *supra* at 555.

Note that the denomination liberal refers to the political tradition of Hobbes, Locke and Hayek. See generally, C. MACPHERSON, *POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962). Thus, it is possible to be both an institutional conservative and a theoretical liberal. That Justices Jackson and Frankfurter shared the liberal tradition may explain much in contrast with Justice Rehnquist's philosophical assumption. See Rehnquist, *supra* note 11, at 17-20 nn. 43-47 and accompanying text. See also E. GERHART, *AMERICA'S ADVOCATE ROBERT H. JACKSON* 288-307 (1958). Gerhart defines Justice Jackson as a political liberal and a judicial conservative. *Id.* at 305.

For an understanding of Justice Frankfurter's liberal philosophical tradition and judicial conservatism, see P. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* 5 (1971) and Lash, *supra* note 108, *passim*.

114. 319 U.S. at 667 (Frankfurter, J., dissenting). Justice Jackson referred to *Barnette* as a case in which "[t]his issue [the extent to which majority rule will be set aside] has been debated, but it has by no means been settled, and views shift as the occasion for judicial intervention shifts from case to case." R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 77 (1955) (footnote omitted).

Second, a shared conservative attitude toward judicial policy-making lends even the "activist" Justice Jackson credibility for all factions in the modern debate and thus connects him to all participants in this symposium in interesting cross-currents. For example, Justice Rehnquist clerked for Justice Jackson and in his article, *The Notion of a Living Constitution*,¹¹⁵ approved of Jackson's opinion in *Fay v. New York*,¹¹⁶ which described the constitutional form of individual rights as "majestic generalities."¹¹⁷ Justice Jackson first used the phrase to describe the fourteenth amendment in *Barnette*.¹¹⁸ Justice Rehnquist described the principle involved in both cases in a way which shows that he acknowledges the institutional level of the activism argument.¹¹⁹ He embraces interpretation while rejecting explicit policymaking: "[W]here the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen."¹²⁰ Professor Tribe cited *Barnette* frequently in his treatise as an example of appropriate judicial protection of substantive values.¹²¹ Judge Friendly, likewise, relied on Justice Jackson and his book, *The Struggle for Judicial Supremacy*.¹²² Judge Friendly, however, cited Justice Jackson for the other side of the activism debate, which corresponds to Justice Rehnquist's argument in *The Notion of a Living Constitution*,¹²³ that explicit policymaking should be left for a more appropriate political institution than the court.¹²⁴ Judge Friendly also cited Justice Frankfurter for the same proposition.¹²⁵

Third, the 1940's debate closely parallels this symposium in interesting ways. If Professor Tribe and Justice Rehnquist truly differ only in degree and if their difference can be honed to a divergent interpretation of Justice Jackson's "majestic generalities," then can the same be said of the Jackson-Frankfurter division in *Barnette*? Are the conclusions reached by Justices Jackson and Frankfurter determined on a level of the debate missed or misstated by Professor Tribe and Justice Rehnquist? Perhaps Judge Friendly's

115. *Living Constitution*, *supra* note 20, at 694.

116. 332 U.S. 261 (1947).

117. *Id.* at 282.

118. 319 U.S. at 639.

119. See notes 7-12 and accompanying text *supra*.

120. *Living Constitution*, *supra* note 20, at 694.

121. See L. TRIBE, *supra* note 84, at 589, 667, 862, 864, 871, 872, 890, 893, 899, 908, 961, 1011.

122. See Friendly, *supra* note 11, at 24 n.13.

123. *Living Constitution*, *supra* note 20, *passim*.

124. See Friendly, *supra* note 11, at 24 n.13.

125. See *id.* at 22.

emphasis on what has been labeled here as the judging glass can explain the difference between the positions taken by Justices Jackson and Frankfurter.

Fourth, the case presents a difficult set of facts for applying Justice Rehnquist's institutional concerns. As a class action, *Barnette* formally manifests the dual character of litigation and thus fulfills Justice Rehnquist's definition of a social problem, a personal dispute whose resolution implies similar results for those similarly situated.¹²⁶ *Barnette* involved a claim of individual right to liberty against a school board, a public institution which legislates but which also has analogues in private education and in many religious institutions. Preserving the fabric of this institution's decisionmaking would have damaged the even more revered institutions of the family and private religious institutions.¹²⁷ Admittedly, Justice Rehnquist only referred to examples of disputes between individuals and the institutions of which they are members. In a pluralistic society, however, few individuals belong to or owe their primary allegiance to only one institution. It is perhaps the exceptional dispute, therefore, which does not concern more than one institution. Although Professor Tribe also recognized that most disputes will involve institutional relationships of some importance to the decision,¹²⁸ he, in contrast to Justice Rehnquist, stated:

[T]he resulting caution need not, and indeed must not, spell automatic deference to the decisions of all groups

. . . [T]he adversary process is needed in order to maintain the delicate balance between undue intrusion into the internal lives of various autonomous groups and undue delegation to those groups of potentially tyrannical authority over their members.¹²⁹

This was precisely the view of Justice Jackson:

It is my basic view that whenever any organization or combination of individuals, whether in a corporation, a labor union or other body, obtains such economic or legal advantage that it can control or in effect govern the lives of other people, it is subject to the control of the Government, be it state or federal, for the Government can suffer no rivals in the field of coercion. Liberty

126. Rehnquist, *supra* note 11, at 2.

127. *Id.* at 4-5, 8-12.

128. Tribe, *supra* note 8, at 54-57.

129. *Id.* at 49-50. There is a curious inconsistency in Justice Rehnquist's position. Compare *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 725-35 (1976) (Rehnquist, J., dissenting) with Rehnquist, *supra* note 11, at 4-5 (approving of the majority's decision). See generally Tribe, *supra* note 8, at 49-50 (fallacy of internal fairness).

requires that coercion be applied to the individual not by other individuals but by the Government after full inquiry into the justification.¹³⁰

Fifth, in *Barnette* the Justices struggled to establish an appropriate standard for review of constitutionally suspect legislation in part because the inchoate standard in the rationale of footnote four in *Carolene Products*,¹³¹ which supported expansive judicial scrutiny of legislative infringements of fundamental liberties, remained mere dictum until *Barnette* was decided. Justice Stone, in *Minersville School District v. Gobitis*,¹³² the case overruled by *Barnette*, directly applied his footnote four theory but in sole dissent:

I am not persuaded that we should refrain from passing upon legislative judgment "as long as the remedial channels of the democratic process remain open and unobstructed." This seems to me no less than the surrender of the Constitutional protection of the liberty of small minorities to the popular will.¹³³

This rationale bears striking resemblance to Professor Tribe's thesis in *Seven Pluralistic Fallacies*.¹³⁴

Both Justices Jackson and Frankfurter begin with a recognition of their duty in constitutional litigation. Justice Jackson stated, "[t]he sole conflict is between authority and rights of the individual,"¹³⁵ while Justice Frankfurter declared, "[a] grave responsibility confronts this court wherever in the course of litigation it must reconcile the conflicting claims of liberty and authority."¹³⁶ Neither believed this task to be purely mechanical.¹³⁷ Importantly, neither believed the task demanded a methodology of instrumental balancing,¹³⁸ apparently unlike Justice Rehnquist,¹³⁹ although Justice

130. R. JACKSON, *supra* note 114, at 69. The inconsistency in Justice Rehnquist's position becomes even more curious when one compares Jackson's statement to Rehnquist's reference to authority as "not only the indispensable condition of all government, including self-government, but it is the ultimate guardian against a state of anarchy in which only the strong would be free." Rehnquist, *supra* note 11, at 17.

131. 304 U.S. at 152 n.4.

132. 310 U.S. 586 (1940).

133. *Id.* at 605-06 (Stone, J., dissenting).

134. See Tribe, *supra* note 8.

135. 319 U.S. at 630.

136. *Gobitis*, 310 U.S. at 591. See also 319 U.S. at 646 (Murphy, J., concurring).

137. Compare, *Barnette*, 319 U.S. 624 (Jackson, J., majority opinion) with *Barnette*, 319 U.S. at 646 (Frankfurter, J., dissenting).

138. Justice Jackson stated:

If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one,

Frankfurter in subsequent years became one of the chief architects of interest balancing.¹⁴⁰ Both believed that value or policy judgments would enter the decision but that the *need* to use policy was not the justification either for making policy judgments or a fortiori for the decision itself. "No mere textual reading or logical talisman can solve this dilemma. And when the issue demands judicial determination, it is not the personal notion of judges of what wise adjustment requires which must prevail."¹⁴¹

The questions which divided Justices Jackson and Frankfurter concern how much protection of individual choice to interpret into the generalities of the first and fourteenth amendments and, thus, how much to interfere with the internal authority of the school board. As Justice Jackson put it: "The question which underlies the the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution."¹⁴² Justice Jackson had no trouble limiting legislative power substantively because of a paramount liberty interest: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."¹⁴³

But Justice Frankfurter replied, not that courts had no role in

presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Id. at 634. And Justice Frankfurter wrote in his dissent: "Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables."

Id. at 652.

The concurrence of Justice Murphy stands in contrast to both:

I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination.

Id. at 646.

139. See note 17 and accompanying text *supra*.

140. See, e.g., *Dennis v. United States*, 341 U.S. 494, 524-25 (1950) (Frankfurter, J., concurring) (advocating weighing competing interests of demands for free speech and for national security). See generally P. KURLAND, *supra* note 113.

141. *Gobitis*, 310 U.S. at 596. Compare this with Justice Jackson's comments in *Barnette*, 319 U.S. at 638.

142. *Barnette*, 319 U.S. at 635-36.

143. *Id.* at 638. See also *Gobitis*, 310 U.S. at 604-05 (Stone, J., dissenting).

protecting individual liberty,¹⁴⁴ but that surely the majority also had substantive interests:

[S]o long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of the minority are more sacred and more enshrined in the Constitution than the consciences of a majority.¹⁴⁵

This dilemma forced Justice Frankfurter to the conclusion that judges lack the competence to second guess the legislative determination: first, because legislators, to the same extent as judges, have a duty to understand and abide by the Constitution;¹⁴⁶ second, because courts lack institutional flexibility;¹⁴⁷ and third, because educational institutions should set policy.¹⁴⁸ Justice Frankfurter concluded that in light of these institutional factors counseling caution, the legislative judgment to seek a clearly legitimate goal should be upheld as a rational interpretation of the Constitution.¹⁴⁹ "In no instance is this Court the primary protector of the particular liberty that is invoked."¹⁵⁰ This would seem a fairly standard, albeit incoherent, move, and thus one both Professor Tribe and Justice Rehnquist move beyond.¹⁵¹ All the institutional infirmities simply imply the "fallacy of institutionalism"¹⁵² if the Justice would be

144. Justice Frankfurter conceded that the courts do have a role in protecting individual liberty, but "[b]efore a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution." *Barnette*, 319 U.S. at 666.

145. *Id.* at 662.

146. For those who pass laws not only are under a duty to pass laws. They are also under a duty to observe the Constitution. And even though legislation relates to civil liberties, our duty of deference to those who have the responsibility for making the laws is no less relevant or less exacting. And this is so especially when we consider the accidental contingencies by which one man may determine constitutionality and thereby confine the political power of the Congress of the United States and the legislatures of forty-eight states.

Id. at 667. See also *id.* at 649.

147. But the real question is, who is to make such accommodations, the courts or the legislature? This is no dry, technical matter. It cuts deep into one's conception of the democratic process—it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say "This or that law is void." It cannot modify or qualify, it cannot make exceptions to a general requirement.

