

ARTICLES

The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges

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Fifteen or twenty years ago, with the appointment of Warren Burger to succeed Earl Warren as Chief Justice, the guard began to change at the Supreme Court. Commentators scrambled to sum up the "Warren Court" before they focused their speculative energies on the latest incarnation of that venerable institution.¹ These retrospectives constituted the climax of the drama of Warren Court scholarly commentary that had been acted out almost simultaneously with the more compelling drama of the Warren Court's decisions through the 1950's and 1960's. This "shadow drama" of commentary was animated largely by the conflict between the Court's detractors and its apologists, which centered on the notion of "judicial activism."

As the detractors would have it, the Warren Court's "activism" consisted of a misguided propensity to meddle in complex political and social issues and to override legislative decisions on the basis of hazy egalitarian notions not derived from the Constitution it purported to construe. The kinds of issues that the Court dared address, its willingness to override the decisions of more politically accountable branches of government, the political values that animated its reasoning, and the alleged "extra-constitutional" source of these values were all aspects of the "ac-

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1. See, e.g., A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); A. COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1968); P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1970); *THE WARREN COURT: A CRITICAL ANALYSIS* (R. Saylor, B. Boyer & R. Gooding eds. 1969); Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970).

tivism" eschewed by the Court's critics.² The Court's apologists, myself among them, defended its decisions from these varied attacks and hailed its vigor as not only appropriate but heroic.³

Now, a significant generation later, the elevation of William Rehnquist to Chief Justice of the United States signals another changing of the guard. In these early days of the Rehnquist Court, the debate about judicial activism must seem to some a bygone argument with little relevance to our current concerns. But the old debate is far from dead. To the contrary, those who criticized the old Court's "activism" are now firmly entrenched in the federal judiciary. The Supreme Court and the rest of the federal bench are dominated by conservative judges who define themselves in opposition to the Warren Court, just as the New Deal Court sought to define itself in opposition to the judiciary of the *Lochner* era⁴ that preceded it. "Judicial restraint" is the shibboleth of the new, powerful judicial right, just as "judicial activism" was their war cry and catch-all criticism back in the Warren era.

I. The Rhetoric of Restraint

Although variously expressed, the notion of judicial restraint has been the guiding force and self-characterization of the new judicial right since the appointment of Warren Burger as Chief Justice. When President Nixon appointed Chief Justice Burger and then Justices Blackmun, Powell, and Rehnquist to the Court, he promised the public that his appointees would endorse his philosophy of "strict construction" of the Constitution. President Reagan echoed this theme at the investiture of

2. Criticism of the Warren Court along these lines is too extensive to document exhaustively here. For a fairly representative sample, see A. BICKEL, *supra* note 1, at 45 (berating the Court for being more "subjective" and "manipulative of its materials" than prior Courts); Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 124 (1959) (calling upon the Court to decide fewer "complex and . . . highly controversial issues" in order to execute a more "lawyerlike examination" of them); Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 144 (1964) (mourning the "subordination, if not destruction, of the federal system" and the "egalitarian revolution" wrought by the Warren Court).

3. See, e.g., Black, *supra* note 1; A. COX, *supra* note 1; Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971) [hereinafter Wright, *Scholarly Tradition*]; Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968).

4. The *Lochner* era dates from the 1905 decision in *Lochner v. New York*, 198 U.S. 45 (1905), in which the Supreme Court struck down a statute establishing maximum working hours for bakery employees. The Court's use of the Due Process Clause of the Fourteenth Amendment to give substantive protection to economic rights continued until 1934, when the Court upheld a New York regulation of milk prices in *Nebbia v. New York*, 291 U.S. 502 (1934).

William Rehnquist as Chief Justice and Antonin Scalia as Associate Justice when he praised both men for honoring the principle of judicial restraint.⁵ Edwin Meese, Reagan's Attorney General, explicating his and the Reagan Administration's theory of the judicial role, warned against the tendency of "recent decades" to view the Constitution as "a charter for judicial activism."⁶ The Federalist Society for Law and Public Policy—perhaps the leading collective voice of the judicial right and legal conservatives generally—has explained that its vision entails a judiciary whose duty is "to say what the law is, not what it should be."⁷

Of course, there are a few voices on the right that favor an "activist" judiciary. The president of Cato Institute, which provides a classically libertarian voice from the right, calls for judicial activism in the name of property and economic rights.⁸ Scholars like Richard Epstein of the University of Chicago and Steven Macedo of Harvard University join in this exhortation.⁹ But this unapologetic attempt to revive *Lochner* does not represent mainstream legal conservatism.

The notion of "judicial restraint," however hazy, must be seen in contrast to the "activism" of the Warren Court in order to understand the conservative judiciary that has come to dominate the federal bench and is likely to do so for some time to come. Unfortunately, judicial activism and judicial restraint are terms whose meanings metamorphosize with each commentator. "Activism" to the Warren Court critics was everything that they deplored in judges, whereas "restraint" to the new judicial right is synonymous with principled decisionmaking. To the proponents of the changes wrought by the Warren Court, "activism" meant judging in the service of conscience, whereas "restraint" is simply restraint from enforcing constitutional guarantees. Used in this fashion, the terms all too often simply become surrogate phrases for "good" or

5. President Ronald Reagan, Speech at the Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House, Washington, D.C. (September 26, 1986), published in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 53, 55 (1986) (copy available through The Federalist Society, Washington, D.C.) [hereinafter *THE GREAT DEBATE*].

6. Attorney General Edwin Meese III, Speech Before the D.C. Chapter of the Federalist Society Lawyers Division, Washington, D.C. (November 15, 1985), published in *THE GREAT DEBATE*, *supra* note 5, at 31, 37.

7. *About the Federalist Society*, in *CHANGING THE LAW: THE ROLE OF LAWYERS, JUDGES AND LEGISLATORS—A LAWYERS CONVENTION*, Washington, D.C. (January 30-31, 1987) (copy of brochure available through The Federalist Society, Washington, D.C.) [hereinafter *About the Federalist Society*].

8. Crane, *Judicial Activism and Economic Liberty*, 8 *CATO POLICY REPORT* 2-3 (Nov./Dec. 1986).

9. See R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); S. MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* (1986).

“bad” judging. Some commentators, aware of this difficulty, have offered careful definitions of these carelessly used phrases.¹⁰ I, too, think it useful to explore what the judicial right means when it proclaims its own restraint and, by implication, accuses its opponents of activism.

Perhaps the largest part of what is meant by “restraint” is deference to the more politically accountable branches of government.¹¹ Because Congress and to a lesser extent the President and the executive branch are accountable to the electorate, their resolutions of important political and social issues ought to count more than those of the unelected judiciary. As a practical matter, this sense of restraint requires courts to find legislative and executive decisions unconstitutional as infrequently as possible.

A second, though less dominant, sense of judicial restraint is adherence to precedent.¹² Courts should be bound by their own prior decisions as well as by those of other branches. Such attention to the limitations entailed by the rules of the judicial craft will tether the judiciary to fairly circumscribed terrain.¹³

A third and final sense of restraint, one that underlies the first two senses, is the notion that judicial decisionmaking should be *apolitical*. This idea addresses the way in which judges make decisions rather than the actual decisions they make. The divorce of judging from politics demanded by this sense of restraint has at least two aspects. First, judges’ decisions should not be determined by the individual judge’s own values or vision of political morality.¹⁴ Judges should look somewhere other

10. See, e.g., Blasi, *The Rootless Activism of the Burger Court*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (V. Blasi ed. 1983); Posner, *The Meaning of Judicial Self-Restraint*, 59 *IND. L.J.* 1 (1983).

11. See Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 *WASH. U.L.Q.* 695, 701 (“Equality is not the only value in society; we must balance degrees of it against other values. That balance is preeminently a matter for the political process, not for the courts.”); Posner, *supra* note 10, at 10-12 (defining “judicial self-restraint” as “the cutting back of the power of [the] court system in relation to—as a check on—other government institutions”).

12. See Blasi, *supra* note 10, at 208 (“[O]ne element in the philosophy of judicial restraint is respect for precedent.”); see also Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 *WIS. L. REV.* 467; Monaghan, *Taking Supreme Court Opinions Seriously*, 39 *MD. L. REV.* 1 (1979).

13. This notion of restraint by craft and prior decision seems close to what Professor Wechsler was advocating in his appeal to “neutral principles.” See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).

14. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 6 (1971) (“[A] Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.”); Meese, *supra* note 6, at 37 (criticizing judicial activists for grounding their rulings in “appeals to social theories, to moral philosophies or personal notions of human dignity”).

than inside themselves in making difficult judicial decisions. Second, judges' decisions, and more specifically judges' approaches to legal analysis, should not be "result-oriented"—that is, having a political "tilt" that consistently favors some groups or kinds of claims over others.¹⁵ The judicial office should not be used systematically to further some larger political program.

Although this tripartite description of "judicial restraint" seems to capture many of the senses in which the term is used by those who advocate it, on closer examination the neatness of the categories begins to blur. For example, although the notion of deference to politically accountable branches of government within our system of representative democracy has some strong and immediate appeal, the force of that notion fades dramatically if we accept the limitations of constitutional democracy. Once we acknowledge that the Constitution appropriately constrains the choices of the representative branches of government in some cases, we can no longer maintain that the sheer *number* of times that the courts rule legislative enactments unconstitutional says much about whether the courts are doing their job right. The criticism has got to be that the courts are overruling majoritarian choices in the *wrong* situations rather than simply too often. But this criticism demands some criteria for determining the "right" situations for invalidating majoritarian choices other than, for example, a rule like "no more frequently than once a year." Similarly, although few would deny the significance of the principle of *stare decisis*, no one would find it inviolable in every case. Surely *sometimes* the courts may modify or abandon existing precedent. Once again, the criticism that "activist" courts ignore *stare decisis* boils down to the criticism that they ignore it in the *wrong* cases. Here again, we have a criticism in search of criteria.

Both of the first two senses of restraint, therefore, seem to collapse into the third. Activist courts are wrong not because they hold statutes unconstitutional or overturn past precedent too often, but because they do so in the wrong cases and for the wrong reasons. Activist courts refer to their own conceptions of political morality or to more concrete political programs, and such reference leads them to reject majority decisions when the Constitution really does not require them to do so. The arguments for judicial restraint thus inevitably boil down to arguments about

15. Alexander Bickel and Philip Kurland have criticized the activist Warren Court for its political agenda of egalitarianism. See A. BICKEL, *supra* note 1, at 13-14; Kurland, *supra* note 2, at 145-49. See also Meese, *supra* note 6, at 39 (advocating "not a jurisprudence of political results," but rather "a jurisprudence that in our day seeks to de-politicize the law").

the role of values or notions of political morality in judicial decisionmaking.

