Roundtable Discussion: The Judiciary Act of 1789*
Roundtable Discussion: The Judiciary Act of 1789*

Abstract

ROGER ABRAMS: Welcome to the fourth and final session of our Bicentennial Symposium on the Judiciary Act of 1789 - Courts and American Society, taking place at Nova Law Center.
Roundtable Discussion: The Judiciary Act of 1789

ROGER ABRAMS: Welcome to the fourth and final session of our Bicentennial Symposium on the Judiciary Act of 1789—Courts and American Society, taking place at Nova Law Center. When I introduced the symposium yesterday morning, I talked briefly about the intentions of the members of the first Congress to create a marketplace of ideas. While the press was certainly influential two centuries ago, it was through the mechanism of the town meeting that citizenry expressed their ideas about the direction of the new country. We hope to recreate that town meeting atmosphere this afternoon with the help of our symposium guest speakers, Professors John Anderson, Ted White, Lino Graglia, and Stanley Kutler. We hope in the process of this roundtable discussion to shed some light, as well as create some heat. The rules, gentlemen: that there are no rules except that everyone has the full opportunity to express his view without treading on each other’s toes. Let us first of all begin by establishing some historical perspective. Professor White, we have been spending a lot of time the last two days talking about events of two hundred years ago and the important decisions of the Marshall Court. But the federal courts have changed over the last two hundred years. How has the role of the courts changed and do you think that is for the better or for the worse?

G. EDWARD WHITE: The Supreme Court has changed in fundamental ways—notably, its membership and its deliberative process. And in several other mundane but important ways, the present Court is also different from that on which Marshall sat. The Justices have their own offices; in Marshall’s day they met in a boarding house. Counsel are limited severely in their time for oral argument; in Marshall’s day they could speak as long as they wanted. In oral arguments there are colloquies between counsel and the justices; in Marshall’s day the justices did not interrupt counsel. Today the Supreme Court holds regular...

* The participants of this panel included Dean Roger Abrams, Dean of the Nova Law Center; Professor John Anderson, Distinguished Visiting Professor, Nova University Law Center; Professor Lino A. Graglia, A. Dalton Cross Professor of Law, University of Texas; Professor Stanley Kutler, E. Gordon Fox Professor of American Institutions, University of Wisconsin; and Professor G. Edward White, John B. Minor Professor of Law and history, University of Virginia.
weekly conferences where the judges speak in prescribed order; there were no such conferences in Marshall's day. The Court, as Story put it, just went back to the boarding house and "mooted" each case as they proceeded. Sometimes they were deliberating and voting informally while counsel were still presenting the case.

A very important difference between the Court then and the Court now is the idea that each justice of the modern Court is accountable. You can look in the U.S. Reports and see how every judge voted on every case—whether he or she concurred or dissented, wrote a separate opinion, or joined the majority. In Marshall's day there was no obligation on the part of individual justices to record their individual votes. The U.S. Reports listed only the opinion of the Court and the name of the judge who delivered it. If there were published dissents, they would be recorded; otherwise there was nothing of the other judges' votes. Some of the judges who were not mentioned had joined the majority, but others had not. Those who had not joined were called silent asquersors; they disagreed with the Court, but they decided not to say anything in the interest of unanimity. This practice, of course, creates a very different impression of what kind of judgments the Supreme Court was making. It appears that the justices often were speaking with one voice, when, in fact, they may not have been.

In short, we are in a different world, in a number of respects. Not only are we in a different world in terms of the technical matters of deliberation and argument, but we are also in a different jurisprudential world. The idea of what judges do is different. We are not persuaded any more by the arguments that were repeatedly made in the Marshall Court period—that judges are mere finders of the law, discovering and declaring a disembodied entity that is somehow out there, without injecting their individual wills into it. We do not accept that argument any more. We worry about things like judicial bias, judicial accountability, and judicial power in a democratic society. We worry about those things perhaps more contemporaneously than the Marshall Court did.

Is this for the better? My idea of history is that things are neither for the better nor for the worse. They are just in a different phase—a different culture. One cannot help living in the world that one lives in and I suppose if one wants to "get along" and not assume the pose that Justice Holmes used to ascribe to Henry Adams—the pose of the old cardinal, all dust and ashes—one enjoys the world one lives in. One prefers its ideological assumptions and its cultural setting to those of an earlier era. But if one wants to look at it philosophically, it is not that things have gotten better, it is just that they are different.

ABRAMS: Professor Graglia, based on your comments during this symposium, I think you would disagree that things might be better simply because we are used to it. Can you give us one case that you think best exemplifies the evils of judicial review in the current court system?

LINO GRAGLIA: I understand your question as asking how the role of the Court has changed. The answer is that it has changed enormously. Marbury v. Madison gave us judicial review, but judicial review would be of little consequence if, as represented by Hamilton and Marshall, the Court had laws unconstitutional only when they were in fact clearly inconsistent with the Constitution. The Constitution actually restricts self-government very little, and American legislators—all of whom can read the Constitution—are not ordinarily disposed to violate its few restrictions. The result is that laws clearly inconsistent with the Constitution are, to say the least, very rare. Indeed, after Marbury, no federal law was held unconstitutional for fifty years. The Court held that Congress had no authority to prevent the extension of slavery. That decision showed that even judicial review exercised only once in a half-century can be once too often. Judicial review became much more common in the late nineteenth century, when the Court used it to strike down much social and economic regulation, particularly that passed by the states.