Id. at 651-52.

148. See *id.* at 657-58.

149. See *id.* at 647.

150. *Id.* at 648.

151. See text accompanying notes 20 & 39. See also Tribe, *supra* note 8, at 44-46.

152. See Tribe, *supra* note 8, at 54-56.

willing to state substantive principles and definitions of rights in other contexts. "Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution."¹⁵³ But neither Justice Jackson nor Justice Frankfurter intended to end the discussion with these observations.

Justice Jackson met Justice Frankfurter's institutional challenge by connecting the institutional difficulties to the real roots of the controversy, the assumptions they hold about the nature of society and normative theories of social organization. At the heart of his opinion, Justice Jackson articulated the notion of the Constitution which prevails to our present day:

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that the government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.¹⁵⁴

Observations about competence settle nothing if the judicial function preserves overarching values which inherently gain an evolutionary yet concrete definition through judicial decisions.¹⁵⁵ Judicial

153. *Barnette*, 319 U.S. at 664 (Frankfurter, J., dissenting). See also note 79 *supra*.

154. *Barnette*, 319 U.S. at 639-40.

155. "The task of this Court to maintain a balance between liberty and authority is never

decisions do articulate governmental values and thus, as a consequence, control the distribution of governmental services in the name of public good, whether or not judges like the fact and whether or not they are conscious of the phenomenon. Judges can fulfill their role of judgment only if their articulations can be justified consistently with the shared fundamental assumptions of the present culture's understanding of the world or reality.

Crucially, Justice Frankfurter did not disagree:

One's conception of the Constitution cannot be severed from one's conception of a judge's function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures.¹⁵⁶

Justice Frankfurter also did not wish to deny the emerging recognition of social interdependence over a view of society as an atomistic aggregation of individuals: "The manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow-men."¹⁵⁷

Thus, while both Justices agreed that judges must interpret the meaning of the Constitution, Justice Frankfurter emphasized the institutional character of the judiciary while Justice Jackson acknowledged and then dismissed the problem. But Justice Frankfurter did not mean to *justify* his opinion on these grounds either. The Justices' different views of the relevance of institutional competence symptomize a substantive difference over what values to *choose* in justifying constitutional interpretation and how much those values will be shaped by arguments cast in institutional form.

Before identifying the policy or value distinctions that existed between Justices Jackson and Frankfurter, it is important to note the similarity of their exchange to that of Professor Tribe and Justice Rehnquist. All four would agree that modern society consists of more than an aggregation of individuals and that the recognition of interdependence expands the notion of legitimate government in the common interest.¹⁵⁸ This recognition, however, would lead Justices

done, because new conditions today upset the equilibrium of yesterday." *American Communications Ass'n v. Douds*, 339 U.S. 382, 445 (1950) (Jackson, J.).

156. *Barnette*, 319 U.S. at 665.

157. *Gobitis*, 310 U.S. at 593.

158. Phillip Kurland, in analyzing *Barnette*, criticizes Justice Jackson as an exemplar of "the liberal judicial creed with all its internal conflicts showing." Kurland, *supra* note 113,

Frankfurter and Rehnquist to emphasize the preservation of order and institutions as preconditions for liberty.¹⁵⁹ Justice Frankfurter might easily be mistaken for Burke or Justice Rehnquist, in passages like the following:

But all these specific activities of government presuppose the existence of an organized political society. The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization.¹⁶⁰

On the other hand, the same view of society would lead Professor Tribe and Justice Jackson to see with special clarity the deficiencies of the political process: a short term orientation and pluralistic intolerance for the nontraditional or powerless minority. The deficiencies create a need for access to the judiciary to complete the larger *political* process of government. As Professor Tribe argued, "a just and reasonably stable division of the burdens and benefits of social and economic life"¹⁶¹ emerges from the interplay of the entire federalistic structure. His argument implies the inclusion of the judiciary as a functional unit of *government*.¹⁶² By quoting Burke, "[p]eople crushed by law have no hopes but from power. If laws are their enemies, they will be enemies to laws,"¹⁶³ Professor Tribe echoed Justice Jackson:

at 559. Kurland assumes that Justice Jackson believed the individual conscience to be important from within a liberal framework. See note 113 *supra*. Kurland suggests a vision of society as an aggregation of individuals which clearly requires all legitimate governmental action to be representative of a majority of individual preferences. Thus, a tension is created by an exercise of judicial review of legislation which, by definition, has been adopted by the representatives of a majority.

Kurland, however, ignores Justice Jackson's rejection of this view in the "majestic generalities" portion of the opinion. Justice Jackson valued the individual because individuals must be treated similarly to stabilize their interdependence and their stake in the intricate web of society. Thus, Justice Jackson's view of the judicial function included an independent charge to preserve the social fabric through the articulation of fundamental values.

159. For an articulation of Justice Rehnquist's position on the desirability of restricting litigation to resolve particular disputes as a function of a weighing of the costs and benefits of recourse to an adversary process, see notes 16-29 and accompanying text *supra*. For Justice Rehnquist, the protection of traditional institutions is the object of government. Wisotsky, *supra* note 51, at 175-76 & nn.12-21; see text accompanying notes 30-32, 55-59, 70 *supra*.

160. *Gobitis*, 310 U.S. at 596. See also text accompanying note 65 *supra*.

161. Tribe, *supra* note 8, at 43; see text accompanying note 153 *supra*.

162. Wisotsky, *supra* note 51, text accompanying n.37 at 179 & nn.133-34 at 197; see text accompanying notes 41, 82-83 *supra*.

163. Tribe, *supra* note 8, at 46 (quoting 3 THE CORRESPONDENCE OF EDMUND BURKE 387 (T. Copeland ed. 1958)).

Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system.¹⁶⁴

For Professor Tribe and Justice Jackson, lasting interdependence depends more on the allegiance fostered by fair treatment by the collective group and the institutions maintained by the resources of society than on the existence of unfettered authority for dominant traditional interests.¹⁶⁵ Their shared view of the necessity of judicial decision focuses the issue of legitimacy on the substantive values which can be justified as articulations of constitutional rights.¹⁶⁶

What values were there at stake in *Barnette*? Justice Jackson's famous defense asserted: "[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹⁶⁷ Justice Frankfurter seemed to agree: "So far as the state was concerned, there was to be neither orthodoxy nor heterodoxy."¹⁶⁸ But he continued, "[t]he constitutional protections of religious freedom terminated disabilities, it did not create new privileges Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma."¹⁶⁹ What was West Virginia's concern, religious proscription of conscience or neutral call to secular duty? Apparently, the real difference between Justices Jackson and Frankfurter occurs in the formalized judicial understanding of the vital, dynamic tension between Jehovah's children and the patriotism of a society at war.

The two Justices seemed to be deciding two different cases. According to Justice Frankfurter, "[a]ll that is in question is the right of the State to compel participation in this exercise by those who choose to attend the public schools It is a general non-discriminatory civil regulation [which incidentally] touches conscientious scruples or religious belief of an individual or a group."¹⁷⁰ Not surprisingly, Justice Frankfurter stated the issue similarly in

164. *Barnette*, 319 U.S. at 637.

165. See text accompanying notes 99-100 *supra*.

166. See notes 86, 104-05 and accompanying text *supra*.

167. *Barnette*, 319 U.S. at 642.

168. *Id.* at 653 (Frankfurter, J., dissenting).

169. *Id.*

170. *Id.* at 650-51.

Gobitis,¹⁷¹ as did the lower court in *Barnette*.¹⁷² Justice Jackson, however, rejected this putative question as an encapsulation of the dispute over the mandatory flag salute:

The *Gobitis* decision, however, *assumed*, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution.¹⁷³

Thus, the articulation of the stakes as defined by the factual representation symbolic of a living dispute may be outcome-determinative; perhaps broadly favorable to the interests of the individual (or plaintiff) while at the same time narrowly noncommittal about the governmental interest (or defendant's)—or vice versa—or any combination in between.¹⁷⁴ Ultimately, whether the

171. 310 U.S. at 392-93. Professor Richard Danzig develops the statement of the issue through various stages of Justice Frankfurter's decision in a way which parallels this portion of the discussion of *Barnette*. See Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, in *SUPREME COURT REVIEW* 257, 260-61 (1977). For this author's differences with Danzig, see note 200 and accompanying text *infra*.

172. *Barnette v. West Virginia State Bd. of Educ.*, 47 F. Supp. 251, 252 (S.D.W. Va. 1942). "Whether children who for religious reasons have conscientious scruples against saluting the flag of the country can lawfully be required to salute it." *Id.*

173. *Barnette*, 319 U.S. at 635-36 (emphasis in original) (footnote omitted). See also D. MANWARING, *RENDER UNTO CAESAR* 227 (1962); Freund, *supra* note 96, at 13; Kurland, *supra* note 113, at 556.

174. The articulation of the stakes as characterized by the perception of the framer of the issue in a particular case controls the positioning of the issue on this continuum. On the one hand, values commanding constitutional protection such as those of privacy, see, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965), were perceived to outweigh the governmental interests. By framing the issue with an emphasis on privacy, the Court in *Griswold*, felt itself justified in striking down the law on the basis that no compelling state interest was present. See also *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Doe v. Bolton*, 410 U.S. 179 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating regulation of contraceptives); *Schneider v. State*, 308 U.S. 147 (1939) (subordinating the problem of litter created by the distribution of handbills to the free exercise of first amendment rights).

On the other hand, when judges are favorably disposed towards a legislative act or pronouncement they construct the factual setting of a case as one involving broad and compelling state interests and only trivial, less compelling infringements on alleged individual rights. This is particularly true in areas perceived as requiring subordination of certain personal values in exchange for progressive or general public benefits. See *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (upholding legislation banning the advertising of cigarettes on the electronic media). See also *Village of Belle Terre v. Buraas*, 416 U.S. 1 (1974) (zoning); *Berman v. Parker*, 348 U.S. 26 (1954); *Miller v. Schoene*, 276 U.S. 272 (1928); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (Ct. App. 1963);

articulation completely controls the decision becomes irrelevant, for it inherently affects the outcome. Platitudes about dreaded Platonic guardians and preferences for democracy can never satisfy the requirement of judgment, and thus can never procedurally define an institutional debate under the labels of policymaking and deference. Similarly, translating that procedural debate into comparative institutional advantages begs the same question by failing to control the terms of the balance, the articulated values.

Justice Frankfurter was aware of the critical importance of linguistic manipulation: "The precise scope of the question before us defines the limits of the constitutional power that is in issue."¹⁷⁵ He then stated his version, concluding that the statement of the issue leads to a question of the allocation of governmental decisionmaking in a way which suggests a reversal of the sequence of *issue* and *authority to decide*: "[B]ut the real question is, who is to make such accommodations, the courts or the legislature?"¹⁷⁶ His case for legislative authority, in turn, was a residual of a well-developed, if narrow, concept of the first amendment's protection of belief but not incidental conduct.¹⁷⁷ So long as belief is not directly coerced and parents remain free to counteract the unconscious pressure of conformity, little legitimately protected liberty seems lost. But com-

Miller v. City of Tacoma, 61 Wash. 2d 306, 378 P.2d 464 (1963).