Having attempted an exploration of the meaning of restraint as it has been used to describe and praise our current mainstream judicial practice, I cannot help being struck by the obvious divergence of the practice from the praise. The conservative-dominated courts have failed to be restrained in any of the senses that I have explored, and thus their watchword of restraint is at best an uneasy one. I refer primarily to the Supreme Court's pronouncements for examples of this divergence, but the phenomenon is hardly limited to them.

The Burger Court has been at least as "activist" as the Warren Court in invalidating legislative enactments. Writing in 1983, Professor Blasi notes that in sixteen Terms the Warren Court invalidated nineteen provisions of federal statutes, whereas in thirteen Terms the Burger Court struck down twenty-four.¹⁶ Similarly, the Burger Court has not been loath to ignore *stare decisis*. In a startling reversal of field, the Court in 1985 overruled its 1976 decision in *National League of Cities v. Usery*.¹⁷ Moreover, although the Court has been reluctant to abandon explicitly the landmark decisions of the Warren Court, it has refused to extend them to new situations that arguably fall within their logic,¹⁸ and has chopped away at those it particularly disfavors, most notably those that recognize the rights of criminal defendants.¹⁹

16. Blasi, *supra* note 10, at 200 & n.9. See also *id.* at 208 ("By virtually every meaningful measure, therefore, the Burger Court has been an activist court.").

17. 426 U.S. 833 (1976). See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). To be fair, two of the most "conservative" voices on the Court, Justices Rehnquist and O'Connor, vociferously argued for deference to the *National League of Cities* precedent. *Id.* at 579, 580.

18. For example, the cases establishing that the right to privacy entails the right to use contraceptives and to terminate a pregnancy seemed to rest on the principle of sexual autonomy. See *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). However, the Burger Court's recent decision in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), upholding a criminal statute penalizing consensual homosexual sodomy, refused to apply this principle. Similarly, the rationale developed for declaring certain legislative classifications "suspect"—such as those based on race, gender, alienage, or illegitimacy—was not applied to include the mentally retarded, despite significant similarities to the other groups singled out for protection. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

19. The Burger Court has cut back dramatically on the rights of criminal defendants, limiting the Warren Court's fourth, fifth, and sixth amendment jurisprudence. It is impossible and unnecessary to catalogue this counter-revolution here, but some examples include *Moran v. Burbine*, 106 S. Ct. 1135, 1145-46 (1986) (rejecting a sixth amendment claim based on police action preventing counsel from speaking to a criminal suspect); *United States v. Leon*, 468 U.S. 897 (1984) (establishing a limited "good faith" exception to the Fourth Amendment's warrant requirement); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (companion case to *Leon*); *New York v. Quarles*, 467 U.S. 649 (1984) (establishing a "public safety" exception to

In so doing, the Court has been unable to avoid reference to its visions of political morality and its conceptions of a just society. Sometimes the Court's value judgments are strikingly close to the surface. Former Chief Justice Burger's support of the Court's holding finding Georgia's sodomy statute constitutional by reference to "millennia of moral teaching"²⁰ provides one example. Moreover, the Court's decisions have not only drawn controversial value judgments, but they have had just the sort of political "tilt" or agenda that so many deplored in the Warren era. The Warren Court's agenda has been described as an "Egalitarian Revolution."²¹ The Burger and Rehnquist Courts' political agenda, while irreducible to a single phrase, is no less evident. In fact, the ascendant judicial right has an agenda so obvious that all participants in the judicial process, from litigants to law clerks, find it fairly easy to predict results of cases given a cursory summary of the issue and a lineup of the judicial actors. It is to this general predictability and the "tilt" so apparent in conservative judicial decisions that I now turn my attention.

II. A Political Program: The Reality of the Judicial Right

Any discussion of present conservative trends in the decisions of the federal courts or in legal academe must begin with the recognition that the conservative movement in this country is riven by a split in ideology. On the one hand, the direct heirs of Professors Bickel and Wechsler counsel a judiciary with a small "j" in order to give the greatest possible scope to majoritarian political decisions. On the other hand, a libertarian conservative school recently has begun to campaign energetically for a jurisprudence of judicial activism on behalf of individual rights in general, but, most importantly, on behalf of individual economic rights.

It is far beyond the scope of my comments here to explore the nuances of this division. Nevertheless, a broad brush description of the competing schools may help establish a structure for identifying and evaluating trends in recent judicial opinions by conservative jurists. The group I have labeled "majoritarian" has as its primary principle the need to restrict judicial infringements on the decisions of the more politically accountable branches.²² Obviously, judges of every political background must heed this principle in some form. What differentiates the ma-

the Fifth Amendment's requirement of *Miranda* warnings). For a more extensive discussion of the Burger Court's work in these areas, see *infra* text accompanying notes 37-49.

20. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2847 (1986) (Burger, C.J., concurring).

21. Kurland, *supra* note 2, at 145.

22. See, e.g., Judge Robert H. Bork, Speech at the University of San Diego Law School (November 18, 1985) [hereinafter Bork Speech], reprinted in *THE GREAT DEBATE*, *supra* note 5, at 43.

majoritarians is the degree of emphasis they place on that idea. The majoritarians insist that courts should play the most limited role possible in evaluating majoritarian political choices, and should never appropriate the power to make controversial value choices. Those choices, because they are so controversial, must be left to the play of the political process in all but the clearest of cases.

The second, recently resuscitated, conservative school places its emphasis on a libertarian concern for individual rights against government action. Liberal jurists and thinkers, of course, have long championed the cause of civil liberties. It seems to me, though, that the new conservative emphasis on individual rights has, at its core, a somewhat different source than that of liberals. Conservative libertarians' views of the matter generally have a strong link to the economic idea of *laissez faire* and the "freedoms" that powerful property rights entail.²³ In recent years we have seen a resurgence of "natural rights" and quasi-"natural rights" analysis, enlisted in the service of a conservative economic program.²⁴ The basic theme is that the courts should intervene much more actively to defend the "economic rights" these theorists find embodied in the Constitution.²⁵

Despite best efforts, these two groups do not always get along.²⁶ At a basic ideological level, they are at loggerheads. The majoritarian strand of conservative judicial thinking denies the legitimacy of judicial intervention in all but the clearest of cases. The doctrine of "original intent," purportedly the sole legitimate guide to constitutional adjudication, is a primary tool for this school of conservatism. The libertarian strand, in sharp distinction, looks to the courts for precisely the sort of value impositions the majoritarians decry. Although the libertarians at times claim to advocate imposition only of "what the Constitution actually says,"²⁷ the more intellectually sophisticated among their ranks are quite open

23. See, e.g., Crane, *supra* note 8, at 2-3.

24. See R. EPSTEIN, *supra* note 9; S. MACEDO, *supra* note 9.

25. The Washington, D.C. think-tank mentioned above, the Cato Institute, has been consistently blunt about the program of this conservative school. For example, a recent issue of the *Cato Policy Report* noted that conservatives had hoped the new Rehnquist Court would "resurrect (after five decades of neglect)" the economic rights that so effectively stymied progressive legislation in the opening decades of this century. Crane, *supra* note 8, at 2. The *Report* goes on to quote disdainfully the Chief Justice's comment that there "is no . . . reason for elevating the doctrine of freedom of contract into a constitutional principle." *Id.*

26. See, e.g., New York Times, Jan. 31, 1986, at A12 (Judge Bork "sharply challenged" by members of audience when he asserted that the time has passed to declare the New Deal unconstitutional); *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 62 (1986) (comments of Professor Ellen Frankel) [hereinafter *Proceedings*]; Crane, *supra* note 8, at 2-3.

27. Crane, *supra* note 8, at 3.

about what they propose to do.²⁸

For that honesty they deserve praise. No one can read Professor Epstein's *Takings*²⁹ and fail to see that the book attacks on moral as well as constitutional grounds the use of government action to redistribute wealth or rearrange the state of society arrived at by private ordering. On the other hand, the majoritarian line of thought, particularly as exemplified in the "original intent" doctrine, purports to avoid politics and to maintain a "value-objectivity."³⁰ This rhetoric only hides the values the majoritarians infuse into the law on a daily basis.

Few if any federal judges embody one view or the other in anything resembling pure form. My colleague, Judge Bork, has accurately observed that "judges, by and large, are not attracted to theory."³¹ Even the most "majoritarian" conservative jurist will occasionally pursue more or less libertarian positions when the opportunity arises, particularly in the area of government regulation of economic activity.³² Nevertheless, it is important to recognize that a fundamental difference of opinion exists within the conservative legal community as to the proper role of the federal judiciary.³³

Despite the underlying ideological conflict, it is possible to discern a fairly consistent set of conservative predilections for particular substantive results in actual judicial decisionmaking. This consistency results in part, no doubt, from the continuing dominance of "majoritarian" jurists among conservative judges. Whatever the cause, these conservative "trends" are clear indications, if not proof, of a "result-oriented" conservative bench. In addition to revealing this "systematic" political tilt, the overall coherence of the conservative agenda is powerful evidence

28. See *Proceedings, supra* note 26, at 50, 66-67 (comments of Professor Epstein).

29. R. EPSTEIN, *supra* note 9.

30. See *infra* notes 76-98 and accompanying text.

31. Bork Speech, *supra* note 22, at 43.

32. See, e.g., *Allied Structural Steel Co. v. Spannaus*, 436 U.S. 943 (1978) (Rehnquist, J.) (striking down a Minnesota pension statute as violating the Contract Clause).

33. A recent brochure of the Federalist Society, a vanguard of contemporary conservative legal thought, graphically demonstrates that conservatives sometimes must struggle to keep their uneasy coalition together. The Society states as its first principle that "the state exists to preserve freedom," and, in the next breath, that the judiciary should "say what the law is, not what it should be." *About the Federalist Society, supra* note 7. The statement goes on to demand "a reordering of priorities within the legal system to place a premium on individual liberty [and] traditional values." *Id.* Either the drafter of the statements was unaware of the conflict between saying what the law "is" and enacting into law the principle that the state's purpose is to preserve freedom, broadly defined, or these comments were developed in a conscious attempt to preserve the peace between the two factions of the conservative movement. That the truce is a fragile one will be immediately apparent to anyone who has attended a Federalist Society discussion of First Amendment rights or other civil liberties questions.

that, for all the rhetoric, conservative judges refer to their own values in deciding individual cases every bit as much as do liberal jurists.

At some risk of belaboring the obvious, let me take a moment to outline what I consider to be the four most notable planks of the conservative judicial position: (1) concern for law and order over the rights of criminal suspects; (2) lack of sympathy for claims of minority groups; (3) deference to the power of the executive branch; (4) and a tendency to favor liberty and property interests over concerns of equality.³⁴ A quick review of the cases will serve as a useful starting place for theory.