The pivotal event in the history of judicial review was the Brown v. Board of Education case in 1954. With Brown, judicial review was changed from a brake to an accelerator of basic social change, as Hamilton and Marshall expected, to the primary instrument and initiator of change. As important as Brown was for what it held, it was vastly more important for its impact on people's—especially judges'—perceptions of the possible role of the Court. This change of perception was most unfortunate and is the source of many of our most serious social problems today. Unlike Professor White, I think that things can very definitely be better or worse and not just different, that it is not just a matter of the time one happens to live in. Our society has been a meteor among the societies of the world in its achievements. After the Civil War, for example, we achieved a rate of industrial development and production unparalleled in history. In our first 150 or so years, we produced a soci-

1. 5 U.S. (1 Cranch) 137 (1803).
et al.: Roundtable Discussion: The Judiciary Act of 1789*

Published by NSUWorks, 1989

Nova Law Review

[Vol. 14]

1989]

Roundtable Discussion

270

weekly conferences where the judges speak in prescribed order; there were no such conferences in Marshall's day. The Court, as Story put it, just went back to the boarding house and "mooted" each case as they proceeded. Sometimes they were deliberating and voting informally while counsel were still presenting the case.

A very important difference between the Court then and the Court now is the idea that each justice of the modern Court is accountable. You can look in the U.S. Reports and see how every judge voted on every case—whether he or she concurred or dissented, wrote a separate opinion, or joined the majority. In Marshall’s day there was no obligation on the part of individual justices to record their individual votes. The U.S. Reports listed only the opinion of the Court and the name of the judge who delivered it. If there were published dissents, they would be recorded; otherwise there was no mention of the other judges’ votes. Some of the judges who were not mentioned had joined the majority, but others had not. Those who had not joined were called silent acquiescents; they disagreed with the Court, but they decided not to say anything in the interest of unanimity. This practice, of course, creates a very different impression of what kind of judgments the Supreme Court was making. It appears that the justices often were speaking with one voice, when, in fact, they may not have been.

In short, we are in a different world, in a number of respects. Not only are we in a different world in terms of the technical matters of deliberation and argument, but we are also in a different jurisprudential world. The idea of what judges do is different. We are not persuaded any more by the arguments that were repeatedly made in the Marshall Court period—that judges are mere finders of the law, discovering and declaring a disembodied entity that is somehow out there, without injecting their individual wills into it. We do not accept that argument any more. We worry about things like judicial bias, judicial accountability, and judicial power in a democratic society. We worry about those things perhaps more contemporaneously than the Marshall Court did.

Is this for the better? My idea of history is that things are neither for the better nor for the worse. They are just in a different phase—a different culture. One cannot help living in the world that one lives in and I suppose if one wants to "get along" and not assume the pose that Justice Holmes used to ascribe to Henry Adams—the pose of the old cardinal, all dust and ashes—one enjoys the world one lives in. One prefers its ideological assumptions and its cultural setting to those of an earlier era. But if one wants to look at it philosophically, it is not that things have gotten better, it is just that they are different.

ABRAMS: Professor Graglia, based on your comments during this symposium, I think you would disagree that things might be better simply because we are used to it. Can you give us one case that you think best exemplifies the evils of judicial review in the current court system?

LINO GRATGLIA: I understand your question as asking how the role of the Court has changed. The answer is that it has changed enormously. Marbury v. Madison1 gave us judicial review, but judicial review would be of little consequence if, as represented by Hamilton and Marshall, the Court held laws unconstitutional only when they were in fact clearly inconsistent with the Constitution. The Constitution actually restricts self-government very little, and American legislators—all of whom can read the Constitution—are not ordinarily disposed to violate its few restrictions. The result is that laws clearly inconsistent with the Constitution are, to say the least, very rare. Indeed, after Marbury, no federal law was held unconstitutional for fifty years. The Court held that Congress had no authority to prevent the extension of slavery. That decision showed that even judicial review exercised only once in a half-century can be once too often. Judicial review became much more common in the late nineteenth century, when the Court used it to strike down much social and economic regulation, particularly that passed by the states.

The pivotal event in the history of judicial review was the Brown v. Board of Education2 case in 1954. With Brown, judicial review was changed from a brake to an accelerator of basic social change, as Hamilton and Marshall expected, to the primary instrument and initiator of change. As important as Brown was for what it held, it was vastly more important for its impact on people’s—especially judges—perceptions of the possible role of the Court. This change of perception was most unfortunate and is the source of many of our most serious social problems today. Unlike Professor White, I think that things can very definitely be better or worse and not just different, that it is not just a matter of the time one happens to live in. Our society has been a meteor among the societies of the world in its achievements. After the Civil War, for example, we achieved a rate of industrial development and production unparalleled in history. In our first 150 or so years, we produced a soci-

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

Published by NSUWorks, 1989
enity of extraordinary prosperity and freedom. I have no difficulty in saying that it was a good society and government created by the Constitution.

The major principles and innovations of the Constitution were republicanism—government by the people through elected representatives—and federalism—local autonomy or decision-making at the state level to the extent feasible. As a result of Brown, however, we now have Supreme Court decision-making on basic social policy issues. This violates both republicanism and federalism because it constitutes totally undemocratic and centralized government. For liberals, the Court has become a shortcut to the achievement of great things that cannot be achieved through the political process. We hear our judges referred to as statesmen and heroes, but I think there is something wrong with a judicial system in which judges play such roles—I prefer my heroes on battlefields. In the past few decades, we have achieved a system of government inconsistent with the system contemplated by the Constitution that gave us our prosperity and freedom. It is true that Congress determines some social policy issues, presumably with the consent of the people, but when the Supreme Court does it, it is totally without warrant.