Between these examples of overriding interests of either the individual or governmental claims lie those articulations that are not readily adapted to clear distinctions. Lines are sometimes difficult to draw, particularly where two divergent claims of individual rights conflict. The exercise of individual freedom in a peaceable manner calls forth no directive for intervention by the state until the exercise of the freedom works to deny the rights of others. "It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin." *Barnette*, 319 U.S. at 630. The judges' expression of the factual statement determines the perception of the rights involved, the nature of the conflict and the nature and extent of the interference, and thus may well control the outcome.

Paul Freund described the critical nature of the judging glass in *Barnette*:

On the sliding scale of measurement which is the constitutional judge's professional instrument, how vital was the secular observance without exemption as compared with the offensiveness of it to a religious dissenter? This analysis was avoided by Mr. Justice Jackson. He elected to minimize the religious factor and to treat the problem under the aspect of freedom of the mind, or integrity of belief whether or not religious in nature.

Freund, *supra* note 96, at 13 (footnote omitted). See also Danzig, *supra* note 171, at 257.

175. *Barnette*, 319 U.S. at 650.

176. *Id.* at 651.

177. *Id.* at 654; see Danzig, *supra* note 171, at 259. "The tendency to ask a question about remedies in some cases and about rights in others is so frequently exhibited in Justice Frankfurter's opinions that differential focusing might fairly be said to be a process central to the functions of his jurisprudence." *Id.* Yet, Danzig did not add that Justice Frankfurter recognized the need to be explicit about why the question has been so framed. See notes 199 and 202 *infra*.

pare this very specific and particularized formula representing the individual's interest with the sweeping evaluation of the governmental interest in forced flag ceremonies in *Barnette*. Justice Frankfurter's method of vaunting the government's interests in *Barnette* reflected his manipulation of the judging glass in *Gobitis*, wherein he stated: "We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security."¹⁷⁸

Neither Justice Frankfurter nor Justice Jackson engaged in interest balancing, preferring a decision justified by hierarchical values. But, if Justice Frankfurter had grounded his decision in a balancing of interests, his task would have been simple.¹⁷⁹ In reply, Justice Jackson argued the inappropriateness of the social interest identified by Justice Frankfurter:

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning.¹⁸⁰

Justices Jackson and Frankfurter disputed the persuasiveness of their articulations of value, a persuasiveness which depends upon a method of justification through linguistic argument.

The linguistic argument occurs as a definition of a certain sort of values, those understood as the object of constitutional protection and, therefore, as prior to political decisions. Justice Frankfurter connected those values to a particular view of the human social animal in a way which led to his conception of an enforceable content for the first amendment within a constitutional separation of powers:

178. *Gobitis*, 310 U.S. at 595.

179. Justice Frankfurter declared that the law in question was enacted with a view toward a legitimate end. Thus, "an act promoting good citizenship and national allegiance is within the domain of governmental authority and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many claims of immunity from civil disobedience because of religious scruples." *Barnette*, 319 U.S. at 654-55. Justice Frankfurter supported this statement with "illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction." *Id.* at 655 (citing *Stansbury v. Marks*, 2 U.S. (2 Dall.) 213 (1793) (testimonial duties); *Hamilton v. Regents*, 293 U.S. 245 (1935) (obligation to bear arms); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination); *People v. Vogelgesang*, 221 N.Y. 290, 116 N.E. 977 (1917) (compulsory medical treatment)).

180. *Barnette*, 319 U.S. at 636.

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws.¹⁸¹

Justice Jackson simply believed that the outward and inner lives of individuals cannot be so clearly separated when the values in question concern "self-determination in matters that touch individual opinion and personal attitude."¹⁸²

Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.¹⁸³

A Justice's view of the relationship of the individual to the social group ultimately governs both the statement of the legal issue in question and the jurisdiction of the interpretation of legal language which resolves it. As Professor Tribe has stated: "The judiciary has thus reached into the Constitution's spirit and structure, and has elaborated from the spare text an idea of the 'human' and a conception of 'being' not merely contemplated but required."¹⁸⁴ Justice Rehnquist similarly demonstrated an undifferentiated and indivisible activism when he recommended an instrumentally weighted value for traditional institutions, whether by interpreting the reach of the underlying legal claim as in the case of *Barnette*, or by directly balancing institutional costs and benefits in deciding a question of remedy, common law or compelling interest.¹⁸⁵

If the opening quotation from Chief Justice Burger can be trusted as metaphor, the current Supreme Court seems disposed to argue on Justice Rehnquist's misleading terms.¹⁸⁶ However, contem-

181. *Id.* at 655.

182. *Id.* at 631.

183. *Id.* at 632-33.

184. L. TRIBE, *supra* note 84, at 893.

185. "Any decision that declares the law under which a people must live or which affects the powers of their institutions is in a very real sense political." R. JACKSON, *supra* note 114, at 53. Justice Jackson also stated: "[T]he people have seemed to feel that the Supreme Court . . . is still the . . . custodian that our system affords for the translation of abstract into concrete constitutional commands." *Id.* at 23. See note 138 and accompanying text *supra*.

186. See text accompanying notes 1-7, *supra*.

porary and subsequent commentary on the *Barnette* case, to a limited extent, has analyzed the opinions of the earlier period more consistently with Justice Frankfurter's version of Humpty Dumpty's tale.¹⁸⁷ Typically, the comments focused on the arguments for greater judicial scrutiny of legislative acts affecting civil liberties than those affecting economic resources.¹⁸⁸ The reexamination in *Barnette* of the Court's role in preserving individual rights was recognized as critical and fundamental:

Thus the cleavage between the views of the majority and dissenting opinions raises a fundamental constitutional issue, which in importance goes far beyond the significance of whether or not school children shall be compelled to salute the flag. Future decisions of the Court in the field of civil liberties will be closely watched by all those interested in the trend which the Court will take on this important question.¹⁸⁹

Significantly, the question itself was framed on the assumption that the point of interest was the justifications for treating differently the areas of law involving economic relationships and personal choice, rather than on a belief that judges should stay out of both areas. "[I]f the Bill of Rights is to mean anything, the Supreme Court must accept its responsibility of carefully scrutinizing legislation which indicates a restriction of the civil liberties guaranteed by the first ten amendments, because those liberties should occupy a more exalted plane than other rights."¹⁹⁰

This responsibility could not be mechanical, deductive or

187. The contemporary criticism is fairly accurately reflected in D. MANWARING, *supra* note 173. The *Gobitis* case has been almost universally attacked. See, e.g., Fennel, *supra* note 113; Heller, *A Turning Point for Religious Liberty*, 29 VA. L. REV. 440 (1943); *The Gobitis Case in Retrospect*, 1 BILL OF RIGHTS REV. 267 (1941); 26 CORNELL L.Q. 127 (1940). The commentary on *Barnette* usually applauds Justice Jackson and finds Justice Frankfurter unpersuasive. Compare Nielson, *Robert H. Jackson: The Middle Ground*, 6 LA. L. REV. 381 (1944-46) and Powell, *The Flag-Salute Case*, NEW REPUBLIC, July 5, 1943, at 16 (incoherence of Justice Frankfurter's view of the judicial function leading to the logical conclusion of legislative absolutism) and 32 GEO. L.J. 93 (1943) (minority rights need protection) and 42 MICH. L. REV. 319 (1943) and 22 TEX. L. REV. 230 (1943) (Supreme Court must preserve the values of the Bill of Rights) with Slade, *Constitutional Law—Guaranty of Liberty—State Law Requiring Public School Pupils to Salute the Flag Held Unconstitutional*, 6 GEO. BAR J. 249 (1943-44) and 12 GEO. WASH. L. REV. 70 (1943) (frustration of the public will by minorities).

In addition, many memorials written about Justice Jackson, after his death in 1954, contain discussions of *Barnette*. See Fairman, *Associate Justice of the Supreme Court*, 55 COLUM. L. REV. 445 (1955); Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937 (1955); Jaffe, *supra* note 108; Steamer, *Mr. Justice Jackson and the First Amendment*, 15 U. PITT. L. REV. 193 (1954); Weidner, *Justice Jackson and the Judicial Function*, 53 MICH. L. REV. 567 (1955); Symposium—*Justice Jackson*, 8 STAN. L. REV. 1, 1-76 (1955).

188. See 32 GEO. L.J. 93 (1943); 92 U. PA. L. REV. 103 (1943).

189. 92 U. PA. L. REV. 103, 105 (1943).

190. 22 TEX. L. REV. 230, 235 (1944).

objective.¹⁹¹ "Justices may always have been sufficiently sophisticated to know that the judicial process . . . is primarily political, not judicial, but it is only recently that they have admitted as much and have begun to discuss publicly their methods of deciding cases."¹⁹² This focus on methodology led to the understood connection between Justice Stone's footnote four in *Carolene Products* and the basis of Justice Jackson's opinion in *Barnette*.¹⁹³ The assumption persisted that Justice Stone's rationale or something like it must prevail. As Thomas Powell wrote, "judicial tolerance, if carried to the extreme of the postulates in its favor, would mean the denial of constitutionally secured liberties. Somewhere the line has to be drawn, as Mr. Justice Frankfurter has recognized in cases where he has condemned or joined in condemnation."¹⁹⁴ Justice Frankfurter's incoherence, as identified by Powell, arose from the problem of generality. In the words of Professor Braden: ity. In the words of Professor Braden:

Aside from all these theoretical difficulties with Mr. Justice Frankfurter's objective standard, there is the practical problem of applying it to concrete cases. That he is aware of this is clear from his acknowledgment that "judges among themselves may differ," and his belief that "alert deference to the judgment of the State court under review" will keep the differences under control. He has said this cannot be "blind acceptance." He must, therefore, be saying that even though judges can agree on what is society's opinion, he reserves the privilege of applying it his way. But he cannot do that except by his own view of how best to enforce the objective rules he finds. By the gradual process of judicial inclusion and exclusion, he will clothe society's abstraction with reality. The reality is his, not society's.¹⁹⁵

In short, Justices Jackson and Frankfurter fought an epic battle for control of the judging glass, the same glass Judge Friendly holds briefly to light in his contribution.

IV. HUMPTY DUMPTY'S REPLY AND THE PROBLEM OF LEVELS OF GENERALITY

Through the extraordinary focusing power of the judging glass, the opposing and potentially governing interests revealed in the

191. See text accompanying note 98 *supra*.

192. Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 571 (1948) (footnote omitted) (citing *Barnette* as an example).

193. See 32 GEO. L.J. 93, 98 (1943).

194. Powell, *supra* note 187, at 17.

195. Braden, *supra* note 192, at 588.

existential facts of each case can be surgically transformed into linguistic forms which shape, in conjunction with other interpretive functions, the written opinion and which thereby define the legal rule applied to those interests. To be sure, others, entire traditions in fact, have critiqued judges for leeways and loopholes in the judicial method. Judge Frank's "fact skepticism"¹⁹⁶ and Karl Llewellyn's "leeways of precedent,"¹⁹⁷ for example, bracket the exercise being labeled by the metaphor of the judging glass.

Whether any one aspect of the process of deciding cases in forms suitable for written communication consistently offers an interpretive opportunity which can be independently outcome-

196. Compare J. FRANK, COURTS ON TRIAL 54-55 (1949) with K. LLEWELLYN, *Legal Tradition and Social Science Method*, in JURISPRUDENCE 95-96 (1962). Both Judge Frank and Professor Llewellyn concluded that the judge's interpretation of the facts of the case provides at least a method, if not a cause, for a particular decision or result in a given case. In transcribing into words on paper the transactions, statements and thoughts surrounding the claim before the court, the judge, to use Llewellyn's words, "picks, leaves, emphasizes, slights, even twists" the facts to fit or predestine his conclusion. *Id.* at 95. Judge Frank, in this regard stated:

The "facts," it must be never overlooked, are not objective. They are what the judge thinks they are. And what he thinks they are depends on what he hears and sees as the witnesses testify—which may not be, and often is not what another judge would hear and see. Assume ("fictionally") the most complete rigidity of rules relating to commercial transactions. . . . Still, since the "facts" are only what the judge thinks they are, the decision will vary with the judge's apprehension of the facts.