The first category is also the most dramatic. As has become all too apparent in recent years, conservatives' affection for strict law and order will often override their commitment to restraint in the form of following precedent. As examples of a resurgent conservatism in the criminal procedure area are legion, I will focus on only the most notable cases. The limits and exceptions carved into the Warren Court's exclusionary rule for unconstitutionally obtained evidence and into its *Miranda* holding³⁵ certainly fit that description. The Court has created a good faith exception to the exclusionary rule in the fourth amendment context that has potentially sweeping ramifications.³⁶ It did so relying on the view that the rule serves only the purpose of deterring unconstitutional police actions, rather than vindicating as well the rights of the criminally accused.³⁷ Similarly, the Court has chopped exceptions into the *Miranda* holding's commitment to coercion-free police questioning of suspects. A "public safety" exception to the exclusionary rule in *Miranda* cases has been created, and the inevitable discovery rule has been significantly strengthened.³⁸ Confessions made without proper *Miranda* warnings do not taint subsequent "Mirandaized" confessions, despite the obvious co-

34. I have not included "federalism" or "states' rights" concerns in these four planks, despite the much touted emphasis on these matters by some conservative jurists, primarily because questions of this kind cut across traditional political lines. See, e.g., Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165 (1984). Nevertheless, it is important to remember that some prominent conservatives on the bench have made federalism an important part of their jurisprudence. See National League of Cities v. Usery, 426 U.S. 833 (1976) (Rehnquist, J.); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 579-80 (1985) (Rehnquist, J., dissenting); *id.* at 588-89 (O'Connor, J., dissenting).

35. *Miranda v. Arizona*, 384 U.S. 436 (1965).

36. *United States v. Leon*, 468 U.S. 897 (1984) (a search warrant issued by a magistrate, later held invalid, is de facto valid if it was relied upon in good faith by police); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (a technical deficiency of the warrant, acted upon in good faith by police, was not sufficient to require invocation of the exclusionary rule).

37. See *United States v. Leon*, 468 U.S. at 905-08.

38. *New York v. Quarles*, 467 U.S. 649 (1984) (Rehnquist, J.) (creating the "public safety" exception to the *Miranda* requirement); *Nix v. Williams*, 467 U.S. 431 (1984) (Burger, C.J.) (inevitable discovery rule applied).

ercive effect the existence of a prior confession will have on the suspect.³⁹ Most disturbing yet, the Court has determined that a confession obtained while police held the suspect incommunicado from lawyers seeking to defend him was not barred by *Miranda* and the exclusionary rule.⁴⁰

The conservative trend in this field, of course, does not end with the redesigned *Miranda* doctrine and the newly constrained exclusionary rule. Conservative voices on the Court have found that school searches are subject only to cursory fourth amendment protection,⁴¹ and have allowed aerial searches of homeowners' backyards without requiring a warrant.⁴² Moreover, in several significant opinions, conservatives have substantially expanded the scope of the "harmless error" doctrine in constitutional questions of criminal procedure.⁴³

Even the dissents by the conservatives on the Court illustrate the underlying program in this field: strong conservative dissents were filed from opinions upholding the right of indigent criminal defendants to a psychiatric witness in insanity defense cases,⁴⁴ finding the use of deadly force to halt fleeing felons unconstitutional in application,⁴⁵ and finding that use of peremptory challenges in jury selection for racially discriminatory reasons violates the Equal Protection Clause of the Fourteenth Amendment.⁴⁶ Finally, there are the death sentence cases, where the conservative Justices have worked to make execution of prisoners a more easily and frequently attained method of punishment.⁴⁷ One cannot help

39. *Oregon v. Elstad*, 470 U.S. 298 (1985) (O'Connor, J.). Particularly troubling is the Court's finding that an un-"Mirandaized" confession could be voluntary, despite clear precedent to the contrary. *Id.* at 310-11.

40. *Moran v. Burbine*, 106 S. Ct. 1135 (1986) (O'Connor, J.).

41. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (White, J.).

42. *California v. Ciraolo*, 106 S. Ct. 1809 (1986) (Burger, C.J.).

43. *Rose v. Clark*, 106 S. Ct. 3101 (1986) (Powell, J., joined by Burger, C.J., and White, Rehnquist, and O'Connor, JJ.) (improperly instructed jury is not necessarily reversible error); *Delaware v. Van Arsdall*, 106 S. Ct. 1431 (1986) (Rehnquist, J.) (violation of the constitutional right to cross-examine witness can be harmless error).

44. *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Rehnquist, J., dissenting).

45. *Tennessee v. Garner*, 471 U.S. 1, 22-23 (1985) (O'Connor, J. dissenting) (a 12-year-old black burglar was shot in the back and fatally wounded by a white officer while escaping with \$10 in goods).

46. *Batson v. Kentucky*, 106 S. Ct. 1712, 1731 (1986) (Burger, C.J., dissenting).

47. *See, e.g., Tison v. Arizona*, 107 S. Ct. 1714 (1987) (defendant need not have "intent to kill" to be sentenced to death); *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987) (statistical evidence of racial factors in capital sentencing proceedings insufficient to establish Eighth or Fourteenth Amendment violation); *Lockhart v. McCree*, 106 S. Ct. 1758 (1986) (Rehnquist, J.) (a "death qualified" jury is not more prone to convict, and is therefore not a violation of due process); *Pulley v. Harris*, 465 U.S. 37 (1984) (White, J.) (the Eighth Amendment does not require "proportionality" review of death sentence by a state appellate court).

being struck by the clarity of the trends in the entire field.

A second and centrally important area in which I see a fairly consistent program among conservative jurists has been the minority rights field. A synopsis of recent developments in this area would require a treatise in itself, so I will mention only a few cases that seem particularly demonstrative of a systemic position among conservative jurists. Perhaps the most dramatic example is last Term's refusal, mentioned above, to find homosexual activity protected by the right to privacy.⁴⁸ The conservative members of the Court have also consistently acted to limit the rights of convicted prisoners,⁴⁹ and even pretrial detainees,⁵⁰ often on the ground of traditional conceptions of the proper place of inmates in the prison system.⁵¹

Naturally, this inhospitality to the claims of minority groups suffuses the conservatives' approach to affirmative action programs.⁵² The list, however, goes far beyond this obvious example. Justice Rehnquist's opinion last Term refusing to question the Air Force's thin justification for its ban on wearing yarmulkes,⁵³ and Justice O'Connor's separate concurring opinion in a case finding political gerrymandering a justiciable issue,⁵⁴ further demonstrate the conservatives' reluctance to vindicate minority rights. Moreover, conservative positions on putatively "procedural" modifications of the law contain a subtle anti-minority rights bias. By limiting access to the courts, conservatives effectively limit the expansion of minority rights and the enforcement of those rights that already exist.⁵⁵

48. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2843 (1986) (White, J.) ("[T]he laws of . . . many States . . . still make such conduct illegal and have done so for a very long time."). Justice White cast the right of privacy as extending only to matters of "family, marriage, [and] procreation." *Id.* at 2844.

49. *Davidson v. Cannon*, 106 S. Ct. 668 (1986) (Rehnquist, J.); *Daniels v. Williams*, 106 S. Ct. 662 (1986) (Rehnquist, J.); *Block v. Rutherford*, 468 U.S. 576 (1984) (Burger, C.J.); *Hudson v. Palmer*, 468 U.S. 517 (1984) (Burger, C.J.).

50. *Bell v. Wolfish*, 441 U.S. 520 (1979) (Rehnquist, J.).

51. *See, e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 525-27 (1984).

52. *See, e.g.*, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (White, J.); *International Bd. of Teamsters v. United States*, 431 U.S. 324 (1977) (Stewart, J.).

53. *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986).

54. *Davis v. Bandemer*, 106 S. Ct. 2797, 2816 (1986) (O'Connor, J., concurring).

55. Recent standing decisions, in particular, show unmistakably the influence of conservative jurists' hesitancy in enforcing minority rights. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737 (1984). In an opinion by Justice O'Connor, the Supreme Court found that parents of black children in the public schools had no standing to challenge IRS regulations that gave favorable tax treatment to private schools that allegedly discriminated on the basis of race. *Id.* at 760-61. The Court based this result on the ground that the plaintiffs' injury—a diminished ability to attend integrated schools—was not "fairly traceable" to the IRS regulations under attack, and that, in any event, withdrawal of the improper subsidies would not make "an appreciable

A third trend in recent conservative jurisprudence has been a growing predilection for deference to executive power. In its administrative law decisions and in its development of the constitutional separation of powers doctrine, the Supreme Court has bolstered executive power in general and presidential power in specific. In the administrative area the Court has expanded the deference owed by the courts to agencies,⁵⁶ and has created an important exception to judicial review of decisions involving prosecutorial discretion.⁵⁷ While the actual changes in substance may at times seem small, the effect of these opinions has been to work a sea change in the atmosphere surrounding judicial review of agency decisions.

In the elaboration of the formal separation of powers doctrine, however, the conservative solicitude for the executive branch has been most startling. In *INS v. Chadha*⁵⁸ the Court struck down the one-House legislative veto on presentment clause grounds, thus making effective legislative control of agency action substantially more difficult. The Court's more conservative members have extended traditional deference to presidential discretion in foreign policy matters to cover even those cases raising substantial questions as to the constitutional rights of United States citizens.⁵⁹ And just last Term, former Chief Justice Burger led a bare majority of the Court in overturning the assignment of "executive" powers to a government official removable by Congress.⁶⁰ The effect of these decisions, and their unmistakable underlying rationale, has been to place fundamental trust in the efficacy and necessity of a powerful, even unfettered, executive branch.

difference" in school integration. *Id.* at 758. See also *infra* notes 136-142 (discussing *Allen v. Wright*).

This sort of language leaves the standing determination almost entirely to judges' discretion, while raising a haze of doctrine that obscures the substantive decision within. For other examples of hostility to minority rights submerged in highly technical discussions of standing and other procedural rules, see *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (White, J.); *Warth v. Seldin*, 422 U.S. 490 (1975) (Powell, J.); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1177 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983) (Bork, J., concurring) (emphasizing that standing doctrine properly implicates considerations of the correct role of the judiciary). These cases represent a fairly obvious bias: the judicial restraint principle is used as a bar to any consideration whatever of asserted minority constitutional rights. The political message is clear.

56. See, e.g., *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985) (White, J.); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (Stevens, J.).

57. *Heckler v. Chaney*, 470 U.S. 821 (1985) (Rehnquist, J.) (agency decisions amounting to prosecutorial discretion are substantially unreviewable by the courts).

58. 462 U.S. 919 (1983) (Burger, C.J.).

59. *Regan v. Wald*, 468 U.S. 222 (1984) (Rehnquist, J.).

60. *Bowsher v. Synar*, 106 S. Ct. 3181 (1986) (Burger, C.J.) (Gramm-Rudman-Hollings Act case).