It is difficult for me to give a case that exemplifies the evils of judicial review because I believe that every one of the Court's controversial so-called constitutional decisions exemplifies those evils. Most people in constitutional law who are at all skeptical of Supreme Court policy-making will point to Roe v. Wade, the abortion decision. One of the most prominent commentators on constitutional law today is John Hart Ely, former dean of Stanford Law School, who wrote a much-noted book called Democracy and Distrust. Ely established himself as a hard-nosed skeptic and opponent of free-wheeling judicial activism by writing that Roe v. Wade was an outrage, that nothing in the Constitution limits the authority of the states to restrict abortion, and that the decision was, therefore, completely unjustified. So, for most critics of the Court, the Court's worst decision and the best example of naked judicial usurpation of legislative power, is Roe v. Wade. Similarly, the worst case of the economic substantive due process era, symbolically at least, was Lochner v. New York, in which the Court held that New York could not restrict the working hours of bakers to ten hours a day.

4. Id. at 119 (Holmes, J. dissenting).

Lochner became so well-known primarily because of Holmes' powerful dissent.

Your question is a difficult one, because although I agree entirely with Ely and other commentators that Roe and other commentators that Roe v. Wade is totally without justification and is an example of egregious judicial misbehavior, I believe the same can be said about all of the Court's rulings of unconstitutionality. They equally represent usurpations of legislative authority. For example, there is no more justification for the Court's decision that states cannot make provisions for prayer and Bible reading in the schools than there is for its saying that the states cannot restrict abortion. We were told by Professor Rohr that while he is dubious about the so-called privacy cases such as Roe v. Wade, he believes that there is some "identifiable basis" in the Constitution for the Court's other controversial decisions. But that is not so; that is not a very perceptive analysis. Indeed, one could say of the prayer decisions that not only are they not based on the Constitution, but they are also clearly in defiance of the Constitution. The first amendment prohibits the establishment of religion, but it is explicitly directed only to Congress, and its purpose was to leave the states completely free of federal interference in matters of religion. But the Supreme Court, an arm of the national government, now uses the establishment clause as a means of imposing restrictions on the states, which is at least as unjustified as the Court's imposing restrictions on the power of the states to make policy regarding abortion. I could go down the list and make the same showing as to all of the Court's other rulings of unconstitutionality.

Although it is the Brown decision that changed the role of the Court and led to these other decisions, I would say that Brown itself was one of the Court's most justifiable decisions.

ABRAMS: Why is that decision justifiable?

GRAGLIA: It is justifiable because the fourteenth amendment was, at the very least, clearly meant to protect blacks. Indeed, the central purpose of all of the three Civil War or Reconstruction amendments—the thirteenth, fourteenth, and fifteenth—was to protect blacks. When you use the fourteenth amendment to protect blacks, you are clearly using it in the most easily justifiable way. Unfortunately however, the issue is not quite that simple, because it is fairly clear from history that the fourteenth amendment was not meant to prohibit school segrega-
Lochner became so well-known primarily because of Holmes’ powerful dissent. Your question is a difficult one, because although I agree entirely with Ely and other commentators that Roe v. Wade is totally without justification and is an example of egregious judicial misbehavior, I believe the same can be said about all of the Court’s rulings of unconstitutionality. They equally represent usurpations of legislative authority. For example, there is no more justification for the Court’s decision that states cannot make provisions for prayer and Bible reading in the schools than there is for its saying that the states cannot restrict abortion. We were told by Professor Rohr that while he is dubious about the so-called privacy cases such as Roe v. Wade, he believes that there is some “identifiable basis” in the Constitution for the Court’s other controversial decisions. But that is not so; that is not a very perceptive analysis. Indeed, one could say of the prayer decisions that not only are they not based on the Constitution, but they are also clearly in defiance of the Constitution. The first amendment prohibits the establishment of religion, but it is explicitly directed only to Congress, and its purpose was to leave the states completely free of federal interference in matters of religion. But the Supreme Court, an arm of the national government, now uses the establishment clause as a means of imposing restrictions on the states, which is at least as unjustified as the Court’s imposing restrictions on the power of the states to make policy regarding abortion. I could go down the list and make the same showing as to all of the Court’s other rulings of unconstitutionality.

Although it is the Brown decision that changed the role of the Court and led to these other decisions, I would say that Brown itself was one of the Court’s most justifiable decisions.

ABRAMS: Why is that decision justifiable?

GRAGLIA: It is justifiable because the fourteenth amendment was, at the very least, clearly meant to protect blacks. Indeed, the central purpose of all of the three Civil War or Reconstruction amendments—the thirteenth, fourteenth, and fifteenth—was to protect blacks. When you use the fourteenth amendment to protect blacks, you are certainly using it in the most easily justifiable way. Unfortunately however, the issue is not quite that simple, because it is fairly clear from history that the fourteenth amendment was not meant to prohibit school segrega-
tion. Constitutional provisions must, in my view, be taken to mean what they were intended to mean by those who made them authoritative—the ratifiers of the Constitution. Interpreting a document can have no function other than to attempt to discern the intent of its author or authors—those who were responsible for its adoption. Anything else is not reading, but writing; it is making oneself the author of a new document.