J. FRANK, *supra* at 55 (quoting Frank, *Are Judges Human?* (pt. 1) 80 U. PA. L. REV. 17, 35-36 (1931)).

197. See K. LLEWELLYN, THE COMMON LAW TRADITION 62-120 (1960). Professor Llewellyn listed seven techniques judges use, or misuse, in order to achieve the desired result in a particular case despite precedent which would seemingly dictate a contrary result. Among these techniques, one is especially apt for this article. Llewellyn described it as follows: "The older case, though significantly parallel in real facts, is brushed off because of the 'facts' (artifacts often 'constructed') there, while a completely different manner of interpretation and classification is used on the raw facts of the case in hand." *Id.* at 85. See also K. LLEWELLYN, *supra* note 196, at 70-71. Llewellyn's close analysis of the deduction process itself, which to an extent underlies the system of stare decisis, reveals that there are inherent margins of play in even the most tightly maintained syllogism. Even from an inductive approach, the leeways available in utilizing any given precedent are vast. For an overview of Llewellyn's ideas of manipulation of precedent, see K. LLEWELLYN, *supra* note 13, at 41-69. See also J. FRANK, *supra* note 196, at 275-76. Judge Frank's analysis of precedential leeways is typical of the many views expressed in the area. Expressing another popular ploy, Judge Frank has categorized some of the methods of avoiding undesirable precedent and has given each method a name: (1) the "'Distinguishing' or 'Precise Question' Device," by which the judge may avoid obnoxious precedent by emphasizing even the most trivial factual distinction ("But this car is yellow!"); (2) the "'Verbal Stability' Device," which method Judge Frank claims judges use to simply alter the meanings of words just enough to accommodate within a given precedent that which otherwise would lie without it; and (3) the "'Ratio Decidendi' Device," where, by reevaluating cases making up an antagonistic strain of precedent, judges can extract from hindsight new and different principles from the cases. They can thus adjust to their liking the rule of law emanating therefrom. *Id.* at 275-80.

determinative, or whether one aspect predominates as a favorite tool at any given time, matters little. Whether the *Barnette* case perfectly fits its proffered explanation and, thus, illustrates an earlier recognition of one aspect of a broader issue inherent in linguistic interpretation, may be even more problematic.¹⁹⁸ One seeks an emphasis, a certain recognition that debates about "activism" obscure the vitality of the legitimately political aspects of judgment. Karl Llewellyn, in fact, described the impact of the judging glass phenomena during the era of the *Barnette* case.¹⁹⁹ What this comment labels the "level of generality" problem and what Professor Danzig calls "differential focusing,"²⁰⁰ Professor Llewellyn described in this way:

[Judges] make the law by voicing what had not been voiced before, and how they voice it . . . , as well as in the sharp or loose phrasing of the solving rule, and in the limitation or extension and the direction of issue and of phrasing—that "how" is creation by the judges.²⁰¹

198. See notes 114-33 and accompanying text *supra*.

199. See text accompanying note 198 *infra*.

200. Danzig, *supra* note 171, at 258. Compare Danzig with Llewellyn's statement following this note in text. Danzig has written:

I suggest that contemporary circumstances were very important factors in the case discussed here and that it was at the point of question framing that these factors were most readily absorbed in the Justice's opinion. In general, I suggest, the techniques of loading questions, whether by means of inflation or by differential focusing, permits simultaneous deference to two conflicting but greatly valued imperatives. It gives play to a judge's sense of what is right and necessary in the everyday world, while it preserves the purity of an opinion's legal logic.

Danzig, *supra* note 171, at 259. This author's differences with Professor Danzig are two-fold. First, although Danzig, like the traditional caricature painted of the legal realist, identifies a technique by which judges manipulate facts and reasoning to reach a conclusion they prefer, he does not explain either: (1) whether he believes the judge could do otherwise; or (2) what conclusion to draw about the norms of the judging craft from this manipulation. At least Karl Llewellyn went beyond this stage to define a notion of the judicial function consistent with this comment's assumptions. See Casebeer, *supra* note 105. Second, Danzig identifies the technique of differential focusing as a discrete technique which the judge may use or not in writing the opinion and, thus, which when present represents one *part* of the *whole* opinion. In contrast, the level-of-generality notion *structures* the entire concept of the judicial function. The statement of the question represents only the most clear manifestation of an indivisible whole which the opinion communicates as the interpretive *process* of moving from presentation of a factual dispute through the manipulation of facts and legal standards to a particularized statement of law. Differential focusing through the judging glass, properly understood, is what judges do, *simpliciter*.

201. Llewellyn, *supra* note 13, at 1296. The problem of interpretation was recognized long before it was addressed by Llewellyn or Danzig:

And would you not say that persuading them is making them have an opinion? . . . When, therefore, judges are justly persuaded about matters which you can know only by seeing them, and not in any other way, and when thus judging of them from report they obtain a true opinion about them, they judge without

However, the critics of the realists, the current conservative institutionalists on the present Court or even political liberals who translate their values into institutional terms for debating purposes, see only part of the story of judicial decisionmaking. The judicial function decides disputes. It produces a service—resolved disputes.²⁰² For the realists, one must strip away the trappings of a formalistic method that hides the real reasons or causes of this end result or, for others, cheats democracy by making unauthorized policy. But this clearly correct impulse to discover the motivation for the decision arguably creates a tunnel vision which deemphasizes as it acknowledges the *written* nature of the judicial function.²⁰³

Judges write opinions and steadily expand their length for an important reason: judicial decisions must be justified. The exercise of raw political power decides cases, to be sure, but judges do not describe their function in that way; and yet after the realists, judges cannot deny the scope for policymaking hidden in the mechanism of decision. Assuming some need for dispute resolution by a “neutral” third party, *choice, judgment*, and not fears of usurped democracy or institutional inflexibility or any of the other fallacies Professor Tribe persuasively dispatched, carry the indwelling need

knowledge and yet are rightly persuaded, if they have judged well And yet, O my friend, if true opinion in law courts and knowledge are the same, the perfect judge could not have judged rightly without knowledge; and therefore I must infer that they are not the same.

PLATO, *THEAETETUS* 72 (B. Jowett, trans. 1949) (footnote omitted). See also note 207 and accompanying text *infra*.

202. See text accompanying note 13 *supra*.

203. At one point during the heyday of the realists, Karl Llewellyn described the judging glass function among a list of numerous techniques by which precedents are manipulated to reach a preconceived result. “One observes the level of *silent* application or modification or escape, in the ‘interpretation’ of the facts of a case, in contrast to that other and quite distinct level of express wrestling with the language of the paper rule.” Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431, 450 (1930), reprinted in LLEWELLYN, *JURISPRUDENCE*, *supra* note 196, at 24. See also, Braden, *supra* note 192, at 576-77.

If the opinion of the Court were significant only as a justification of the action taken in the case before it, the entire range of verbal legerdemain might be safely employed. Unfortunately, the Court’s every word must be set down with an eye to its meaning in the future in similar situations, in analogous situations, even in irrelevant situations.

Id. Similarly, Professor Kantorowicz wrote:

The realists’ conception of the Law, their substantive thesis, is therefore: the Law is not a body of rules, not an Ought, but a factual reality. It is the real behavior of certain people, especially of the officials of the Law, more especially of the judges who make the Law through their decisions, which, therefore, constitutes the Law.

Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240, 1243 (1934).

As Professor Jaffe summarized, “to the simon-pure ‘realist’ each conflict was to be apprehended and evaluated in terms of its overwhelming immediacy, of its current complex of ‘realities.’” Jaffe, *supra* note 108, at 942.

for justification. Other institutions may determine the occasions for judicial choice by setting jurisdiction or justiciability requirements²⁰⁴ or they may engage in the ongoing dialogues of governance which modify judicial choices in subsequent enforcement or legislation. Such acts by other institutions will channel the kinds of justifying arguments which will be persuasive, but the *necessity* to justify is preestablished by the idea of judgment. Judgment requires criteria of choice and if choice can no longer believably refer to an objective prior source, given the subjectivity of human fulfillment of any role, the criteria must evolve internally to the decision.²⁰⁵ Because this function is ongoing, judgment in a form which can be used analogically for the guidance and the justification of future cases requires a retrievable form, the written opinion.²⁰⁶

*The judging glass produces the central interpretive structure of an opinion, the transformation of the dispute into linguistic forms capable of analogic or legal reasoning.*²⁰⁷ The most obvious manifestation of this central structure appears in the framing of the issue. But phrasing the issue is simply the most obvious manifestation, and it not surprisingly appears as such by linguistic necessity. As Karl Llewellyn, perhaps the only realist not clearly subject to this comment's critique, observed: "Behaviour is too heterogeneous to be dealt with except after some artificial ordering. The sense impressions which make up what we call observation are useless unless gathered into some arrangement."²⁰⁸ The arrangement chosen by a *judge* assumes a particular form, following function. Yet, because the judicial function is an interpretive one, function depends on the form of interpretation *created* by the written articulation of judicial argument. Form and function are inevitably united by the interpretive structure of judgment. The entire written opinion constitutively²⁰⁹ decides the object of litigation: the settlement of a dynamic

204. See *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1868); note 14 and accompanying text *supra*.

205. See Casebeer, *supra* note 105, at 684-94.

206. See note 203 *supra*.

207. The extent to which a concept of realistic *structuralism* can be defined as a useful method of criticism, and thus of judicial methodology, constitutes the subject of my current research. I do not mean to use the concept of structure rigorously in this article and therefore make no reference to any particular school of structuralism.

208. K. LLEWELLYN, *supra* note 196, at 27.

209. I use "constitutive" in the same sense as Roberto Unger does when he distinguishes constitutive, technical, instrumental and prescriptive rules:

Constitutive rules define a form of conduct in such a way that the distinction between the rule and the ruled activity disappears. It has been said that the rules of games and the rules of logic are of this sort. The moves of a game and thus the game as a whole are defined by its rules.

R. UNGER, *KNOWLEDGE AND POLITICS* 68-69 (1975).

dispute captured by the judging glass as the clarification of the relevance of government for social relationships, rules of law, and sometimes constitutional rights.

Two conclusions follow from these observations. First, the judicial decision cannot be characterized as a discrete act of government *accompanied* by a written articulation and justification as a *record* of the act. The judicial decision, while certainly a governmental act and thus inherently political, does not consist solely of a ruling. Rather, the governmental *process* of the judicial decision unfolds through and thus *is* a written articulation of values to which other governmental institutions react in greater or lesser understanding and efficiency. Part of their reaction includes legislative adjustment of the relations of disputants whose fight composes the raw material of the process.