The final element of the conservative program I see emerging in the courts is a more general one. It seems to me that conservative judges on the federal bench have tended to favor liberty and property interests over general concerns of equality. Granted, this is an ephemeral concept, but some illustrations may help clarify my meaning.

Up to this point, I have avoided discussing first amendment free speech issues in my elaboration of conservative judicial proclivities, primarily because the split in conservative ideology discussed above is quite pronounced in the free speech area.⁶¹ As a consequence, clear "conservative" trends are more difficult to identify in this realm. Nevertheless, the free speech cases centering on election laws which limit campaign expenditures and contributions are important evidence of the conservative predilection for liberty and property rights over concerns of equality. In *Buckley v. Valeo*,⁶² *FEC v. National Conservative Political Action Committee*,⁶³ and, most recently, *FEC v. Massachusetts Citizens for Life*,⁶⁴ the Supreme Court has acted to curtail severely the ability of legislatures to control the influence of money over the political process. I have discussed this matter at length elsewhere,⁶⁵ and will not repeat that discussion here. Suffice it to say that the determination that "money is speech," thus warranting the full protection of the First Amendment, contains not only solicitude for free speech, but a fundamental *sub rosa* concern for property rights over the requirements of political equality.

This concern for property extends beyond the election law and first amendment arena. It may be that recent decisions resuscitating the Contract Clause,⁶⁶ and linking standing in criminal cases to property rights,⁶⁷ contain the seeds of a new conservative predilection for constitutional property protection. It is unquestionably too early to say. But even the hints of ideas shown in these few cases demonstrate, I believe, an important conservative bias, as yet diffuse, against arguments for greater equality of whatever stripe.⁶⁸

61. In the free speech area, of course, libertarian and majoritarian principles intersect at right angles. The First Amendment has always stood for the proposition that the majority cannot silence those with whom it disagrees.

62. 424 U.S. 1 (1976) (per curiam).

63. 470 U.S. 480 (1985) (Rehnquist, J.).

64. 107 S. Ct. 606 (1986).

65. Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

66. *Allied Structural Steel Co. v. Spannaus*, 436 U.S. 234 (1984) (Rehnquist, J.).

67. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978) (Rehnquist, J.).

68. The affirmative action cases cited *supra* at note 52 also tend to support this observation.

The laundry list of conservative judicial trends outlined here is certainly not cut in stone. It merely represents roughcut observations made without any rigorous attempt at classification and analysis. Nevertheless, the relative ease with which conservative trends can be identified makes the conservative rhetoric of restraint somewhat difficult to accept. Listening to this litany of cases, is it really possible to say these results are the consequence of an apolitical mode of decisionmaking? I think not. These four trends amount to a systematic conservative "tilt," and offer us powerful evidence that politics is not far away, even when rhetoric is "neutral." In the next section, I will examine the efforts of conservative legal thinkers to put forward apolitical methods of judicial decisionmaking to explain these otherwise obvious political predilections in conservative decisionmaking.

III. Attempts at Reconciling Rhetoric and Reality

It is difficult to reconcile the omnipresent rhetoric of judicial restraint with the programmatic aspects of the conservative judiciary observed above. The language of restraint and neutrality rings a bit hollow in the face of the sheer predictability of outcomes based on judicial ideology. One wonders why more is not made of this paradox, why it is not a greater source of *embarrassment* to the judicial right. But little explanation is offered by conservative judges and theorists for the incongruity of rhetoric and reality; indeed, they seem to feel that little is called for. One reason might be that the mere fact that the decisional chips happen to fall a certain way time after time proves little about the mental processes of the decisionmaker. After all, the conservative judge might explain, my decisions cannot be attributed to my dislike of certain groups or claims; rather, that is just the way the law *is*, whether I (or you) like it or not. This somewhat disingenuous explanation is hard to contest directly. The connection between a mere consistent pattern of results and a political program lies in the decisionmaker's mind and thus is impossible to bring to light other than circumstantially.

More threatening to the judicial right is the claim that their decisions, in addition to serving an identifiable political program, are informed by exactly the fundamental and contested value choices that they maintain are anathema to principled decisionmaking. Conservative judges have therefore devoted significant effort to establishing repositories of value outside of themselves and their own theories of political morality to which they can turn in hard (often constitutional) cases. By positing the existence of some neutral repository of value, whether it be tradition, consensus, the intent of the Framers, or the goal of efficiency,

conservative judges can rebut the charge that they, like the activist judges they attack, pursue "an 'acknowledged desire for change in the law in accordance with the decider's own conception of right.'"⁶⁹

One possible reference point for judges is traditional or consensus values. Reference of this kind seems more common and less subtle in this age of groups like the "Moral Majority" and their emphasis on the role of nonsecular values in political life. A clear recent example, mentioned briefly above, is the Supreme Court's decision upholding Georgia's criminal sodomy statute. History, tradition, and "millennia of moral teaching" helped the Court to decide that the Constitution did not protect the sexual choices of consenting homosexual adults.⁷⁰ Indeed, some constitutional law doctrines, like those governing the regulation of obscenity, explicitly call for reference to consensus values.⁷¹ Judge Posner has given voice to a version of this judicial methodology, urging that judges limit the infusion of values in their decisionmaking to "values that are widely, though usually they will not be universally, held."⁷²

The problem with reference to tradition and consensus as a neutral repository of value in judicial decisionmaking is twofold. First, judicial review of legislative enactments requires that judges have some theory that can plausibly criticize majoritarian choices. Reference to tradition or consensus to decide difficult constitutional questions dangerously limits the critical "bite" required for effective judicial review. Majoritarian conservative judges, however, might not find this limitation objectionable. A more significant difficulty is that reference to "tradition" or "consensus" assumes there is such a thing (or things). After all, we are wary of the nonelected judiciary making value choices precisely because they are so contested in our society. We want judges to decide cases without reference to values because we acknowledge that individuals disagree about them. Thus it makes little sense for judges to refer to some purported agreement on fundamental issues when it is existing *disagreement* about them that impels the search for a neutral referent.

A second and seemingly more promising "neutral" source of values, at least in constitutional litigation, is the "original intent of the Framers of the Constitution." When called upon to give content to the evocative promises of "due process" and "equal protection," originalist judges can avoid making difficult value choices by referring to value choices made in

69. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 988 (1967) (quoting D. ACHESON, MORNING AND NOON 69 (1965)).

70. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2847 (1986) (Burger, C.J., concurring).

71. See *Miller v. California*, 413 U.S. 15, 22 (1973) (offering guidelines for determinations of obscenity based on "contemporary community standards").

72. Posner, *supra* note 10, at 24.

the past and democratically ratified. This formulation of the judge's role in constitutional litigation has great appeal in its resounding refutation of the "politics" of adjudication. In much the same vein, a third neutral repository of value—and one whose usefulness is not limited to constitutional cases—is the methodology of "law and economics." Efficiency becomes a "neutral" value and the model of the market a "neutral" tool for resolution of intractable issues. Whereas the originalist judge uses the tools of the historian to become a sort of passive human microphone through which the past can speak, the economist judge uses the quasi-scientific methods of economic analysis to reveal objective truth in the laboratory of the courtroom.

Both modes of analysis seem to eliminate the need for judges to make value choices in adjudication. In this way they mediate the tension between the right's rhetoric of restraint and the appearance of "politics" in conservative judicial opinions. The ability of these two modes of analysis to resolve an otherwise embarrassing paradox helps explain their increased attractiveness to both judges and commentators.⁷³ The methodology of originalism may have particular appeal to majoritarian conservative judges because it refers judges to value choices ratified, though long ago, by a political majority. Constitutional change, the originalists maintain to the applause of the majoritarians, should come through popularly approved constitutional amendment rather than from the bench. On the other hand, the economic approach to law may have a stronger appeal to the libertarian wing of the judicial right because its deployment of the model of the self-regulating market gives government an appropriately limited role. Both modes of analysis, however, have been adopted by the mainstream of the judicial right⁷⁴ in an effort to account for their judicial decisions in light of their own rhetoric of restraint.

That effort ultimately has failed, and this failure is the centerpiece of this essay. Neither originalism nor economic analysis can successfully bridge the divide between rhetoric and reality because neither can remove from a judge's job the necessity to make heart wrenchingly difficult "political" choices. Both methods of analysis, when examined more than cursorily, end up being "political" in both of the senses already discussed: they each have a "tilt" toward certain kinds of parties and claims, and they each require that judges refer to their own values and

73. See *infra* notes 78-85 & 99-104 and accompanying text.

74. For example, Judge Posner, a primary proponent of economic analysis of law, has also acknowledged the power of originalism. See Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1365 (1986).

moral visions. Neither methodological “engine” can work, it turns out, without the fuel of moral philosophy—which is exactly what the judicial right seeks to and must avoid.

The failure of the judicial right to find a neutral methodology to vindicate their rhetoric has serious consequences. Conservative judicial opinions and the scholarship of the right, in their continuing invocation of neutrality and restraint, ultimately sound a dangerously disingenuous intellectual note. If we cannot rid adjudication of “politics” in the way the judicial right desires, surely it is better to have our politics brought out from the shadows, to have them examined seriously and with the best efforts of the earnest minds that occupy the bench.

A. Originalism

The debate about the role of the original intent of the Framers in constitutional adjudication has been with us for a long time. The late Justice Hugo Black was perhaps the most ardent defender of textualism, a form of originalism. He would carry a copy of the Constitution in his pocket and vehemently reject the notion that anything more was needed to resolve constitutional crises. Of course, reliance on the “plain meaning” of the words of the Constitution—“textualism”—is not exactly the same thing as reliance on the original intent of those who wrote the words—“originalism.”⁷⁵ Nonetheless, the two methodologies are similar in spirit. Justice Black’s famous dissent in *Adamson v. California*⁷⁶ argued in classic originalist style that the Framers of the Fourteenth Amendment intended it to enforce the Bill of Rights against the states.⁷⁷

Over the years, Justice Black’s approach has been elaborated, vigorously defended, and just as vigorously attacked. Raoul Berger is the most prolific—and extreme—proponent of originalism.⁷⁸ Many other

75. See Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 809 (1982) (distinguishing textualism and intentionalism).

76. 332 U.S. 46, *reh’g denied*, 332 U.S. 784 (1947).

77. *Id.* at 68 (Black, J., dissenting). The Supreme Court has frequently appealed to original intent to resolve constitutional issues. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“The Court’s interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees.”); *Payton v. New York*, 445 U.S. 573, 591 (1980) (inquiring into “what the Framers of the [Fourth] Amendment might have thought to be reasonable”); *Trimble v. Gordon*, 430 U.S. 762, 779 (1977) (Rehnquist, J., dissenting) (appealing to the intent of the Framers of the Fourteenth Amendment to oppose the majority’s decision that a statute limiting the inheritance rights of illegitimate children violated the Equal Protection Clause); *Oregon v. Mitchell*, 400 U.S. 112, 202-03 (1970) (Harlan, J., concurring and dissenting) (“[W]hen the Court gives the language of the Constitution an unforeseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers.”).

78. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

commentators have rebutted Berger's formulation from a variety of perspectives.⁷⁹ Indeed, the issue has been discussed so often and with such enthusiasm that one recent commentator has sardonically noted "the ennuui that the standard debate has come to induce in all but its most obsessive practitioners."⁸⁰ It is thus both surprising and significant that the debate continues—and with heightened energy. Professor Ronald Dworkin has noted that there is "a new generation of enthusiasts" for the originalist position,⁸¹ and my colleague Judge Bork has quite recently observed that "the torrent of words is freshening."⁸² In the past two years, numerous scholars have revisited the originalist controversy,⁸³ and Attorney General Meese continues to call upon the federal courts to adhere to originalism in their constitutional decisionmaking.⁸⁴

The significance of this recent enthusiasm, as I have noted above, is that the judicial right sees in originalism the possibility of value-free adjudication. Thus the rather tedious debate about the proper role of original intent has somewhat higher stakes today. At issue is whether the judicial right can fulfill its promise to "de-politicize the law."⁸⁵ Current criticism of the originalist position should therefore focus on whether originalism can perform the mammoth task assigned to it. Indeed, as I hope to show, many of the more specific criticisms of originalism derive their force from the underlying and global failure of originalism to fulfill its depoliticizing mission.

1. *Originalism and Political "Tilt"*

The most obvious failure of originalism in its quest to be apolitical is its overwhelming bias against expansive claims of individual right. The Framers enacted a Bill of Rights with rather vague provisions. To main-

79. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

80. Grey, *The Constitution As Scripture*, 37 STAN. L. REV. 1, 1 (1984).

81. Dworkin, *supra* note 79, at 470.

82. Bork Speech, *supra* note 22, at 43.

83. See, e.g., Berger, "Original Intention" in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985); Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482 (1985).

84. See Meese, *supra* note 6. Indeed, the Attorney General affirmed his originalist views as recently as January 13, 1987 at an informal lunch with the law clerks at the United States Courthouse in Washington, D.C.

85. Meese, *supra* note 6, at 39.

tain now, 200 years later, that the only valid claims of individual rights are those for which we can produce authoritative evidence of the Framers' affirmative intent, automatically puts those claims at enormous disadvantage. Justice Brennan, who has perhaps the best vantage point from which to observe this uphill struggle for individual rights, has resoundingly rebuked the originalists for exactly this failing:

[T]he political underpinnings of such a choice [originalism] should not escape notice. A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. Nothing intrinsic in the nature of interpretation—if there is such a thing as the “nature” of interpretation—commands such a passive approach to ambiguity. This is a choice no less political than any other; it expresses antipathy to claims of the minority rights against the majority.⁸⁶

I have maintained elsewhere that the appropriate role of the courts in a democratic society is to be the protector of individual rights, particularly those of unempowered minorities.⁸⁷ The originalist theory of interpretation makes this role impossible by its inherent hostility to claims of right. The proponents of originalism fail to see that this hostility reflects a political agenda in a fashion similar to the Warren Court's sympathy to claims of equality in the 1950's and 1960's.

Indeed, the purportedly apolitical tool of originalism gives the judicial right the opportunity to reject wholesale the work of the Warren Court without seeming to evaluate it on political grounds. Many commentators have criticized originalism for its inability to account for decades of constitutional law.⁸⁸ Any theory of adjudication must offer some explanation for and understanding of the practice of judging as it has evolved, even as it criticizes that practice. Originalism can offer no explanation for much of the work of the Warren Court except that it was wrong.⁸⁹ Decades of court opinions would become irrelevant were originalism adopted wholesale, including much of modern free speech, equal protection, and fourth amendment doctrine. This result is disturbing not only because it limits the explanatory value of originalism,

86. Justice William Brennan, Speech to the Text and Teaching Symposium, Georgetown University, Washington, D.C. (October 12, 1985), reprinted in *THE GREAT DEBATE*, *supra* note 5, at 11, 15.

87. See Wright, *Judicial Review and the Equal Protection Clause*, 15 *HARV. C.R.-C.L. L. REV.* 1 (1980).

88. See, e.g., Brest, *supra* note 79, at 234; Munzer & Nickel, *supra* note 79, at 1031-32.

89. See Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 710-14 (1975) (describing the doctrines that cannot be justified in terms of original intent); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 *OHIO ST. L.J.* 261, 265 & n.18 (1981) (same).

but because wholesale abandonment of Warren Court precedent is simply too politically convenient for the right. Originalism permits the judicial right to choose a preferred constitutional history—the history of 1787 rather than that of the 1940's, 1950's or 1960's. It permits them to reject the constraining power of decades of precedent that have by now become part of our national consciousness. There is something almost Orwellian in this rewriting of our constitutional past, and something reminiscent of “double-speak” in the refusal to acknowledge that such revisionism is profoundly political in nature.

2. *Originalism and “Value-Free Adjudication”*

Justice Brennan identified with force and clarity the kind of politics involved in the choice of originalism as a tool.⁹⁰ Some of originalism's proponents might even acknowledge that their politics to some degree affect their propensity to find that choice compelling. They are certain to insist, however, that once we decide to adhere to the intent of the Framers, for whatever reason, we need make no further reference to politics of any type. This is a strong claim, and it would be a compelling one if it were true. But I am convinced, after canvassing the extensive criticisms of originalism, that the claim fails. Originalism as a methodology is not a machine that, once set in motion, requires no more from its operator. Judges, in attempting to advert to “original intent,” are necessarily called upon to make exactly the sorts of political value judgments that the originalist project is meant to avoid. Indeed, the numerous “practical” criticisms of originalism as a judicial tool ultimately lead us to just this conclusion.

For example, the first practical problem posed for originalism is whose intent counts as “the original intent of the Framers?” The use of the word “Framers” seems to suggest the actual drafters of the relevant provisions, or perhaps the delegates to the original Constitutional Convention. But the argument for *why* we should look to the Framers' intent focuses on the ratification process and the popular approval of the Framers' choices. On this theory of democratic validation, we should look to what the ratifiers thought they were enacting. Professor Dworkin has gone beyond simply two choices to list a dizzying array of possible candidates for the role of “Framers.”⁹¹ It is certainly not obvious which of any of these choices we should make. The reasons for choosing one version of the Framers over another have got to be something like the reason, offered above, for choosing the ratifiers over the drafters—some

90. See *supra* note 86 and accompanying text.

91. Dworkin, *supra* note 79, at 482-83.

argument about what would be most “democratic.” Originalism, which was supposed to get us out of the business of theorizing about democracy, seems to embroil us in just that enterprise at the very first step.

But this is just the tip of the iceberg. Once we decide who the Framers are, we need some concept of what constitutes individual intent. In Professor Dworkin’s terms, do we look to an individual’s “hopes” or to his “expectations” about the future meaning of constitutional language?⁹² Do we look at concrete or abstract intention?⁹³ If we decide to look at “abstract” intent—if, for example, we decide that the Framers of the Fourteenth Amendment “intended” to enact some abstract notion of equality—how do we as judges give that abstraction concrete reality without reference to our own notions of what equality entails?⁹⁴ And once we have resolved all of the problems about what it means to have an intention, we need to formulate some theory about group intention, when each of the group members may have intended different things. Anyone who has participated in committee decisionmaking knows how difficult it is after the fact to formulate a plausible “group intention.” These difficulties are obviously exacerbated 200 years after the fact!

Moreover, we run into something of a quandary if we find, as some have argued, that the Framers did not intend for their intentions to guide constitutional decisionmaking,⁹⁵ or that they intended to delegate certain decisions to future generations.⁹⁶ If we look to the Framers to resolve current issues, but this inquiry directs us back to our own contemporary resources, the resort to originalism solves very few problems indeed.

Underlying all of these conceptual difficulties are the severe historiographical problems posed by originalism. Judges, after all, are not historians, and the materials necessary for a determination of any

92. *Id.* at 483-85.

93. *Id.* at 488-91.

94. Indeed, some scholars have argued that if we consider the intent of the Framers at even a moderate level of abstraction, originalism ceases to have much constraining effect at all on constitutional decisionmaking. See Grey, *supra* note 80, at 2 & n.2 (citing scholars who maintain that “the text [of the Constitution], if read with an appropriately generous notion of context, provides as lively a Constitution as the most activist judge might need”).

95. See Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (demonstrating through historical research that the Framers did not intend their “original intent” to govern constitutional adjudication because that term had a meaning at the time entirely different from current usage).

96. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 135-49 (1977). Of course, the “delegation” notion is hotly contested by originalists and can certainly be made to prove too much. Surely the Framers did not delegate authority to interpret the Constitution contrary to any specific intent they might have had. See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 380 (1981).

sophisticated notion of intent are incomplete and inconclusive.⁹⁷ We have no rules for deciding which historical materials should take precedence in cases of conflict, or even which materials count as authoritative at all. Can personal letters prove the existence of individual intent? Other writings? What if there is no evidence of intent for some Framers as opposed to others? What if there are different kinds of evidence of intent for different Framers? These evidentiary problems, especially considered in light of the conceptual difficulties, make plausible the charge that originalism simply could not *work*.

But that is not the charge I wish to press. I do think that the various conceptual and evidentiary problems posed by originalism could be resolved—in the same way we have resolved difficult conceptual problems and problems of proof in other areas of the law. Through the common law we have developed the concepts of “congressional intent,” “discriminatory intent,” and “criminal intent,” and have structured rules that describe what constitutes evidence of these states of mind. The courts could likewise fashion rules about whose constitutional intent matters, what counts as individual intent, what counts as group intent, and what may serve as proof of these things. Surely all this could be done, but the price would be high.

We must remember that originalism has a special project. Originalists do not contend that reference to original intent is the *only* way to resolve constitutional questions; rather, they suggest that it is the only way to do so without embroiling judges in debates about democratic theory and the nature of a just society. And yet the fashioning of such rules, unless it is done in an unacceptably arbitrary and irrational fashion, will inevitably call upon judges to refer to their conceptions of democracy. And even when all the rules are fashioned, we may still find that the Framers did intend to delegate at least certain issues to the future, or that they “intended” at a very abstract level. Such conclusions would call upon judges, in their interpretations of delegated or abstract constitutional provisions, to make the very value choices they would make in the absence of any originalist methodology at all. The price for making originalism “work,” it appears, is that we abandon the project’s central goal of depoliticization.⁹⁸

97. See Munzer & Nickel, *supra* note 79, at 1032-33 (predicting a high likelihood of mistakes from judges attempting historical assessments of intention).