In 1880, the Court made a very important decision in *Strauder v. West Virginia*, holding that the fourteenth amendment, along with the other Civil War amendments, should be understood as simply prohibiting all legislation unfriendly to blacks. Such legislation includes laws disadvantaging blacks because they are black, or seeking to hold them in an inferior status. It seems to me that this decision is defendable, if only because the fifteenth amendment had wiped out the previous distinction between political and civil rights, and the Court had a legitimate need to find a meaningful and judicially administrable principle in the fourteenth amendment. There is no doubt that segregation disadvantages blacks in our society. Therefore, if the Brown Court was correct in accepting *Strauder*—as I think it was—it was correct in disallowing segregation.

**ABRAMS:** On the other side, is there a defender of *Roe v. Wade*, here? *John?*

**JOHN ANDERSON:** Reluctantly, I would approve the result of *Roe v. Wade*, but I decry the methodology that the Court employed. Archibald Cox, in his book, *The Court and the Constitution*, approves the result, but confesses that what he said, and the reasoning that was used by Blackmun in that decision, was something with which he could not agree. As Justice O'Connor said in *Akron v. Akron Center for Reproductive Health, Inc.*, the *Roe* decision almost puts the Court on a collision course with advancing medical technology, because of the division of pregnancy into three parts. I am not comfortable, frankly, with the basis for the Court's decision or the reasoning that it used, even though I certainly recognize, unlike former Judge Bork, the importance of a right of privacy; *Griswold v. Connecticut* was decided correctly, and privacy ought to be one of those constitutional values.

1. 100 U.S. 303, 310 (1880).
6. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The President's position was that it was necessary for the Secretary of Commerce to seize control and operation of the steel mills to avert a nation-wide strike of steel workers which would jeopardize national defense, and that he had the authority to order such actions.
tion. Constitutional provisions must, in my view, be taken to mean what they were intended to mean by those who made them authoritative—the ratifiers of the Constitution. Interpreting a document can have no function other than to attempt to discern the intent of its author or authors—those who were responsible for its adoption. Anything else is not reading, but writing; it is making oneself the author of a new document.

In 1880, the Court made a very important decision in Strauder v. West Virginia, holding that the fourteenth amendment, along with the other Civil War amendments, should be understood as simply prohibiting all legislation unfriendly to blacks.9 Such legislation includes laws disadvantaging blacks because they are black, or seeking to hold them in an inferior status. It seems to me that this decision is defensible, if only because the fifteenth amendment had wiped out the previous distinction between political and civil rights, and the Court had a legitimate need to find a meaningful and judicially administrable principle in the fourteenth amendment. There is no doubt that segregation disadvantages blacks in our society. Therefore, if the Brown Court was correct in accepting Strauder—as I think it was—it was correct in disallowing segregation.

ABRAMS: On the other side, is there a defender of Roe v. Wade, here? John?

JOHN ANDERSON: Reluctantly, I would approve the result of Roe v. Wade, but I decry the methodology that the Court employed. Archibald Cox, in his book, The Court and the Constitution,* approves the result, but confesses that what the Court had to say, and the reasoning that was used by Blackmun in that decision, was something with which he could not agree. As Justice O'Connor said in Akron v. Akron Center for Reproductive Health, Inc.,* the Roe decision almost puts the Court on a collision course with advancing medical technology, because of the division of pregnancy into three parts. I am not comfortable, frankly, with the basis for the Court's decision or the reasoning that it used, even though I certainly recognize, unlike former Judge Bork, the importance of a right of privacy, Griswold v. Connecticut10 was decided correctly, and privacy ought to be one of those constitutional values that the Court upholds. I just wish the Court had found a better basis for its decision in Roe. I think that Larry Tribe, who talks about personal autonomy, personhood, and the inviolability of the human personality, offers a much better basis on which to build a rationale than the Blackmun decision.

ABRAMS: Do you think the Court is going to deal with this case because people are protesting about it, saying that Roe v. Wade is dead because pro-life advocates lie down in the street trying to stop women from entering abortion clinics?

ANDERSON: I have thought a great deal about that, and it is a conflict that seems to be unabating, but I would certainly hope the Court does not yield to such pressure. It is not that I dispute the right of people peaceably to disagree with the Court. Even legislatures, as they did in the State of Missouri, have a perfect right to pass laws that are in conflict with what would seem to be the correct interpretation of the Constitution under Roe v. Wade, and to set up a situation where the matter can be revisited. However, I would very much hate to think that the Court is going to be subjected to the kind of pressures—not very subliminal pressures either—created by people through riots, commotion, and civil disorder in the streets through bombings, fire bombings, and some of the other things that have occurred.

ABRAMS: John, do you think the Court was moved during the '60s to uphold the '65 Civil Rights Act and the '65 Voting Rights Act as a result of people lying down in the streets and protesting, or do you think that the Court just ignores what is going on in the evening news or in the country?

ANDERSON: No, the Court does not ignore the public's actions or reactions. There is a very interesting passage in Rehnquist's book on the Supreme Court11 in which he writes that when he was a young clerk with Justice Jackson, Jackson came out of a conference and revealed to his clerk the fact that there was going to be a six to three decision against the President on the steel seizure case.12 Jackson made some

---

7. 100 U.S. 303, 310 (1880).
10. 381 U.S. 479 (1965).
remark to the effect that, "well, the President is really going to lose on this one." Thus Rehnquist builds the story around all of the events that have been taking place contemporaneously with the decisions, first by Judge Pine and then by the appeals court judge in the case. The events included those that had combined to put the President in a much weaker political situation than he had been previously. So, I think the Court was not unaware of what was going on in the country. It is not as simple as the famous remark that "they read the election returns," but the justices are not unaware of what contemporaneous events are going on and the shadow that these events cast upon the decisions they make.