Second, the forms of the judicial decision process, linguistic arguments built into a written opinion, communicate and in turn shape the articulation of social values inherent in interpreting legal claims. Therefore, the forms chosen in the particular case also need to be explained and thus implicitly justified. Of course, many judges write no opinions, but this empirical artifact only suggests that the work which opinion writing accomplishes has been completely internalized for some kinds of disputes at some levels of judging. The more critical point remains the inherent risks of the judging glass extracting from a vital, dynamic life situation presenting a different face to every observer, the inappropriate level of generality of the legal stakes. The judicial "decision" is a nondiscrete episode embodied in a written articulation within the continuous process of justifying dynamic social values which need clarification at the behest of correctly interested parties. The justification emerges internal to the rationalization of the demands presented by the "factual" context in a society of interdependent individuals which persuade the reader of the social need for the judicial mode of governance. *Opinion equals decision equals justification, and no society which wishes to remain a society escapes the task, if not the institution.*²¹⁰

Judge Friendly's article explored the level-of-generality phenomenon in relation to the judicial duty of justification mainly in his

210. Without order there is no group life, there is no group. If the members of a group do not . . . manage to live together, if their respective conduct is not to some degree oriented with reference to each other . . . you have no group *Settlement* of disputes, in any fashion, means reestablishment of the old order, or as the case may be, a new establishment of a somewhat different order in the group.

K. LLEWELLYN, *supra* note 13, at 108 (emphasis in original).

discussion of *Brown v. Board of Education*²¹¹ and *Roe v. Wade*.²¹² Before turning to these cases, Judge Friendly explained why the level-of-generality problem inheres in *justified* judgments: "Some provisions of the Bill of Rights invite the courts to develop and then to apply notions of social policy."²¹³ Judge Friendly cited the concept of cruel and unusual punishment as a phrase which is not static but must continually be reexamined in light of "evolving standards of decency."²¹⁴ But Judge Friendly indicated that it would be a mistake to conclude, because such concepts seem open-ended, that the judicial role is intrinsically different there from the role the courts play when they are dealing with seemingly more narrow and precise language. To show that even the most narrow phrases over time have been subject to changing interpretations, he cited the language of the first amendment: "Congress shall make no law"²¹⁵ To ask a judge to avoid making a partially subjective judgment is to ask for the impossible: "The question is not whether but to what extent"²¹⁶

In analyzing *Brown*,²¹⁷ Judge Friendly observed that: "Social policy entered the decision at two points—the Court's emphasis on the special importance of education and its determination that separate education was 'inherently unequal.'"²¹⁸ Thus, he equated the latter interpretive problem of open-ended legal rules with the interpretive problem of how generally to characterize the problem of discrimination involved in *Brown*. Judge Friendly thought that tying the unjust discrimination involved in separation of the races to the importance of education was an effort to justify the decision at the wrong level of generality because that choice of nexus forced the judges to utilize psychological and sociological data that is more appropriately utilized to justify shifting legislative arrangements. Judge Friendly thought several more appropriate jural principles could have been constructed on the facts of *Brown* and used to interpret the Constitution.²¹⁹

211. 347 U.S. 483 (1954).

212. 410 U.S. 113 (1973).

213. Friendly, *supra* note 11, at 27.

214. *Id.* at 28 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

215. U.S. CONST. amend. I; see Friendly, *supra* note 11, at 28.

216. Friendly, *supra* note 11, at 28.

217. *Brown v. Board of Educ.*, 347 U.S. 483 (1954) held that the separate but equal doctrine, adopted in *Plessy v. Ferguson*, 193 U.S. 537 (1896), is not applicable to public education.

218. Friendly, *supra* note 11, at 29.

219. Judge Friendly explained his concept of generality:

Several such bases could have been derived from the text and the history of the equal protection clause. The Court might have gone to the full extent of saying

If the Court had taken any of these courses, it would not have been subject to the criticism that it was using psychological evidence of dubious validity, . . . as the justification for substituting its factual judgment that "[s]eparate educational facilities are inherently unequal" for the legislature's factual judgments that they were not.²²⁰

The choice of what the facts *stand* for cannot be neutral. As Judge Friendly continued: "Admittedly, the jural bases suggested above are not interchangeable; each would have consequences different from the *Brown* opinion and from each other for such issues as the appropriate remedy for de jure segregation, what was to be done about de facto segregation and the constitutionality of reverse discrimination."²²¹ Where the claim becomes a jural principle further defining the evolving standards of constitutional, statutory or common law, there exists an inescapable need to explain *why* the facts yield a particular putative claim for judicial protection.

Sometimes the constitutional language being interpreted forces an explicit judicial focus on the level of generality with which the factual dispute will be viewed. Justice Jackson argued that the justification of an equal protection decision depends primarily upon which *justifiable* characterization of the facts the judges choose:

[T]here is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus

that any governmental classification based on race was a denial of equal protection. It might have said, less broadly, that any racial classification imposed by a majority upon a minority constituted such a denial. It might have said, still less broadly and with a view to the particular evil that gave rise to the writing of the fourteenth amendment, that any racial classification imposed upon blacks violated the equal protection clause. It might have said, as Professor Goodman has suggested, that since a racial classification is constitutionally suspect, the state had the burden of showing that such classification did no harm, and the finding of the Kansas district court and the opinions of the psychologists were relevant, although not really necessary, to show how far the state had fallen short of discharging that burden. Finally, in light of the doctrine that has since developed, the Court could have said that any racial classification must be shown to be required by a compelling interest and that the state had not done so.

Id. at 30-31 (footnotes omitted) (citing Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275 (1972)).

220. Friendly, *supra* note 11, at 31 (footnote omitted).

221. *Id.* (footnote omitted). For a complete analysis of these issues and the consequences of judicial decisions on each, see Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275 (1972).

to escape the political retribution that might be visited upon them if large numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.²²²

Recent decisions, particularly in the area of gender discrimination, have recognized variable standards of rationality which the classification of individual status for governmental purposes must meet to avoid unconstitutional arbitrariness.²²³ Thus, the need for judicial review of legislative acts has been translated into legal standards defining equal protection of the laws. It is no accident that the problem of interpretation of constitutional texts which define individual rights collapses into the problem of interpretation of the facts of a dispute over rights, for the legal *standard* concerns which situational contexts should remain personal and beyond the reach of political regulation and which should be treated similarly to other situations legitimately subjected to majoritarian control. For example, in *Craig v. Boren*,²²⁴ Justice Brennan attacked the use of "archaic and over broad" generalizations that courts had previously used to justify their decisions in similar cases:

[I]ncreasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loosefitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.²²⁵

222. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring); see Kurland, *supra* note 113, at 572-73. Kurland, however, saw Justice Jackson's view as important only as related to doctrinal results and not as tied to a deeper view of constitutional structure and the judicial institution. Thus, Kurland missed the directional force of Justice Jackson's analysis in *Railway Express* for the decision in *Barnette* and for the continuity between *Railway Express* and Warren Court decisions. For the development of this argument, see the discussion of *Maier v. Roe*, 432 U.S. 464 (1977), in notes 263-70 and accompanying text *infra*.

223. See Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

224. 429 U.S. 190 (1976) (holding unconstitutional an Oklahoma statute prohibiting the sale of beer to males under the age of 21 and to females under the age of 18 on the grounds of gender-based discrimination).

225. *Id.* at 198-99 (citation omitted).

That the approval or deferral of a legislative factual stereotype as rational must be grounded in principles of accuracy and fairness, as indicated by Justice Jackson, should be obvious from the Court's opinion in *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873) (uphold-

Thus, while the level-of-generality problem stems from the interpretation of fact necessary to judgment, regardless of the legal question, when the question is one of constitutional rights, the generality problem is heightened. The level of generality itself is an object of interpretation because the concept of a constitutional right universally applies to all individuals as members of the society. However, while certain statutory phrases and constitutional allocations or limitations of authority facially highlight the generality of a case's factual force, the same, if more hidden, impacts occur in other doctrines. In a sense, all fourteenth amendment claims, whether based upon equal protection or due process raise the same question: whether the legislature has demonstrated sufficient rationality to justify the need to regulate personal choices or personal status under the name of the common welfare.²²⁶

Decisions concerning substantive due process protection of privacy illustrate the intensified focus on the level-of-generality problem in cases arising under the fourteenth amendment. Not surprisingly, the speakers at this symposium used these cases in support of their arguments. In his awesome work, *American Constitutional*

ing an Illinois law prohibiting the practice of law by women), a case from the Court's now discredited formalistic period.

In his concurring opinion in *Bradwell*, Justice Bradley stated:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender The constitution of the family organization, which is founded in divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are [sic] to fulfill the noble and benign offices of wife and mother.

Id. at 141 (Bradley, J., concurring). I am indebted to Linda Furman, one of my students, for this observation.

226. For the bridging doctrine which makes clear the liberty and equal protection sides of the fourteenth amendment coin, compare the pronouncement and use of irrebuttable presumptions as a part of judicial decisionmaking by Justices Stewart and Powell in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (challenging mandatory maternity leave without pay as violative of the fourteenth amendment). In his concurring opinion, Justice Powell reexamined the "irrebuttable presumption" rationale used by Justice Stewart's opinion for the majority and deemed the "equal protection analysis" to be "the appropriate frame of reference." *Id.* at 651. Justice Stewart's opinion for the majority held the mandatory maternity leave rule violative of the due process clause "because of their use of unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty." *Id.*; see Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975). Professor Tribe advanced three categories of constitutional limitation encompassed by the concept of due process: (1) substantive "constraints upon the policies government may seek to implement;" (2) procedural, "constraints upon the methods by which governmentally chosen policies may be enforced;" and (3) structural, focusing on "the structures through which policies are both formed and applied, and formed in the very process of being applied." *Id.* at 269 (emphasis in original).

Law, Professor Tribe²²⁷ noted the impact of the level-of-generality in his criticism of the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*,²²⁸ involving the constitutionality of enforcing penal statutes against sexual activities between consenting adults.²²⁹

The eventual unfolding of doctrine in this area will confront one methodological problem that it would be useful to examine here. Insofar as the right of personhood is limited to liberties long revered as fundamental in our society, it makes all the difference in the world what level of generality one employs to test the pedigree of an asserted liberty claim It is crucial, in asking whether an alleged right forms part of a traditional liberty, to define the liberty at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct.²³⁰

Professor Tribe connected the justification of the scope of the privacy protection to the desideratum that courts must be sensitive to include both popular and unpopular exercise of rights when defining basic values "so rooted in the traditions and conscience of our people to be ranked as fundamental."²³¹ Clearly, the notion of justification requires as much, but furthermore, the justification is particularly judicial, as is Judge Friendly's notion of jural principle and Justices Jackson's and Frankfurter's notion of judges protecting long term values from short term majoritarian manipulation against minorities. Thus, Professor Tribe emphasized the fundamental value of a just third party *process* for dispute resolution, particularly for access to those disfavored or discriminated against in the political process. Therefore, the process itself must be conceived as a value of the resolution. Unlike the realists, at least in their usual portrayal,²³² Professor Tribe did not require separating the decision

227. At this point a slight unfairness to Professor Tribe must be confessed. Although Professor Tribe's contribution at this symposium has been criticized because he confined his analysis to the terms of the activism-deferral dichotomy, he has emphasized the fundamental value of a just third-party process for dispute resolution. See L. TRIBE, *supra* note 84.

228. 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975).

229. The federal court refused to grant relief against enforcement or threatened enforcement of Virginia's sodomy laws prohibiting male homosexuality. Thus, the privacy and personal choice protection of acts and conduct in the fourteenth amendment only relates to traditional relationships, such as elements of marriage or family life viewed from a historically approved and sanctioned perspective. *Id.*

230. L. TRIBE, *supra* note 84, at 944-45 (footnote omitted). See generally *id.* at ch. 15.

231. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 652 (1943) (Frankfurter, J., dissenting).