98. Professor Dworkin has reached much the same conclusion in his brilliant exposition of the politics of originalism. See Dworkin, *supra* note 79, at 498 (“[J]udges cannot discover [the intent of the Framers] without building or adopting one conception of constitutional intention rather than another, without, that is, making the decisions of political morality they were meant to avoid.”). Others have likewise questioned originalism’s ability to avoid politics.

B. Economic Analysis

Increased enthusiasm for originalism in recent years has been matched by a growing enthusiasm for the "law and economics" approach to legal analysis. The names of the prime proponents of this technique are now commonplace in the discussion of cases and doctrines: Judges Posner and Easterbrook in the Seventh Circuit have earned perhaps the greatest recognition in the field,⁹⁹ but the work of scholars such as Professors Coase, Melamed, and Calabresi¹⁰⁰ forms the foundation of much of the analysis itself. As yet, the federal courts have seldom applied economic or cost-benefit analysis directly, and it is difficult to think of many actual cases where this sort of analysis might have taken place.¹⁰¹ The issue at hand, therefore, is whether the economic method practiced in academic journals has a proper place in adjudication.

Needless to say, I am not an economist. As a consequence, my comments here will not focus on the numerous technical difficulties that surround the application of an unfettered cost-benefit economic approach to particular situations. Others, far better qualified than I in this regard, have effectively discussed those problems.¹⁰² Instead, this section will

See, e.g., Michelman, *Constancy to an Ideal Object*, 56 N.Y.U. L. REV. 406, 409 (1981) (insisting on "the irrepressibility, the inescapability, of rationalistic political moralizing in constitutional adjudication"); Tushnet, *supra* note 79, at 826 (arguing that originalism (or "interpretivism") cannot avoid the politics of judging without reference to "a shared system of meaning" that does not exist).

99. *See, e.g.,* R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (3d ed. 1986); Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

100. *See, e.g.,* Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1961); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1960); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). I do not mean to imply that this work *alone* provides a sufficient foundation for economic analysis of law. This would be a long footnote indeed if it tried to mention all of the important work in the field. For some interesting studies on the empirical and theoretical validity of some aspects of the basic theories set out by Coase, see Zerbe, *The Problem of Social Cost in Retrospect*, 2 RES. L. & ECON. 83 (1980) (providing a substantial bibliography); Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986) (examining the enormous importance of transaction costs in dispute resolution).

101. In antitrust, environmental, and similar nonconstitutional areas, of course, the courts have often resorted to economic analysis to help resolve cases. *See, e.g.,* Cargill, Inc. v. Monfort of Colorado, Inc., 107 S. Ct. 484 (1986); Natural Resources Defense Council, Inc. v. E.P.A., 804 F.2d 710 (D.C. Cir. 1986), *reh'g en banc granted* (Jan. 23, 1987). In the constitutional realm, however, particularly in individual rights cases, the list of examples seems limited to the criminal procedure area. *See infra* notes 112-119 and accompanying text.

102. *See, e.g.,* Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 1981 REG. 33 (Jan./Feb. 1981) [hereinafter Kelman, *Ethical Critique*]; Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 38 (1981). Two criticisms

examine economic analysis in the law, and specifically cost-benefit analysis, in light of the two aspects of "politics" outlined above.¹⁰³ first, the systematic "tilt" that flows from choosing to apply an economic approach to constitutional questions, and second, the opportunity that the apolitical rhetoric of economic analysis offers judges to insinuate their own values into decisions without being called to account for those values.

At the outset, it is important to note the limits of this criticism. I am not some sort of intellectual Luddite, smashing the machinery of economic analysis to restore an imagined golden age. Without doubt, careful considerations of the costs and benefits of governmental and private actions can be a useful and appropriate tool for evaluating that action.¹⁰⁴ My criticisms strike at the unreflective application of this analytical tool to all aspects of social life, and most importantly, at the claim that it can remove adjudication from the realm of politics.

1. *Economic Analysis and Political "Tilt"*

Despite protestations to the contrary by some proponents of economic method in legal decisionmaking,¹⁰⁵ the idea of cost-benefit analysis rests on a philosophical foundation that conflicts with many of the principles that the law seeks to uphold. Professor Dworkin, to name just one critic of the method, has argued vociferously and effectively that economic efficiency, in and of itself, cannot be a sufficient moral justification for decisionmaking.¹⁰⁶ Economic analysis by its very nature assumes the acceptability of a utilitarian calculus of all human needs and desires. A

that have dominated the discussion are the "offer-asking" problem (people are more willing to pay to prevent a harm than to create a benefit), and the ever present difficulty of weighing unattractive wealth distributional effects against efficiency gains.

103. See *supra* notes 14-15 and accompanying text.

104. Even the most determined critics of economic method in law tend to admit this. See, e.g., Kelman, *Ethical Critique*, *supra* note 102, at 40.

105. See R. POSNER, *supra* note 99, at 19-23. Judge Posner's approach to this point is complex, and he is quite aware that efficiency does not serve as the *only* criterion for establishing "justice." *Id.* at 17-19. He tends to label any concern for the "symbolic" element of the law, however, as a concern for "pseudojustice." *Id.* at 23 n.15. In any event, the policy choices he advocates tend to belie his professed views on the limits of economic analysis in the law. See *id.* at 111-16 (presenting arguments for legalization of baby-selling on efficiency grounds); see also Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 5-6 (1975) (noting that Judge Posner uses efficiency as a primary criterion).

106. See R. DWORKIN, *Is Wealth a Value?*, and *Why Efficiency?*, in A MATTER OF PRINCIPLE (1985). With his usual style and panache, Professor Dworkin argues that the ethical basis of economic and cost-benefit analysis—the pursuit of social wealth—cannot be evaluated separately from other considerations of justice. He rejects the idea that total wealth is of value in itself, and calls for a "principled" approach to social wealth as an element of fundamental fairness. *Id.* at 265-66, 267-69.

moment's reflection, however, demonstrates that a purely utilitarian approach in some areas of the law is out of step with our most basic notions of justice and fairness. The values that motivated our forebears to place a Bill of Rights in the Constitution do not easily succumb to the language of dollars and cents,¹⁰⁷ and neither do environmental or a host of other important values. As others have noted, the Emancipation Proclamation was not subjected to an inflationary impact statement.¹⁰⁸ Society feels, rightly, that some values are simply too important to be priced.¹⁰⁹

The federal courts confronted the heart of the problem in the days before the amount in controversy requirement for federal question jurisdiction was abolished. A party seeking injunctive relief to stop an alleged violation of constitutional or statutory rights had to meet the \$10,000 requirement just as did claimants for money damages. But how much is a constitutional right worth? The courts wrestled with the question, and had not fully resolved it when Congress interceded to remove the amount in controversy requirement altogether.¹¹⁰ Clearly, however, the very process of assigning a dollar amount to a constitutional claim made judges extraordinarily uncomfortable. Placing a price on constitutional ideals can only debase them.¹¹¹

Notably, in the few areas of constitutional adjudication where the courts have actually used some form of quasi-economic analysis, they have carefully limited the scope of its application. The criminal procedure cases discussed in part II of this essay¹¹² are a useful example. The Supreme Court has dramatically restricted the scope of the exclusionary rule in the fourth amendment context, and at times has used a vaguely economic approach to do so.¹¹³ Nevertheless, the cases display a substan-

107. See Kelman, *Ethical Critique*, *supra* note 102, at 33, 36.

108. *Id.*

109. See *id.* at 38-39 (discussing society's abhorrence, for example, of slavery and vote-selling).

110. See, e.g., *Cortright v. Resor*, 325 F. Supp. 797, 808-11 (E.D.N.Y. 1971) (searching for ways to price the rights involved at sums greater than \$10,000 and ultimately concluding that fundamental rights should be presumed to meet jurisdictional requirements); *West End Neighbor Corp. v. Stans*, 312 F. Supp. 1066, 1068 (D.D.C. 1970) (same). But see *McGaw v. Farrow*, 472 F.2d 952, 954 (4th Cir. 1973) (finding no implicit jurisdiction for constitutional claims); *Spock v. David*, 469 F.2d 1047, 1052 (3d Cir. 1972) (same); *Goldsmith v. Sutherland*, 426 F.2d 1395, 1398 (6th Cir.), *cert. denied*, 400 U.S. 960 (1970) (same).

111. See, e.g., *Cortright*, 325 F. Supp. at 810 ("A monetary price can hardly be placed on the rights guaranteed by the First Amendment."); see also Kelman, *Ethical Critique*, *supra* note 102, at 37-38.

112. See *supra* notes 35-47 and accompanying text.

113. See, e.g., *Massachusetts v. Sheppard*, 468 U.S. 981, 990-91 (1984); *United States v. Leon*, 468 U.S. 897, 910 (1984); see also, Boyd, *Forgotten Points in the Exclusionary Rule Debate*, 81 MICH. L. REV. 1273, 1281-82 (1983) (use of cost-benefit analysis in fourth amendment jurisprudence creates "enormous pressure" to restrict the rule's scope).

tial reluctance on the Justices' part to think of rights in cash terms. The Court only applied an economic approach to exclusionary rule doctrine, for example, *after* establishing that the exclusionary rule *itself* is not an integral part of the fourth amendment right against unreasonable searches and seizures.¹¹⁴ Justice White in particular has been extraordinarily careful to point out that the rule is merely a judge-made measure designed to deter police misconduct.¹¹⁵ Deciding exclusionary rule cases on the basis of comparisons of marginal deterrence of the police and marginal damage to the accused becomes much more palatable when the cost-benefit analysis does not directly impinge upon a constitutional right.

The relegation of the exclusionary rule to subconstitutional status has evoked spirited and effective criticism.¹¹⁶ The most effective theoretical attack points out that removing the rule from the constitutional realm will inevitably result in restriction of its applicability to an increasingly smaller set of circumstances.¹¹⁷ Once again, an economic approach devalues the rights it seeks to analyze.

That the Justices were unwilling to impose cost-benefit analysis *directly* on adjudication of constitutional rights is, to my eye, the most remarkable aspect of these cases, apart from their divergence from precedent.¹¹⁸ It is impossible to say at what level of consciousness or motivation the Justices decided to "de-constitutionalize" the exclusionary rule. Perhaps they decided to relegate a rule that precedent gave constitutional status to a lesser station merely to reach the desired result more persuasively, and to avoid "unnecessary" controversy. On the other hand, it is just as likely that the Justices instinctively recoiled from applying an economic model of analysis to matters of individual rights, and demoted the constitutional question to a mere "deterrence policy" so as to avoid confronting the implications of that application in reaching

114. See *United States v. Calandra*, 414 U.S. 338, 348 (1974); see also *Illinois v. Gates*, 462 U.S. 213, 223 (1983); *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting); Boyd, *supra* note 113, at 1273-75.