ABRAMS: Professor Kutler, can you think of one case which really shows the present Court, or the Court within the last 30 to 40 years, at its creative best—protecting basic human rights and dignity—where the legislative process which Professor Graglia would extol, just did not work?

STANLEY I. KUTLER: John Anderson said that Rehnquist's book illustrates that the Court does not operate in a vacuum. At one point, Rehnquist describes how the Justices and their clerks watched the Watergate hearings. So, when they came to United States v. Nixon, they were very well informed about the background of the case. To be sure, they never would have qualified as jurors in Judge Geisel's courtroom for the North trial. United States v. Nixon offers us an opportunity to cast the Court in a light different than that presented by Professor Graglia. One might argue that society, for all kinds of reasons, most of which boil down to a lack of political will on the part of elected legislative and executive leaders, has turned increasingly to courts for the resolution of problems. In 1954, what southern legislature would courageously confront the social, economic, and moral ills of segregation that adversely affected both blacks and whites? How many legislatures were prepared to reapportion themselves? Few to none. Thus, we turned to the courts, for better or for worse. Surely for worse, Professor Graglia contends, when we look at Roe v. Wade. Whatever the merits or lack thereof of that case, the courts certainly failed to settle the decisive problem of abortion—failed to settle it as readily as, let us say, reapportionment failed to settle. Court intervention is not always proper, and we do not always have a happy ending; but Graglia's absolutism flies in the face of history.

The Nixon case offers a splendid example of how the Court can work in the fashion that John Marshall articulated in Cohens v. Virginia—as a forum for the peaceful resolution of problems. When we learned in July 1973 that Richard Nixon had bugged himself, most knowable people—for both political and constitutional reasons—would have offered substantial odds that Nixon would never have to surrender his tapes. Yet almost one year later, the Supreme Court ordered him to do so. It is revealing to trace the events of that year, to watch the momentum of opinion and the mobilizing of institutions, all awaiting some "definitive ruling"—a Nixon-imposed criterion—from the Supreme Court on the President's claims for executive privilege. The Court did not offer such a definitive ruling, but it clearly and unanimously—ruled that Nixon had to surrender the tapes. The process and outcome of that year, it seems to me, speak volumes about what we think of the Court.

The Dred Scott v. Sandford case offers the nineteenth century analogy to Roe v. Wade. The former, like the latter, alternately pleased and inflamed various elements of the community. The South was delighted; most northern Democrats applauded the Court's "definitive ruling." Yet Dred Scott turned out to be a disaster. An equally odorous element contemptuously denounced the decision believing, as in Horace Greeley's words, that it deserved as much respect as if it had been made in a Washington barroom. But I find another stream of opinion most interesting. These people contended that they did not like the decision but found themselves more alarmed by the wanton assaults on the Court as an institution. In other words, though they thought the particular decision was wrong, they still believed the institution re-
remark to the effect that, "well, the President is really going to lose on this one." Rehnquist builds the story around all of the events that had been taking place contemporaneously with the decisions, first by Judge Pine and then by the appeals court judge in the case. The events included those that had combined to put the President in a much weaker political position than he had been previously. So, I think the Court was not unaware of what was going on in the country. It is not as simple as the famous remark that "they read the election returns," but the justices are not unaware of what contemporaneous events are going on and the shadow that these events cast upon the decisions they make.

ABRAMS: Professor Rutker, can you think of one case which really shows the present Court, or the Court within the last 30 to 40 years, at its creative best—protecting basic human rights and dignity—where the legislative process which Professor Graglia would extol, just did not work?

STANLEY I. KUTLER: John Anderson said that Rehnquist's book illustrates that the Court does not operate in a vacuum. At one point, Rehnquist describes how the Justices and their clerks watched the Watergate hearings. So, when they came to United States v. Nixon, they were very well informed about the background of the case. To be sure, they never would have qualified as jurors in Judge Gesell's courtroom for the North trial. United States v. Nixon offers us an opportunity to cast the Court in a light different than that presented by Professor Graglia. One might argue that society, for all kinds of reasons, most of which boil down to a lack of political will on the part of elected legislative and executive leaders, has turned increasingly to courts for

the resolution of problems. In 1954, what southern legislature would courageously confront the social, economic, and moral ills of segregation that adversely affected both blacks and whites? How many legislatures were prepared to reapportion themselves? Few to none. Thus, we turned to the courts, for better or for worse. Surely for worse, Professor Graglia contends, when we look at Roe v. Wade. Whatever the merits or lack thereof of that case, the courts certainly failed to settle the decisive problem of abortion—failed to settle it as readily as, let us say, reapportionment failed to settle. Court intervention is not always proper, and we do not always have a happy ending; but Graglia's absolutism flies in the face of history.

The Nixon case offers a splendid example of how the Court can work in the fashion that John Marshall articulated in Cohens v. Virginia—as a forum for the peaceful resolution of problems. When we learned in July 1973 that Richard Nixon had bugged himself, most knowledgeable people—for both political and constitutional reasons—would have offered substantial odds that Nixon would never have to surrender his tapes. Yet almost one year later, the Supreme Court ordered him to do so. It is revealing to trace the events of that year, to watch the momentum of opinion and the mobilizing of institutions, all awaiting some "definitive ruling"—a Nixon-imposed criterion—from the Supreme Court on the President's claims for executive privilege. The Court did not offer such a definitive ruling, but it clearly and unanimously—ruled that Nixon had to surrender the tapes. The process and outcome of that year, it seems to me, speak volumes about what we think of the Court.