232. See Casebeer, *supra* note 105.

as a consequence of the judicial function from the process of decision.²³³

The history of the new substantive due process can be viewed as a shift in the focus of the judging glass on disputes over governmental limitations of personal choice, almost as a microscope shifts powers to reveal greater definition or broader environments within its slides. Judge Friendly, in fact, believes the protection of choice now exceeds the generality of privacy and should thus be recognized as a right of personal autonomy.²³⁴ Beyond merely increasing the volume of restatements of liberty, the expansion of constitutional protections of privacy involves a notable style of argument. The only difference between the later, broad holdings and the initial formulations lies in the expansion of the characterization of the factual issue.²³⁵ The same notions of personal autonomy used to justify the decision in *Griswold v. Connecticut*²³⁶ were subsequently used to justify the protections of privacy in *Carey v. Population Services International*²³⁷ and *Whalen v. Roe*.²³⁸

Liberty under the fourteenth amendment, as defined in *Griswold*, includes a protection of privacy which prohibits the enforcement of a ban on the use of contraceptives because such enforcement intrudes into the sacred marital bedroom, or perhaps alternatively, because privacy protects against governmental acts which inhibit a full exploration of intimacy in marriage. In *Eisenstadt v. Baird*,²³⁹ the generality of the protection of such choices extended to *individuals* in the exercise of personal sexual practices (at least those that are "traditional"): "If the right of

233. See L. TRIBE, *supra* note 84, at 13-14. In the context of all his writings, Professor Tribe, with characteristic clarity, connected process and product. See Tribe, *Policy Science: Analysis or Ideology?*, 2 PHILOSOPHY AND PUB. AFF. 66 (1972-73); Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973); Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974).

234. Friendly, *supra* note 11, at 35. But see *Whalen v. Roe*, 429 U.S. 589 (1977), holding that a New York statute requiring recordation of prescriptions for certain drugs and providing safeguards to prevent unauthorized access to or use of the records in the state's possession not to be violative of any right protected by the fourteenth amendment. Although the Court recognized the right of privacy as encompassing the "individual interest in avoiding disclosure of personal matters" and "the interest in independence in making certain kinds of important decisions," the statutory scheme was viewed not to "pose a sufficiently grievous threat to either interest to establish a constitutional violation." *Id.* at 599-600.

235. Compare *Griswold v. Connecticut*, 381 U.S. 479 (1965) with *Whalen v. Roe*, 429 U.S. 589 (1977) and *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). See also Friendly, *supra* note 11, at 36-37.

236. 381 U.S. 479 (1965).

237. 431 U.S. 678 (1977).

238. 429 U.S. 589 (1977).

239. 405 U.S. 438 (1972).

privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁴⁰ By 1976, in *Carey*, Justice Brennan asserted: "Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."²⁴¹ Judge Friendly's notion of personal autonomy²⁴² seems more appropriate than the limitation of due process which Justice Stevens articulated as the common denominator of privacy protection in *Whalen*. Justice Stevens wrote: "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."²⁴³ This level-of-generality in the definition of liberty evolves through the cases as each case suggests to the Court a factual restatement of the constitutional principle which can be justified in an opinion explaining the resolution of an adversary dispute.²⁴⁴

Judge Friendly focused on the abortion question and *Roe v. Wade*²⁴⁵ as an example of a correct decision from any realistic view of the facts, but one poorly justified by the written *opinion* which too broadly generalized the legal form of the resolution of the particular dispute.²⁴⁶ The *Wade* facts create a difficult task for the manipulators of the judging glass. Judges must avoid preoccupation with the transforming of facts into potential components of a jural argument (the intended product of the focusing process), causing them

240. *Id.* at 453.

241. 431 U.S. at 687. See generally 32 U. MIAMI L. REV. 750 (1978).

242. See Friendly, *supra* note 11, at 35.

243. 429 U.S. at 598-600.

244. See L. TRIBE, *supra* note 84, at 886. Professor Tribe described *Whalen* as the "most comprehensive attempt thus far to define the constitutional right of privacy." *Id.* For a different approach to the judicial process, see E. LEVI, *supra* note 13. Instead of deducing the doctrinal solution to a given factual dispute from an established, or evolving, principle, judges decide by a "process of determining similarity or difference," *id.* at 3, that is "reasoning by example." *Id.* at 1. While individual cases may appear to be decided on the basis of a set rule, that rule emerged from the process of reasoning by example. Thus, legal reasoning is circular. Factual situations are compared and judgments are made, a rule is derived from prior judgments and the rule is then "applied" to other situations judged as similar. The actual process, however, is not the application of a rule but the classification of a given factual situation as sufficiently similar to other situations so that it may be treated similarly.

245. 410 U.S. 113 (1973).

246. See Friendly, *supra* note 11, at 32, 33-34. "[C]onsiderations of social policy militating against [abortion statutes] were strong indeed Ultimately, however, one must face the question of how this overwhelming social case could be translated into a principle of constitutional law" *Id.* at 32-33.

to forget that justifications cannot be divorced from the implicit demands of real, ongoing social problems.²⁴⁷ Just as the discourse must be general enough to protect liberty, it must be specific enough to be identified through the facts as meaningfully addressing the underlying social problem brought to the courts in the structure of a two-party litigation.²⁴⁸ Judge Friendly noted that sociological data appropriately explained which factual aspects of the dispute require transformation through the judging glass into potential jural principles.²⁴⁹ The data *explains* rather than justifies the judgment in *Wade*, for the same reasons given by Judge Friendly in observing that the mere analysis of data does not accomplish the justification of the judgment in *Brown*.²⁵⁰ Sociological data arguably controlled the *Brown* decision on the assumption that if education were, in fact, unequally achieved by separation of races, equal protection would be denied. But justification depends upon the persuasiveness of the entire case for the chosen postulates, communicated through the consequences of the decision and confirmed by later episodes within the judicial process.²⁵¹ To Judge Friendly, the weakness of the *Wade* opinion stemmed from inadequate emphasis on the realities of serious injury and death due to illegal abortions²⁵² and the disproportionate number of the poverty stricken suffering such injuries.²⁵³ These factors should have been involved in translating "a case of such overwhelming social import" into a legal principle. As Judge Friendly stated: "Justice Blackmun must have been fully aware of all this, as witness the final paragraph of his subsequent dissent in *Beal* where he condemns the majority for refusing to recognize the realities of poverty."²⁵⁴

247. See generally Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); Radin, *supra* note 95. Radin explained the interpretation problem in terms of statutory construction. He suggested that, in deciding whether to apply a strict or liberal construction to a statute, judges should refer to a "competent calculus of probable consequences." *Id.* at 885. Landis replied that judges should restrict themselves to finding the intent of the legislature and then applying that intent without unnecessary judicial interference. Landis, *supra* at 889-90.

248. There is another confusion, found in dealing with rules, and strengthened by the associated idea of rights, within the field of doctrine itself. Having come to regard words as sound bases for further thinking, the tendency is well nigh inevitable to simplify the formulations more and more: to rub out of the formulations even the discrepancies in paper doctrine which any growing system of law contains in heaping measure. . . .

Llewellyn, *supra* note 203, at 440.

249. See Friendly, *supra* note 11, at 33-35.

250. See *id.* at 29-32.

251. For a detailed discussion of *Brown* and its progeny, see Goodman, *supra* note 221. See generally Radin, *supra* note 95.

252. See Friendly, *supra* note 11, at 33 n.59.

253. See *id.*

254. *Id.*

Although this commentary will not enter the mammoth debate on abortion, Judge Friendly's mention of the Supreme Court's most recent decision in the area, *Maier v. Roe*,²⁵⁵ is interesting in several respects. First, Judge Friendly's criticism of the *Wade* decision, that the judging glass was improperly focused, will be borne out if the infirmity which he isolated exists in a subsequent decision, for example, *Maier*. Second, since *Maier* involved a question of equal protection, the level-of-generality issue appears in the case by the very nature of the right itself.²⁵⁶ Third, a comparison of *Maier* and the lower court opinion in *Barnette* finds a remarkably similar dispute underlying both, but *Barnette*, unlike *Maier*, arose in a due process context.²⁵⁷

In *Barnette*, when Judge Parker stated the question for decision as "[w]hether children who for religious reasons have conscientious scruples against saluting the flag of the country can lawfully be required to salute it,"²⁵⁸ the principle he drew from the fact situation centers on the effect of withdrawal of the public benefit of education in order to coerce religious conduct. "If they are required to salute the flag, or are denied rights or privileges which belong to them as citizens because they fail to salute it, they are unquestionably denied that religious freedom which the Constitution guarantees."²⁵⁹ When government grants a benefit, it cannot do so in a way which coerces rather than simply affecting individual choices protected as fundamental under the Constitution.²⁶⁰

In the Supreme Court's opinion in *Barnette*, Justice Frankfurter in dissent responded that education is only an opportunity and can be conditioned in its provision:²⁶¹

255. 432 U.S. 464 (1977).

256. See text accompanying note 223 *supra*.

257. See text accompanying note 132 *supra*.

258. *Barnette v. West Virginia Bd. of Educ.*, 47 F. Supp. 251, 252 (1942).

259. *Id.* at 253.

260. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (Seventh Day Adventist may not be denied unemployment benefits solely because religion proscribed working on Saturdays).

261. 319 U.S. at 656. See also *Arnett v. Kennedy*, 416 U.S. 134, 151-52 (1974) (Rehnquist, J., plurality opinion):

Here appellee did have a statutory expectancy that he not be removed other than for "such cause as will promote the efficiency of [the] service." But the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which "cause" was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement.

Id.

But the practical opportunities for obtaining what is becoming in increasing measure the conventional equipment of American youth may be no less burdensome than that which parents are increasingly called upon to bear in sending their children to parochial schools because the education provided by public schools, though supported by their taxes, does not satisfy their ethical and educational necessities.²⁶²

Judge Parker might have answered, if given the opportunity, that Justice Frankfurter's observations were irrelevant even if correct: Judges cannot escape the level-of-generality problem so easily. Of course educational benefits, such as the amount of education and the range of curriculum, offered members of the public can be conditioned,²⁶³ but at some point the conditions realistically move beyond affecting and inducing to coercing a form of exercise which reduces religious freedom. At some point the secular purpose of legislation must confront limits given the "manifold character of man's relations."²⁶⁴ Interdependence forces a limitation on authority in the name of liberty as much as limitation of liberty in the name of order.²⁶⁵ As Judge Parker concluded, "[t]here is not a religious

262. 319 U.S. at 657. But see D. MANWARING, *supra* note 173, at 230-31; 26 CORNELL L.Q. 127, 129 (1940): "A patent objection to this argument is that attendance at *some* school is required, and frequently the parent cannot support his child at a private school. In such a situation, it seems mere verbiage to speak of a 'choice.'"

263. Justice Jackson did not deny that the state may condition educational benefits. The conditions, however, must be instituted pursuant to a legitimate state power. In *Hamilton v. Regents*, 293 U.S. 245 (1934), a requirement that university students undergo military training was upheld. In *Barnette*, Justice Jackson distinguished *Hamilton* on two grounds: (1) attendance at a university is voluntary as opposed to compulsory public education; and (2) the state is explicitly granted the power to raise militia and may employ reasonable means to do so, but the state has no such power to compel adherence to a given political doctrine. 319 U.S. at 632.

264. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 593 (1940).