115. See, e.g., *United States v. Leon*, 468 U.S. at 906-07; *Stone v. Powell*, 428 U.S. at 540 (White, J., dissenting).

116. See, e.g., Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983); Boyd, *supra* note 113.

117. See, e.g., Boyd, *supra* note 113, at 1281-82.

118. Granted, the Court has made some effort to reconcile the new nonconstitutional exclusionary rule with earlier precedent, most importantly *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Olmstead v. United States*, 277 U.S. 438 (1928). See *United States v. Leon*, 468 U.S. at 905-06 ("These *implications* need not detain us long.") (emphasis added).

the result they felt just.¹¹⁹ If the latter interpretation is correct, then the exclusionary rule opinions, ironically enough, are important evidence of the *limits* of cost-benefit analysis in the individual rights field. Unfortunately, they are also evidence of the malleability of the idea of “constitutional rights” and of the economic method’s potential for obscuring the real issue in a case.

The inappropriateness of pricing constitutional rights is not the only systematic difficulty economic analysis encounters in legal decisions. The assumptions underlying an economic mode of analysis may conflict, intensely and unavoidably, with values we otherwise hold dear and seek to vindicate in a legal setting. For example, economic method commonly uses the marketplace model as a starting point for analysis. Two basic premises of marketplace models are that actors are more or less equal, and that they consent to the economic transactions in which they engage. But the very notion of individual rights reflects society’s understanding that in some matters all actors are not equal. This understanding rests on an appreciation of the complexity of human motivation: we do not allow people to “sell themselves into slavery” or to “sell their votes,” because these rights are too important to subject to momentary whim or to unequal bargaining power.¹²⁰

This marketplace *assumption* of basic equality can work to limit the claims for relief of inequality the courts will find acceptable. We are often reminded that the underlying model for free speech is the “marketplace of ideas.”¹²¹ When the courts accept this model, they implicitly accept the “marketplace” assumption that actors are more or less equal. Having made that assumption, the courts are less likely to act to remedy obvious inequities in the relative ability of speakers to have their say, as

119. For thoughts on judges’ proper role in individual rights cases generally, see Wright, *supra* note 87.

120. Two related concerns support the limitation of “alienation” rights. First, we may be concerned that the bargaining power of the parties is so unequal as to make laughable the notion that a transaction is truly voluntary. Modern-day consumer protection efforts often aim to counteract that sort of inequality. Second, it is beyond question that people do not always consent out of some sense of personal autonomy. On the contrary, consent may represent a form of symbolic submission to authority. For an intriguing discussion of this latter point and related issues, see West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 385 (1985). For Judge Posner’s reply and Professor West’s rejoinder, see Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986); West, *Submission, Choice and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

121. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

the cases demonstrate.¹²² The marketplace model conflicts directly with such claims, because it tends to deny the very inequality at issue.

2. *Economic Analysis and "Value-Free" Adjudication*

I have tried to make clear that economic analysis imposes a unique and troubling utilitarian perspective on constitutional adjudication, and that this perspective ultimately tends to devalue individual rights. I have also argued that basic assumptions underlying economic analysis may conflict with equality claims. These substantive biases closely parallel the bias in the "originalism" doctrine.¹²³ But the problem does not end there. Just as with originalism, economic analysis as actually *applied* by its practitioners has often served as a smoke screen for the insinuation of values that consequently go unexamined and unjustified. Moreover, any development of limiting rules to constrain this value-influence *itself* requires a choice of values.

The federal courts themselves have seldom applied economic or cost-benefit analysis directly.¹²⁴ The issue at hand, therefore, is whether economic method as practiced in journals has a proper role in adjudication. A close examination of the academic work of the economic school reveals that value-laden assumptions exist within even the most "apolitical" economic analyses of the law. This discussion will scrutinize one recent piece of writing by way of illustration. Before becoming a federal circuit judge, Frank Easterbrook wrote a foreword to the *Harvard Law Review's* annual recapitulation of the Supreme Court's Term.¹²⁵ The foreword, entitled *The Court and the Economic System*, sets out to evaluate how economic analysis affected the Court's approach to various issues the Term before. On the surface, Professor Easterbrook's approach does not appear to lean one way or the other—it seems a dispassionate elaboration of certain methods of analysis, rather than an argument for any particular choice of values.¹²⁶ For the purposes of this essay, I will focus on the discussion of the Supreme Court's opinions in *Bacchus Imports, Ltd. v. Dias*¹²⁷ and *Allen v. Wright*,¹²⁸ to demonstrate that unvoiced opinions suffuse the analysis presented.

122. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); see also *supra* notes 62-67 and accompanying text.

123. See *supra* notes 90-98 and accompanying text.

124. See *supra* note 101 and accompanying text.

125. Easterbrook, *supra* note 99.

126. *Id.* at 4-5 ("[T]here has been a substantial change in how all the Justices perceive economic issues. . . . [T]hey apply [economic reasoning] in a more thoroughgoing way than at any other time in our history.").

127. 468 U.S. 263 (1984).

128. 468 U.S. 737 (1984).

Professor Easterbrook discusses both of these cases in his section "The Court on the Margin." In that section he points out that, without a proper understanding of incentives, courts' efforts to influence conduct are doomed.¹²⁹ He argues that what matters to people is not the "average" return on a particular activity, but that activity's "marginal" return—its return compared to the return on other activities. People "substitute among opportunities until they receive approximately the same reward for each of their activities."¹³⁰

Assume for the moment that this approach yields a roughly accurate account of human behavior.¹³¹ If we make this assumption, Professor Easterbrook's ensuing analysis of *Bacchus*¹³² flows easily enough. In *Bacchus*, liquor importers in Hawaii challenged on commerce clause grounds that state's law exempting two locally manufactured alcoholic beverages from taxation.¹³³ The Supreme Court found the fact that these products accounted for less than one percent of total Hawaii liquor sales to be beside the point, and struck down the law as an impermissible burden on interstate commerce.¹³⁴ What mattered to the Court, Professor Easterbrook comments with approval, was that the subsidy of local liquors would result in some consumer substitution of those liquors—however small—for out of state liquors. The harm to liquor importers may have been negligible, but the sign on the variable was undeniably positive, not negative. Easterbrook concluded the case was a useful demonstration that "[t]he sign is what matters in good marginal analysis."¹³⁵ In other words, a slight reduction in returns on a certain activity will create incentives for people to substitute other activities to maximize returns.

Fair enough. With this general approach in mind, let us turn to Professor Easterbrook's analysis of *Wright*. In *Wright*, parents of black schoolchildren challenged an allegedly permissive IRS policy toward tax exempt status for private schools that discriminated on the basis of race.¹³⁶ The parents alleged injury from the very fact of government sponsorship of discriminatory private schools, and from the effect that sponsorship had on both the quality and the racial composition of the

129. Easterbrook, *supra* note 99, at 33.

130. *Id.*

131. Some scholars would take issue with this assumption, of course. See authorities cited *supra* note 102.

132. Easterbrook, *supra* note 99, at 34.

133. 468 U.S. at 265.

134. *Id.* at 268-73.

135. Easterbrook, *supra* note 99, at 34.

136. 468 U.S. at 743-45.

public schools.¹³⁷ The Supreme Court, relying on separation of powers and injury in fact rationales, found that the parents lacked standing to challenge the IRS action.¹³⁸

Professor Easterbrook takes a dramatically different approach to this case from that he takes toward *Bacchus*. He does not focus on the effect that tax exempt status has on the cost of attending a private school that discriminates, and the likely substitution of those private schools for public schools that will result. Instead, he considers the effect a court ruling would have on the IRS and its enforcement policy,¹³⁹ and concludes that the Court would have to take charge of the entire IRS enforcement branch to remedy the harm alleged.¹⁴⁰ This would be necessary because the IRS would substitute certain "strategic" behavior to minimize the adverse effect the ruling would have on its operations. Only full scale *control* by the Court could alleviate this problem. He goes on to say that "even if we grant the plaintiff's injury and substantive entitlement . . . the injury is attenuated. . . . Probabilistic losses of [this] sort . . . are poor justification for judges to assume the duty of faithful execution that has been assigned to [a] different branch."¹⁴¹

What has happened to the wonderful dictum that "the sign is what matters in good marginal analysis"? It apparently controls cases where the courts seek to regulate the *economic* legislation of all the states, but not cases where the courts might have to regulate IRS policy to avoid government sponsorship of racism. The harm to the plaintiffs in *Wright* (as in *Bacchus*) clearly existed, though its magnitude was uncertain. Yet this positive sign was insufficient to convince Professor Easterbrook that the Court should hear the case, let alone find for the plaintiffs.¹⁴² Applying Professor Easterbrook's own approach, then, I find his conclusions

137. *Id.* at 746-47.

138. *Id.* at 756, 761. The Court, it seems to me, failed to address the enormous symbolic aspect of the IRS' failure to discourage private school racial discrimination. *Id.* Nevertheless, as the Court did not apply economic principles in making this error, any criticism of the Court's opinion itself is not relevant to the discussion here, and, as a consequence, I will hold my fire.

139. Easterbrook, *supra* note 99, at 41-42.

140. *Id.* at 42.

141. *Id.*

142. *Id.* Professor Easterbrook would differentiate the two cases, no doubt, by pointing to the separation of powers problems he sees in *Wright*. In his discussion of *Bacchus*, however, he fails even to mention the countervailing interest in federalism that arises in that case—an equally important separation of powers question. Neither does he ever mention the possible substitutions the State of Hawaii will make to minimize the effect the Court's ruling will have on its own activities. Perhaps he has simply dismissed these points, perhaps not. He surely has not discussed them.

inexplicable. Values other than an academic interest in marginal analysis must run beneath the surface.

Some lack of precision in a law review article, of course, may or may not demonstrate flaws sufficiently grave to warrant criticism of an entire school of thought. The lack of precision in this particular case, though, points up real limitations in the usefulness of economic analysis in constitutional adjudication. The divergent conclusions Professor Easterbrook reaches in applying "marginal analysis" to *Bacchus* and *Wright* are troubling evidence that value-choice is an integral part of much economic method.

Economic analysis is a flexible tool.¹⁴³ A practiced analyst can use it to arrive at almost any result *other* considerations might dictate. Professor Easterbrook's analysis of *Wright* displays a certain unwillingness to take the substantive claim in that case seriously. Granted, reasonable minds may differ on these questions. Nevertheless, the constitutional value at issue in *Wright*—the right to attend an integrated public school—has formed the very marrow of the courts' efforts to make racial equality a fact in this country, and not merely an empty phrase buried in some obscure amendment to a dusty parchment. To dismiss this claim of right, a claim so firmly embedded in thirty years of United States history and law, without discussion and without acknowledgement of its importance, is legal obfuscation of the worst sort.¹⁴⁴ Remember, *Wright* is a standing case; the question was whether the claim could be presented at all, not whether it should prevail.