The Dred Scott v. Sanford case offers the nineteenth century analogy to Roe v. Wade. The former, like the latter, alternatively pleased and inflamed various elements of the community. The South was delighted; most northern Democrats applauded the Court's "definitive ruling." Yet Dred Scott turned out to be a disaster. An equally obdurate element contemptuously denounced the decision believing, as in Horace Greeley's words, that it deserved as much respect as if it had been made in a Washington barroom. But I find another stream of opinion most interesting. These people contended that they did not like the decision but found themselves more alarmed by the warrant assaults on the Court as an institution. In other words, though they thought the particular decision was wrong, they still believed the institution re-

17. 19 U.S. (6 Wheat.) 264 (1821).
18. 60 U.S. (19 How.) 393 (1856).
Published by NSUWorks, 1999
tained its legitimacy.

This pattern is not exceptional. Despite two centuries of attacks, the Court has grown in prestige and standing as an institution. United States v. Nixon demonstrated that the impasse between the President, the Congress, and the Special Prosecutor could be resolved only by the Court. We had an apparent consensus that such a course was peaceful, proper, and wise. Ironically, Nixon lost the battle, but the "presidency" that he so often hid behind, gained a bit of legitimacy—some running room, if you will, for the concept of executive privilege.

ABRAMS: Professor Kutler, based on your comments that the American public's views vary and that they would be appalled at the suggestion that the Court had no role in reviewing legislation for constitutionality, would you say that the American public believes the appropriate role for our court system is to review legislative decisions?

KUTLER: I am not certain that the average person conceptualizes the matter in that fashion, but we do have some vague notions of the Court as ultimate arbiter. The Court constitutes a useful role in the governmental apparatus and it is a desirable prize for all political groups. After Dred Scott, the Republicans assailed the Court, some calling for its destruction. But Lincoln and others understood the game; they made the Court "theirs" and became its staunch defenders.

ABRAMS: Professor White, the relationship between politics and the Court has recently stepped into the limelight. We saw in 1987 the spectacle of the Senate confirmation hearings of Judge Bork. The American public watched; the hearings were almost on prime time. We certainly watched and enjoyed this lesson in political theory. It seemed that politics were very much the essence of what was going on in that decision-making process. Is that new, or is that the way the Court has always been selected? Would you say, looking historical perspective, that the process is more political or less political now?

WHITE: You seem to pose two distinguishable sub-questions. One is: has the Court or Justices been involved in politics in the past? The answer to that is clearly yes: the question, indeed, is nearly rhetorical.

The other question is: was there something new about the Bork nomination in that the traditional "presidential prerogative"—the custom that the President's ideology can be controlling in a Supreme Court nomination, so long as the nominee is "qualified" in ordinary professional, legal, and non-political terms—no longer controlling in Supreme Court nominations?

I think the second question is an interesting and important one. It turns out that the "presidential prerogative" custom is itself comparatively modern, dating back only to the early twentieth century, although it has been assumed to be a permanent feature of the process. Yet with the Bork nomination, we may have a new ball game. The opponents of Bork were never able to establish that he was in some way unqualified, in the sense of experience, ethics, or other typical criteria used now in the nomination process such as an American Bar Association rating on the candidate's qualifications, a listing of the candidate's experience, and so on. It is hard to imagine a more qualified candidate than Bork under those criteria, yet the Bork nomination was defeated, basically because Bork's ideological views were successfully labeled as "extreme." In particular, his views on the law of privacy and the Constitution and his previous views on racial issues (since recanted, but not entirely successfully) were so labeled.

In other words, it now appears that after the Bork nomination, presidents not only have to nominate a person who is qualified professionally, they have to nominate someone whose politics, if not delightful to the Senate, are at least not so offensive to the Senate on ideological grounds that the candidate cannot be confirmed. This concept is nothing new in the sweep of history, but it is certainly new since the Roosevelt administrations.

Is this new emphasis on the ideology of the nominee a good thing? I certainly thought it was a good thing in the Bork process. I was delighted when Bork was not confirmed, and I based my opposition on ideological grounds. I know Bork; I know his work. I think he is able; I think he is certainly a higher cut, in terms of professional ability, than many of the judges who are presently sitting on the Court, and others who conceivably could be nominated. But I think he would have been an activist, conservative judge reaching results and exerting influence in a way that I would oppose. So if the same emphasis on ideology occurs in the future, and a president appointed a nominee whose views I strongly supported, and that nominee were disqualified on ideological grounds, I would have to say that since we are in a new ball game, it is only fair to play by the new rules.

ABRAMS: Is that the game, John?

ANDERSON: When the president is appointing someone to a job that he will hold for life, or at least for good behavior—which presumably may extend far, far beyond the president's own term—the game is fair. This is particularly true in the case of Bork where the Democrats had
tained its legitimacy.

This pattern is not exceptional. Despite two centuries of attacks, the Court has grown in prestige and standing as an institution. United States v. Nixon demonstrated that the impasse between the President, the Congress, and the Special Prosecutor could be resolved only by the Court. We had an apparent consensus that such a course was peaceful, proper, and wise. Ironically, Nixon lost the battle, but the "presidency" that he so often hid behind, gained a bit of legitimacy—some running room, if you will, for the concept of executive privilege.

ABRAMS: Professor Kutler, based on your comments that the American public's views vary and that they would be appalled at the suggestion that the Court had no role in reviewing legislation for constitutionality, would you say that the American public believes the appropriate role for our court system is to review legislative decisions?