265. For example, consider procedural due process. Pure positivism, as illustrated by Justice Rehnquist's approach in *Arnett v. Kennedy*, 416 U.S. 134 (1974), pretends that procedural due process can be defined by the legislature internally to the claim of right it grants. Yet, as Justice Powell argued, the right to due process "is conferred, not by legislative grace, but by constitutional guarantee." *Id.* at 167. See also *id.* at 211 (Marshall, J., dissenting).

Once the question for decision is the *judicial* application of a claim of constitutional guarantee to a particular set of facts, including the substance of a statute, the level-of-generality problem which inheres in judgment (who will be protected to what extent in what choices as framed by these facts) becomes integral to the notion of right. See L. TRIBE, *supra* note 84, at 891. Thus, pure positivism of the sort advocated by Justice Rehnquist eliminates the problem of generality only by eliminating the notion of procedural due process itself. See also Shapiro, *supra* note 104, at 323-25.

Professor Thomas Reed Powell lodged the same attack in principle against Justice Frankfurter's similar statement of the conditioned educational benefit in *Barnette*. "Mr. Justice Frankfurter's feeling for a judicial duty of equal deference to legislative judgments whatever the interests and the ideals at stake points strongly in the direction of legislative absolutism." Powell, *supra* note 187, at 18.

persecution in history that was not justified in the eyes of those engaging in it on the ground that it was reasonable and right and that the persons whose practices were suppressed were guilty of stubborn folly hurtful to the general welfare."²⁶⁶

The choice of a level-of-generality at which the decision will be argued and justified necessitates an explanation because of the need to ground justification in a particular political theory. The political theory must persuasively legitimate the inherently political basic values articulated in the exercise of the judicial function. The argument encapsulated in footnote four of *Carolene Products* and Justice Jackson's refusal to allow the *Barnette* decision to turn on judicial competence, as in the *terms* of the activism debate or on any instrumental view of judicial power, suggest that justification of interpretation, and the inherent accompanying policymaking in the idea of judgment, must ultimately ground in a set of fundamental social values. These values must be sufficiently fundamental to explain simultaneously the authority of the judges vis-à-vis other governmental institutions to govern the case, and to explain the choice of particular reasoned principles which resolve the litigation.²⁶⁷ For as Justice Stone wrote in *Gobitis*:

History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. The framers were not unaware that under the system which they created most governmental curtailment of personal liberty would have the support of a legislative

266. 47 F. Supp. at 253.

267. [I]t is arguable that, the more human activity and human personality are shaped by the forces and pressures of homogenization spawned by mass industry and the mass media—the forces that define culture and constitute the economy—the less sense it makes to spin out special limits and duties for *government* in its dealings with individual persons and groups. In the end, little beyond a profession of faith can be offered in response to such a perception. The very idea of a fundamental right of personhood rests on the conviction that even though one's identity is constantly and profoundly shaped by the rewards and penalties, the exhortations and scarcities and constraints of one's social environment, the "personhood" resulting from this process is sufficiently "one's own" to be deemed fundamental in confrontation with the one entity that retains a monopoly over legitimate violence—the government. Thus active coercion by government to alter a person's being, or deliberate neglect by government which permits a being to suffer, are conceived as qualitatively different from the passive, incremental coercion that shapes all of life and for which no one bears precise responsibility.

L. TRIBE, *supra* note 84, at 890 (footnote omitted). But see Rehnquist, *supra* note 11, at 7-8.

judgment that the public interest would be better served by its curtailment than by its constitutional protection.²⁶⁸

Maher involved a similar struggle. Majority and minority Justices split over the nature of the liberty in controversy. The difference in the characterization of the rights thought to be at stake in *Maher* involved a challenge to medicaid programs which subsidized medical expenses incident to pregnancy and childbirth but not incident to non-therapeutic abortions. Justice Powell perceived the issue as whether women have been permitted the *opportunity* to choose to have an abortion²⁶⁹ in the same way that Justice Frankfurter labeled the consequences of upholding mandatory flag salutes as the opportunity to choose parochial schools rather than participate in conditioned public education.²⁷⁰

Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.²⁷¹

Like Justices Stone and Jackson, Justice Brennan viewed the issue as whether the state has the authority to withhold some medical responses to a physiological condition by failing to pay for selected medical responses preferred by an individual.

As a practical matter, many indigent women will feel they have no choice but to carry their pregnancies to term because the State will pay for the associated medical services, even though they would have chosen to have abortions if the State had also provided funds for that procedure, or indeed if the State had provided funds for neither procedure. This disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure.²⁷²

Significantly, Justice Brennan quoted Justice Frankfurter's recognition that the lines between inducement and coercion, a problem of the appropriate level-of-generality with which to measure the loss of freedom in choosing birth or abortion to terminate pregnancy in

268. 310 U.S. at 604-05 (Stone, J., dissenting). See also text accompanying note 136 *supra*.

269. 432 U.S. at 476-77.

270. *Barnette*, 319 U.S. at 657 (Frankfurter, J., dissenting).

271. 432 U.S. at 473-74.

272. *Id.* at 483 (Brennan, J., dissenting).

the context of conditioned payment, *depends* upon the class of people being affected.²⁷³

Justice Powell, however, did not justify his conclusion and reasoning that rights are merely opportunities when he failed to explain why wealth makes no factual difference in the statement of the claim raised by the real dispute in *Maher*. Although there exist political theories upon which Justice Powell might have relied to explain his concept of rights and thereby to justify the chosen level-of-generality by which to distinguish the legitimate expectations of the respondents, his failure to explicitly tie the values of a politics of opportunity to the realities of poverty renders his opinion inadequate. Thus, Judge Friendly cited Justice Blackmun's dissent chastizing Justice Powell for misunderstanding the right involved in *Maher*.²⁷⁴

There is another world "out there," the existence of which the court, I suspect, either chooses to ignore or fears to recognize, and so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly, and, in so doing, would better the lot of the poorest among us.²⁷⁵

Ultimately, Justice Powell's failure to realistically understand the threat to liberty created by the governmental interest in the particular outcome of personal choice leads to a failure to justify the holding in *Maher* in the context of an ongoing judicial process of governance. Justice Marshall in his dissent in *Maher* charged, "the Court pulls from thin air a distinction between laws that absolutely prevent exercise of the fundamental right to abortion and those that 'merely' make its exercise difficult for some people."²⁷⁶

Further indication that Justice Powell failed to understand the importance of the level-of-generality with which opinions are written appears in his opinion in *Moore v. City of East Cleveland*.²⁷⁷ He

273. To sanction such a ruthless consequence inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread."

Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (citation omitted).

274. Friendly, *supra* note 11, at 33 & n.61.

275. Beal v. Doe, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting) (companion case to *Maher*).

276. *Id.* at 457 (Marshall, J., dissenting) (citation omitted).

277. 431 U.S. 494 (1977). Justice Powell announced the judgment of the Court and delivered an opinion in which Justices Brennan, Marshall and Blackmun joined. Justice Brennan filed a concurring opinion in which Justice Marshall joined. Justice Stevens filed an opinion concurring in the judgment. Chief Justice Burger filed a dissenting opinion.

noted that judges should not narrow the scope of constitutional rights merely because they fear being criticized for judicial interference with democratic policymaking.

As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.²⁷⁸

Justice Powell then articulated a protection of family rights at the level-of-generality of the extended family, but separated that holding from the judicial definition of protected choices which justified the Court's interference with East Cleveland's zoning: "the choice of relatives in this degree of kinship to live together may not lightly be denied by the state . . . the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."²⁷⁹

Perhaps, Professor Tribe's discussion of *Moore* in his treatise²⁸⁰ reaches the point which now appears to be the logical conclusion of the participants in this symposium but which is actually the point from which this symposium should have commenced. Professor Tribe recognized that: "Justice Powell . . . sought escape from the perils of judicial subjectivity in history and tradition."²⁸¹ For Justice Powell, our society has highly valued the extended family, not only historically but functionally, "it is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."²⁸² But Professor Tribe criticized Justice Powell's position:

Nor would it be consistent with the rationale of *Moore* to withhold the status of preferred rights . . . from these practices or institutions that "inculcate and pass down" values that the current majority might *not* deem among its "most cherished," for the plurality opinion's closing sentence insisted that "the Constitution prevents East Cleveland from standardizing its children.

Justice Stewart filed a dissenting opinion in which Justice Rehnquist joined. Justice White also filed a dissenting opinion.

278. *Id.* at 502 (Powell, J.) (footnote omitted).

279. *Id.* at 505-06.

280. See L. TRIBE *supra* note 84, at 573 n.5.

281. *Id.* Justice Powell stated that: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." 431 U.S. at 503 (footnote omitted).

282. *Id.* at 503-06.

...” Both the historical inquiry and the functional analysis then, must proceed at a level general enough to avoid the trap of sanctifying the conventional and preventing moral and cultural change.²⁸³

Professor Tribe offered this analysis as support for the inexorable conclusion in which the terms of the activism debate have no place:

References to history, tradition, evolving community standards, and civilized consensus, can provide suggestive parallels and occasional insights, but it is an illusion to suppose that they can yield answers, much less absolve judges of responsibility for developing and defending a theory of what rights are “preferred” or “fundamental” and why.²⁸⁴

V. CONCLUSION: ALL THE KING’S HORSES AND ALL THE KING’S MEN

So many connections link the speakers in this symposium, the temptation beckons to see much more in the cross currents than perhaps can be squared with all their prior decisions, thoughts and writings. Indeed, a methodological paradox confronts this comment. The article proceeds by interpretation, as does judicial decision-making; criticism parallels judgment. The paradox raises the question of whether the speakers’ thoughts have been perceived and translated at the right level-of-generality both to be faithful to the intended communication of the speakers’ thoughts and to be coherent in the critical manipulation of the speakers’ conclusions.

Answers to that question can be provided at three levels. First, even in the terms of the traditional judicial activism debate, all three speakers demonstrated reliance on assumptions which explode

283. L. TRIBE, *supra* note 84, at 573 n.5 (citations omitted). For an understanding of the level-of-generality on which to value the family as an institution, see Gelfand, *Authority and Autonomy: The State, the Individual and the Family*, 33 U. MIAMI L. REV. 125 (1978). Justice Rehnquist argued strongly in the symposium that the family as a private institution should not be subject to governmental interference. See note 88 *supra*. Although he advanced no reason for finding institutional or even traditional value only in the nuclear family, Justice Rehnquist apparently would not extend judicial authority under the open texture of due process protection beyond this limited definition of the family institution. Despite Justice Powell’s emphasis on the tradition and institution, Justice Rehnquist joined Justice Stewart’s dissent in *Moore*. 431 U.S. at 531-41 (Stewart, J., dissenting). And in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), Justice Rehnquist joined Justice Stewart’s concurring opinion which saw the foster family as *purely* the creature of the state.

The family life upon which the State “intrudes” is simply a temporary status which the State itself has created. It is a “family life” defined and controlled by the law of New York, for which New York pays, and the goals of which New York is entitled to and does set for itself.

Id. at 863 (Stewart, J., concurring). See generally L. TRIBE, *supra* note 84, at 987 & n.17A.