There is another, equally important sense in which economic analysis involves a choice of values. As in the case of originalism,¹⁴⁵ it is possible to imagine a specific set of guiding rules for economic analysis of law that would limit the ability of judges to infuse their own values into the process. But the act of establishing such rules, ironically enough, requires the very value judgments the rules are meant to avoid. Each decision arriving at a particular rule for economic analysis *itself* involves a choice of values, as Professor Kennedy has pointed out at some length.¹⁴⁶

143. This is essentially the same point made in Kennedy, *supra* note 102, at 443 (focusing on the ability of an analyst to control the dose of "transaction-cost" introduced into the analysis). Professor Kennedy takes the point somewhat farther than I would, though, and sees only the most limited usefulness for economic analysis of law. *Id.* at 444.

144. The court of appeals opinion found that the historical concern for school desegregation was a powerful argument in favor of justiciability. *Wright v. Regan*, 656 F.2d 820, 832 (D.C. Cir. 1981). Underlying the court's determination was the notion that the right to attend integrated public schools is too important to be hung exclusively on questions of judicial efficiency. *See supra* notes 105-122 and accompanying text.

145. *See supra* text accompanying notes 97-98.

146. Kennedy, *supra* note 102, at 422-43.

Though I will leave full elucidation of this aspect of value-choice in economic analysis to him, a simple example may make clear my meaning. If we arrive at an economic value for a certain state of affairs by asking "How much will people pay to prevent some harm from happening?" we will obtain a lower figure than if we ask "How much will people ask in exchange for allowing some harm to occur?"¹⁴⁷ People tend to value the present state of affairs more than any hypothetical conditions.¹⁴⁸ We will have undervalued the condition or right in question if we ask the first question. We could, of course, establish our first question as the "correct" one for economic analysis purposes. In that case, we would have our "neutral" rule, but we would have made a value choice—against status quo rights—as well.

Thus, economic analysis of the law seems stranded between Scylla and Charybdis: if the rules of the game are sufficiently precise to control outcomes, they require value choices in their own right; on the other hand, if the analytic process limits the number of rules so as to avoid these choices, the method of analysis becomes so open-ended as to make manipulation and value-infusion inevitable.

IV. A Call for Candor

If originalism and economic analysis are inevitably political, as I have maintained, the protestations of neutrality by their proponents take on a somewhat sinister cast. Couching judicial decisions in the detached and even mechanistic language of originalism or economics is a way of hiding the politics that may in fact animate the decision. Even worse, it is a way of denying the legal audience of judicial opinions and the general public the opportunity to peruse and thus participate in significant political choices. For example, if *Brown v. Board of Education*¹⁴⁹ had been decided on the basis of newly discovered historical evidence suggesting that the Framers of the Fourteenth Amendment did intend the Amendment to eradicate segregation in the public schools, or on the basis of some principle of economic efficiency (though this is harder to imagine),

147. *Id.* at 401-02. There are, of course, other examples. If we decide that setting legal rules that ignore the effects of "transaction costs" will maximize economic efficiency, we have implicitly decided to accept the distribution of wealth and power that exists as a background to whatever legal transaction is under review. (Interestingly, Judge Posner recognizes this fact, see R. POSNER, *supra* note 99, at 8-10, but apparently feels it should have no particular influence on his analysis. See Baker, *supra* note 105, at 6-7). Professor Kennedy details various places this sort of hidden value choice must be made in establishing "apolitical" or constrained economic analysis, and ultimately concludes that economics is inherently and irrevocably manipulable. See Kennedy, *supra* note 102, at 443-45.

148. Kennedy, *supra* note 102, at 401-03.

149. 347 U.S. 483 (1954).

the country would have been deprived of the opportunity to examine collectively, as we did back in 1954, whether the American notion of equality could tolerate segregated public schools. That examination was a good thing for the country, and only an institution like the courts, protected from public ire and able to prescribe with authority, could have led that examination successfully.

It may be clear by now that I do not regard our inability to discover or invent an apolitical, value-free mode of adjudication as a “failure.” The inevitable politics of judging should not be apologized for, but accepted and even welcomed. It should certainly not be swept under the carpet as the judicial right seems inclined to do. Accepting the role of politics—some might call it conscience—in judging will not denigrate the judiciary, nor will it lead to terrible judicial decisions. I am convinced that if we as judges could acknowledge the “politics” of what we do with candor and seriousness, our judging and even our society would be the better for it.

Some might fear that if judges acknowledged that their jobs required them to refer to their own political values in elucidating our common ones, the judiciary would lose the legitimacy crucial to its effective functioning. First of all, I am somewhat skeptical of the claim that the public views the court system as totally divorced from the world of politics. Certainly, the politics of the judicial appointment process escapes no one’s eye. But more significantly, the *pretense* of neutrality seems to me more threatening to the legitimacy of the courts than a frank admission of the ways in which politics must be accommodated. To return to the *Brown* example for a moment, suppose the public recognized, as they could not fail to do, that the real issue in that case was the nature of racial equality, while the Supreme Court insisted that the matter turned simply on the objective evaluation of historical documents with no call for theorizing on what, if anything, equality means. The legitimacy and usefulness of the Court’s ultimate decision would indeed have been jeopardized in such a situation.

The problem of legitimacy aside, some might fear that candor will harm the actual practice of judging. Even if judges really aren’t completely constrained by the limiting methodologies we invent, don’t we want them to *think* that they are? As Professor Brest colorfully put it in the context of originalism, “confining the Court to some form of originalism is rather like setting the speed limit at 55 miles an hour to keep cars from going faster than 65.”¹⁵⁰ But we have already seen above, in exam-

150. Brest, *supra* note 79, at 235.

ining the actual decisions of the judicial right, that the rhetoric of restraint does not seem to restrain very much by its own force. And even if rhetoric did have some residual restraining force, what is it that we are seeking to restrain judges *from*? Part of the job of judging is to develop some account of the liberties and equality promised by the Constitution; the myth of restraint will restrain judges from even attempting to perform this function. Abandoning the myth that judging is completely divorced from discussions of political and moral philosophy will permit judges to make such examinations with the seriousness and depth that they deserve. Judicial decisions, I am convinced, will be better for such candor.

The audience of those opinions will benefit from judicial candor as well. I touched upon this theme above, when I mentioned the importance of the *Brown* Court's courageous confrontation of the central issue of equality. We are a society in which different visions of equality, liberty, and their interrelationship compete daily in every arena. The major issues that we collectively confront as a society—racial justice, the legitimacy of the claims of the poor, the appropriate limits on the liberties of the wealthy—all require reference to some vision of justice. The courts serve as a forum for working out, albeit painfully and haltingly, our collective vision. Professor Dworkin put it much more eloquently than I can: "We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally become questions of justice."¹⁵¹ Judges cannot create this forum in the service of our common political life without acknowledging the critical role of political and moral philosophy in their decisionmaking.

If moral philosophy is truly part of constitutional judging, however, how can we criticize constitutional judgments that seem to us to be flawed? It is this fear that underlies much of the desperate attempt to find neutral ground on which to base difficult judicial decisionmaking. For example, Chief Justice Rehnquist has argued that unless we attempt to follow the intent of the Framers, there can be no principled distinction

151. Dworkin, *supra* note 79, at 518. I do not mean to suggest that the judiciary is the only potential moral actor in our system of government. To the contrary, the history of this Nation speaks eloquently of the other two branches' ability to act forcefully in the service of justice. The Emancipation Proclamation, after all, was an executive pronouncement, and the first reconstruction, a creation of the Legislature. See generally A. MAAS, CONGRESS AND THE COMMON GOOD (1983); G. WOODS, THE CREATION OF THE AMERICAN REPUBLIC (1969). Nevertheless, by its very nature, the judiciary carries a heavier burden in the service of justice, one that it must not shrug by claiming scientific neutrality.

between our judicial decisions and those of the now discredited *Dred Scott* and *Lochner* Courts.¹⁵² He is right that if we acknowledge the role of moral philosophy in adjudication, we cannot establish a clear *methodological* distinction between the philosophy-based decisionmaking of the Warren Court and that of, for example, the *Lochner* Court. But that is not the same as saying that therefore the decisions of the Warren Court and the *Lochner* Court were equally right.

As Justice Rehnquist himself points out, one can still criticize past Courts "because they sought to bring into the Constitution the *wrong* extraconstitutional principle."¹⁵³ Chief Justice Rehnquist rejects this basis of criticism because he maintains, correctly, that such principles are contested. What he does not acknowledge, however, is that these principles are not "*extra-constitutional*." Questions about what "liberty" and "equality" mean, which is after all what both the *Lochner* and the Warren Courts were attempting to answer, are the very heart of our Constitution. Recognizing that the very heart of our Constitution is contested and contestable entails, as I have said before, that "the ultimate test of the Justices' work . . . must be goodness."¹⁵⁴ By this I mean that we should ask whether any given constitutional opinion offers the best account—and this account cannot help being normative—of what the equality and various liberties promised in the Constitution mean. Oddly enough, the extreme libertarian branch of the right that calls for a revival of judicial activism in the name of economic liberty is more successful in this regard than the mainstream of conservative judicial thought.¹⁵⁵ Although their account of what the Constitution protects is dramatically lopsided, they at least recognize the role of theory in our constitutional construction.

I do not want to be understood as suggesting that constitutional adjudication is simply up for grabs and that *any* decision is acceptable as long as it has some basis in moral theory. If we are worried that judges will get carried away by their own moral philosophies, we should remember that there is plenty to constrain judicial decisionmaking aside from the myth that it is completely apolitical. The language of the Constitution, after all, rules *out* a great deal, even if it does not present only

152. See Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976).

The Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), gave substantive due process protection to slaveholders' property rights, holding that neither Congress nor the states had power to grant citizenship to slaves or their descendants. For a discussion of the Court's decision in *Lochner*, see *supra* note 4.

153. Rehnquist, *supra* note 152, at 703.

154. Wright, *Scholarly Tradition*, *supra* note 3, at 797.

155. See *supra* notes 8-9 and accompanying text.

one possible interpretation.¹⁵⁶ Precedent constrains to a degree, as does the craft of judging by which judges know, but cannot always articulate, what is an acceptable judicial decision. In light of these constraints, I find dire predictions of judicial tyranny to be unpersuasive. But I still think it is a mistake to pretend that judges are more constrained than they are and to ignore the ways in which political and moral philosophy do play a role in judicial decisionmaking.

As a so-called "liberal" judge looking ahead to a long stretch of conservative judging from the federal bench, I still think it best to be frank about how judges must inevitably call upon their "politics" to do their jobs well—or at all. Constitutional judging is, at least in difficult cases, nothing less than a quest for the goal of moral and political truth. Recognizing this can only improve our work as judges, making it both more honest and more useful. If such recognition can bring us any closer to that elusive goal, it may also improve us collectively as a society.

156. See Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