KUTLER: I am not certain that the average person conceptualizes the matter in that fashion, but we do have some vague notions of the Court as ultimate arbiter. The Court constitutes a useful role in the governmental apparatus and it is a desirable prize for all political groups. After Dred Scott, the Republicans assailed the Court, some calling for its destruction. But Lincoln and others understood the game; they made the Court "theirs" and became its staunch defenders.

ABRAMS: Professor White, the relationship between politics and the Court has recently stepped into the limelight. We saw in 1987 the spectacle of the Senate confirmation hearings of Judge Bork. The American public watched; the hearings were almost on prime time. We certainly watched and enjoyed this lesson in political theory. It seemed that politics were very much the essence of what was going on in that decision-making process. Is that new, or is that the way the Court has always been selected? Would you say, looking historical perspective, that the process is more political or less political now?

WHITE: You seem to pose two distinguishable sub-questions. One is: has the Court or Justices been involved in politics in the past? The answer to that is clearly yes: the question, indeed, is nearly rhetorical. The other question is: was there something new about the Bork nomination in that the traditional "presidential prerogative"—the custom that the President's ideology can be controlling in a Supreme Court nomination, so long as the nominee is "qualified" in ordinary professional terms—is no longer controlling in Supreme Court nominations?

I think the second question is an interesting and important one. It turns out that the "presidential prerogative" custom is itself comparatively modern, dating back only to the early twentieth century, although it has been assumed to be a permanent feature of the process. Yet with the Bork nomination, we may have a new ball game. The opponents of Bork were never able to establish that he was in some way unqualified, in the sense of experience, ethics, or other typical criteria used now in the nomination process such as an American Bar Association rating on the candidate's qualifications, a listing of the candidate's experience, and so on. It is hard to imagine a more qualified candidate than Bork under those criteria, yet the Bork nomination was defeated, basically because Bork's ideological views were successfully labeled as "extreme." In particular, his views on the law of privacy and the Constitution and his previous views on racial issues (since recanted, but not entirely successfully) were so labeled.

In other words, it now appears that after the Bork nomination, presidents not only have to nominate a person who is qualified professionally, they have to nominate someone whose politics, if not delightful to the Senate, are at least not so offensive to the Senate on ideological grounds that the candidate cannot be confirmed. This concept is nothing new in the sweep of history, but it is certainly new since the Roosevelt administrations.

Is this new emphasis on the ideology of the nominee a good thing? I certainly thought it was a good thing in the Bork process. I was delighted when Bork was not confirmed, and I based my opposition on ideological grounds. I know Bork; I know his work. I think he is able; I think he is certainly a higher cut, in terms of professional ability, than many of the judges who are presently sitting on the Court, and others who conceivably could be nominated. But I think he would have been an activist, conservative judge reaching results and exerting influence in a way that I would oppose. So if the same emphasis on ideology occurs in the future, and a president appointed a nominee whose views I strongly supported, and that nominee were disqualified on ideological grounds, I would have to say that since we are in a new ball game, it is only fair to play by the new rules.

ABRAMS: Is that the game, John?

ANDERSON: When the president is appointing someone to a job that he will hold for life, or at least for good behavior—which presumably may extend far, far beyond the president's own term—the game is fair. This is particularly true in the case of Bork where the Democrats had
some reasonable expectation—though it turned out they were wrong—of improving on their very poor batting average as far as recovering the White House. It seems to me they had every reason to play by the new rules. Also, because what we are talking about is the Chief Justice of the United States, the head of the third great independent branch of our government, the Senate does have the right to consider the ideology of the nominee. If the Senate feels that the nominee is going to, on very, very critical points, tend to reverse precedents which are already well established (and it seems clear that is what Bork intended to do: become a leader of at least that wing of the Court, resulting in the overturning of well established questions of the Court), then I think the Senate has a perfect right, in preserving the essential architecture of this tripartite system of government, to reject such a nominee.

ABRAMS: So you would have voted “no” to the Bork nomination?

ANDERSON: Correct.

ABRAMS: Professor Graglia, you would have voted “yes”?

GRAGLIA: I would very definitely have voted “yes.” Placing Bork on the Court would have made an enormous contribution to American welfare. I agree entirely with John and Ted White that the Senate has a right to consider a nominee’s ideology. That is not really a very useful observation, however, because the senators obviously can consider whatever they choose to consider. A senator can refuse to vote for someone for any reason, certainly including ideological reasons. I would go further and even say that a senator should consider a nominee’s ideology. If, for example, I were a senator and Larry Tribe were nominated to the Supreme Court by some misguided president, I would vote against him on the grounds of his ideology or, more specifically, his extremely expansive view of the proper role of judges in our system of government. He believes that it is appropriate for Supreme Court justices to make major social policy decisions that improve on the morality of government. I think that is neither the function of judges, nor a good system of government. For example, I think that capitalism really works better than socialism—that it is not a matter of where or when you happen to live, but a matter of the way in which the world is made. Similarly, I think that democracy and local autonomy are much to be preferred to centralized decision-making by unelected, life-tenured judges. Because Tribe disagrees with this and would use a position on the Court to advance his liberal political ideology, I would vote against him.