284. L. TRIBE, *supra* note 84, at 572-73 (footnote omitted).

the notion of judicial deferral.²⁸⁵ Where conflict between these speakers on the judiciary evolves into a question of "degree,"²⁸⁶ the activism issue can be critically analyzed only by consideration of differences over natural law, political theory or some other source of basic values.²⁸⁷ The logical end-point of the debate empties Chief Justice Burger's epithet²⁸⁸ of any content. Of course, when people use words, they mean exactly what they say if they are the masters of their intent and define communicable ideas. But mastery implies more than raw power: mastery involves a certain control which depends upon potential recognition by others of the ability of the master to persuade doubters of the correctness of the perceived authority by reference to some relevant standard. As Karl Llewellyn has stated:

The quarrel which one has with the judges is rather that they do not play sleight-of-hand enough or, better, that their sleight-of-hand is too often uninspired routine; is not always lit by passionate, conscious battle with the problem of ends and purposes which presents itself before honest juggling can begin. The only other quarrel would be that, juggling too often *unawares*, they may be dupes of their own magic of yesterday, dupes of the game instead of its masters, and sometimes fail in their job because the wizard's hat they play before the multitude seems even to themselves to bring forth rabbits, white or pied, by some spontaneous generation.²⁸⁹

Second, in law the fragile mastery of the judiciary depends upon the credibility of the ongoing judicial process in the generation of doctrine which resolves disputes, facilitates private action and sets parameters by reference to basic values on the exercise of both public and private authority. Thus, the rejection of the terms of the activism debate, while important in itself, also enables the recovery of an important understanding of the judicial function, the essence of which is not simply "just results" and institutional baggage but rather the articulation of legal rationales in applied situations as the

285. For instance, Judge Friendly assumed that the judiciary must give substantive content to certain constitutional rights and thus apply notions of social policy. See Friendly, *supra* note 11, at 27-28; text accompanying note 109 *supra*. Justice Rehnquist advised judges to act with an eye toward the institutional interest in litigation. See text accompanying notes 53-63 *supra*. Professor Tribe assumed that the judiciary should open itself to members of politically powerless groups so as to provide the only available proving ground for minority claims. See text accompanying note 78 *supra*.

286. See notes 71, 104-08 and accompanying text *supra*.

287. See, e.g., text accompanying notes 70-79 & 231 *supra*.

288. "'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'" LOGICAL NONSENSE, *supra* note †.

289. K. LLEWELLYN, *supra* note 196, at 90-92 (1962).

form of the decision. Justification, the essence of the judicial function, follows from interdependence of form, which is determined by the result, and result, which is reasoned *through* the form. This model of judicial decisionmaking possesses a significance independent of any determination by the symposium speakers as to its correctness.²⁹⁰

Third, the judging glass highlights the general problem of interpretation, which in turn forces a recognition of the interdependence of form and substance, opinion and result. The judging glass demands both interpretation of substance (facts) and interpretation of form (rules, precedents, open-ended constitutional powers) and bridges both substance and form by translating a characterization of facts into linguistic claims.²⁹¹ But more may be implied by understanding judicial opinions as the product of a translation of dynamic reality into principles justified by their integration into a rational argument. The traditional view of what judges do, service the adversary society with third party neutral dispute resolution,²⁹² myopically undervalues judging as a political and governmental function. The legitimacy of this function stems not from its formation like that of *elected* legislatures, independent of their institutional product, but from the judiciary's own coherence. That is, a judicial result is justified only when it is a judicial decision, a demonstration through linguistic argument of the justness of a result whose persuasiveness rests on the fundamental values which must be the chosen basis for the inherent interpretation necessary to judgment of any kind.

In a constitutional democracy, these values will include those fundamental liberties which are conceived to be beyond manipulation in the interest of short-term and shifting majorities and the preservation of shared access to the political process to which direct authority for policymaking has been granted. The articulation of fundamental values will necessarily require a notion of institutional adequacy, in the sense of *how* judges should act, as suggested by

290. This author's understanding of the substantive impact of form has been greatly enriched by numerous discussions with my colleague, Patrick O. Gudridge. For his superb development of the concepts touched upon here, see P. Gudridge, *Notes Toward a Theory of Legislation* (unpublished draft on file in the *University of Miami Law Review*).

291. Karl Llewellyn labeled his version of this process "situation sense." William Twining explained that, "exhibition of 'situation sense' involves both steps: the formulation of principles or policies *and* the classification of the facts into a general type-fact-situation. Indeed, it would be artificial and misleading to separate formulation of policy from classification of facts, because they are to a large extent interdependent." W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 222-23 (1973).

292. See generally H. Hart & A. Sacks, *supra* note 13.

Judge Friendly,²⁹³ but not in the sense of *what* to judge in the first place. The question of how judges should decide cases is inescapably substantive. Thus, ultimately it is not the justification of *results* which necessarily carries all credible judicial decisions back to a plea for a shared vision of normative political theory,²⁹⁴ but rather it is the justification of *interpretation* inhering in the *process* of judgment which makes this demand. Yet, because the objects of interpretation are factors in a process designed to reach a litigated result, the explanation of the opinion is also the explanation of the result. The modern Court has simply put the institutional cart before the constitutional Court.

The reason the Court has become so sensitive about competence may be obvious; as Professor Bickel has observed, while the Justices' subject is politics, their subject is also themselves.²⁹⁵ While the structure of judicial decision of adversary disputes forces self-investigation, the object of investigation, the crystalization and conceptualization of fundamental values, forces the self-scrutiny or caution to take the form of policy legislation: What can judges *justifiably* do? What *jurisdiction* they then will possess to define social values can only be justified by a method of decision which is the *same* as a theory of politics. The notion that theory depends upon practice and perhaps is practice, regardless of its symbolic representation in language, combines with the notion that judges, as a part of government, always act in a political manner to produce a conclusion in which the method of decision and a theory of politics are related.

Once the judges are seen in public law as the regulators of the political process, as they are, less controversially, under the common law the regulators of private orderings,²⁹⁶ the important data for those needing to predict judicial behavior becomes the political, social and even metaphysical system which can be distilled as a Court's consciousness from individual judicial actors in dialogue.²⁹⁷

293. *E.g.*, Friendly, *supra* note 11, *passim* (courts should observe "procedural fairness" when relying on social or economic data rather than neutral principles).

294. *See* Wisotsky, *supra* note 51, at 204.

295. *See* A. BICKEL, *THE LEAST DANGEROUS BRANCH* 88-98 (1962). Professor Bickel concluded that the activism concept of literal absolutes is merely an illusion promulgated by judges who seek to avoid responsibilities for the actual policies they make. He also saw beyond that illusion to the central feature of judicial policymaking: personal convictions.

296. *See generally* Friendly, *supra* note 11.

297. Given the necessity of a resort to politics in interpreting legal language, the open texture of the constitutional provisions focuses attention on a collective essence of individual assumptions: "[B]ills of right seem always to have depended . . . on the existence of a broad region of interpretation within which court decisions and administrative and legislative action have worked progressively to a practical definition and within divergent philosophies have

Through his or her opinions, each judge, consciously or not, converses with other judges, legislative and executive officers, litigants and the public about what principles of social organization can permissably be constructed by the society in that era of time.²⁹⁸ Justice Jackson clearly understood the role of the Supreme Court: "The ultimate function of the Supreme Court is nothing less than the arbitration between fundamental and ever-present rival forces or trends in our organized society. The technical tactics of constitutional lawsuits are part of a greater strategy of statecraft in our system."²⁹⁹

This function is constitutional; it is inescapable; it cannot be deferred, and it can only be disguised and not forsaken in institutional arguments.³⁰⁰ Those judges who would persist in disclaiming responsibility for mastery over their own words or their understandings of their own decisional process do more than deliver an incomplete service and an ungrounded opinion; they set the judicial function and with it, the concept of ordered liberty, rocking on a thin wall of social cohesiveness. As this commentator has argued previously,³⁰¹ a society regulated by a legal form may be stable either because the norms of relationships are truly shared to a high if approximate degree or, momentarily, because the norms are imposed or chosen sub silentio. However, when the individual's worth and dignity stem from the importance of the individual to the society, even if that instrumental value stems from membership in a

worked to less ambiguous or conflicting theoretic bases." McKeon, *The Philosophic Bases and Material Circumstances of the Rights of Man*, in HUMAN RIGHTS 35, 46 (UNESCO ed. 1949).

298. See Wisotsky, *supra* note 51, at 197.

299. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 311-12 (1941).

300. For example, note how the problem of generality has become translated from a substantive problem of the reach of a constitutional protection into an institutional question of standing by Justice Rehnquist in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 781 (1976):

The logical consequences of the Court's decision in the case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed This effort to reach a result which the Court obviously considers desirable is a troublesome one, for two reasons. It extends standing to raise First Amendment claims beyond the previous decisions of this Court. It also extends the protection of that Amendment to purely commercial endeavors which its most vigorous champions on this Court had thought to be beyond its pale.

Similarly, aspects of class actions in civil procedure are determined by characterization of the factual need to prefer class litigation to case by case adjudication in the same way that guarantees of procedural due process gain content by the variable need to individualize notice and hearing. See *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1370-71 (1976). See also text accompanying note 259 *supra*.

301. Casebeer, *supra* note 105, at 693.

traditional private institution, then the resulting differential treatment of minorities and individuals, which creates a perceived domination, risks the very fabric of communication which order is intended to preserve. Thus, it would be perverse to fail to see the importance of justification as critical to judicial functioning. The key to the genesis of shared values³⁰² and truly ordered liberty³⁰³ can only be reached when domination gives way to the full recognition of social interdependence, and liberty is both generous and general enough to accommodate competing tastes, lifestyles and thus visions of the future of the society. Thus, Justice Jackson quoted Thomas Paine: " 'He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.' " ³⁰⁴

In this sense, the path leads back to *Barnette* once more, and to the Justices who understood *our* times much more clearly than do the Justices of the present Court. Justice Frankfurter wielded the judging glass toward a situation of compelled flag salutes and found the necessary preconditions for liberty in order built on patriotism. As he wrote in *Gobitis*, so he would believe in *Barnette*:

The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. "We live by symbols

."³⁰⁵

Justice Jackson grasped the glass and saw more clearly a danger to that very cohesion and the interdependence of common life:

A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn. . . . If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall

302. R. UNGER, *supra* note 209, at 100-03.

303. The phrase "ordered liberty" was also used in dealing with the incorporation of the Bill of Rights into the fourteenth amendment. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149 n.13 (1968).

The term is used here not in reference to the incorporation doctrine but rather to illustrate the sort of ideal society envisioned by Professor Tribe in *Seven Pluralist Fallacies*. Tribe, *supra* note 8. Of course, the "ordered liberty" of the incorporation doctrine pointed toward the same general conception of social values.

304. *Cramer v. United States*, 325 U.S. 1, 45 (1945) (quoting V. BROOKS, *THE WORLD OF WASHINGTON IRVING* 57 n.(1944)).

305. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 596 (1940). See text accompanying note 159 *supra*.

be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.³⁰⁶

A common life will never exist, let alone be treasured, by command or by the instrumental sacrifice of the symbols by which men, women and even children define themselves.

Society through the judging glass and social values defined by its focusing must continue to make sense to virtually all members of our society, lest the wind of dissent from law's new "'enemies'"³⁰⁷ tip the teetering judicial function, like Humpty Dumpty, from its perch so that we are left muttering about judges, as Lewis Carroll left Alice muttering upon parting company with Humpty Dumpty—" 'of all the unsatisfactory people I *ever* met—' [Alice] never finished the sentence, for at this moment a heavy crash shook the forest from end to end."³⁰⁸

306. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-33, 642 (1943).

307. For the use of the word "enemies," see Tribe, *supra* note 8, at 46 (quoting 3 *THE CORRESPONDENCE OF EDMUND BURKE* 387 (T. Copeland ed. 1958)).

308. *LOGICAL NONSENSE*, *supra* note †, at 209.