The question we should be asking Supreme Court nominees, however, is not whether they are political liberals or political conservatives, but whether they support or oppose judicial activism, defined as a willingness to strike down choices made in the political process that are not clearly disallowed by the Constitution. For the past thirty-five years, judicial activism has been uniformly in favor of liberal objectives, and conservatives have most strongly opposed it. However, one can be a principled opponent of judicial activism, as I would hope I am and believe Bork is. Bork is not, as Professor White seems to think, an advocate of judicial activism of the right. If he were, I, too, would have been against him. There is such a thing as activism of the right, and I have an article coming out in *The Public Interest* opposing it. Professor Richard Epstein of the University of Chicago is a judicial activist of the right, but no one in the Reagan Administration suggested putting him on the Supreme Court, though he was offered a seat on the Second Circuit. If Epstein was on the Supreme Court, he would hold rent control and minimum wage laws unconstitutional; that is, he would use judicial review to further a conservative agenda. While the conservative agenda is a lot more consistent with freedom, prosperity, and the existence of a viable society than the liberal agenda, it should not be enacted by judges. Reversing *Roe v Wade*, however, is not comparable to that; the Court would not be using judicial review to enact a conservative policy preference, but would be only returning the issue to the ordinary political process. What a judicial activist of the right would do is hold that it is unconstitutional for a state to permit abortion. I think that would be as unjustifiable as *Roe*, even though it is possible to argue that abortion deprives an innocent human being of life without due process of law.

ABRAMS: Let me test your views Professor Graglia, because over the last two days you have shared with us, I think rather eloquently, your position, and I like the term “nonactivist.” As I understand it, and correct me if I am wrong, you are wedded to the majoritarian principle as the sole basis for legitimacy; that is, decisions which involve fundament-

---

some reasonable expectation—though it turned out they were wrong—of improving on their very poor batting average as far as recovering the White House. It seems to me they had every reason to play by the new rules. Also, because what we are talking about is the Chief Justice of the United States, the head of the third great independent branch of our government, the Senate does have the right to consider the ideology of the nominee. If the Senate feels that the nominee is going to, on very, very critical points, tend to reverse precedents which are already well established (and it seems clear that is what Bork intended to do) become a leader of at least that wing of the Court, resulting in the overturning of well established questions of the Court), then I think the Senate has a perfect right, in preserving the essential architecture of this tripartite system of government, to reject such a nominee.

ABRAMS: So you would have voted “no” to the Bork nomination?

ANDERSON: Correct.

ABRAMS: Professor Graglia, you would have voted “yes”?

GRAGLIA: I would very definitely have voted “yes.” Placing Bork on the Court would have made an enormous contribution to American welfare. I agree entirely with John and Ted White that the Senate has a right to consider a nominee’s ideology. That is not really a very useful observation, however, because the senators obviously can consider whatever they choose to consider. A senator can refuse to vote for someone for any reason, certainly including ideological reasons. I would go further and even say that a senator should consider a nominee’s ideology. If, for example, I were a senator and Larry Tribe were nominated to the Supreme Court by some misguided president, I would vote against him on the grounds of his ideology or, more specifically, his extremely expansive view of the proper role of judges in our system of government. He believes that it is inappropriate for Supreme Court justices to make major social policy decisions that improve on the morality of government. I think that is neither the function of judges, nor a good system of government. For example, I think that capitalism really works better than socialism—that it is not a matter of where or when you happen to live, but a matter of the way in which the world is made. Similarly, I think that democracy and local autonomy are much to be preferred to centralized decision-making by unelected, life-tenured judges. Because Tribe disagrees with this and would use a position on the Court to advance his liberal political ideology, I would vote against him.

The question we should be asking Supreme Court nominees, however, is not whether they are political liberals or political conservatives, but whether they support or oppose judicial activism, defined as a willingness to strike down choices made in the political process that are not clearly disallowed by the Constitution. For the past thirty-five years, judicial activism has been uniformly in favor of liberal objectives, and conservatives have most strongly opposed it. However, one can be a principled opponent of judicial activism, as I would hope I am and believe Bork is. Bork is not, as Professor White seems to think, an advocate of judicial activism of the right. If he were, I, too, would have been against him. There is such a thing as activism of the right, and I have an article coming out in The Public Interest opposing it. Professor Richard Epstein of the University of Chicago is a judicial activist of the right, but no one in the Reagan Administration suggested putting him on the Supreme Court, though he was offered a seat on the Second Circuit. If Epstein was on the Supreme Court, he would hold rent control and minimum wage laws unconstitutional; that is, he would use judicial review to further a conservative agenda. While the conservative agenda is a lot more consistent with freedom, prosperity, and the existence of a viable society than the liberal agenda, it should not be enacted by judges. Reversing Roe v. Wade, however, is not comparable to that; the Court would not be using judicial review to enact a conservative policy preference, but would be only returning the issue to the ordinary political process. What a judicial activist of the right would do is hold that it is unconstitutional for a state to permit abortion. I think that would be as unjustifiable as Roe, even though it is possible to argue that abortion deprives an innocent human being of life without due process of law.

ABRAMS: Let me test your views Professor Graglia, because over the last two days you have shared with us, I think rather eloquently, your position, and I like the term “nonactivist.” As I understand it, and correct me if I am wrong, you are wedded to the majoritarian principle as the sole basis for legitimacy; that is, decisions which involve fundamen-
tal policy must be made by an elected body. Am I right so far?

GRAGLIA: Yes.

ABRAMS: Because of the federalist part of your philosophy, that legislative body which makes those decisions may be Congress, although you prefer state legislatures. If you had to choose between the Supreme Court and Congress, Congress would win all the time. Does it matter whether the persons who elect these representatives are informed or uninformed, or will any voter suffice, except those in Chicago who have died but still continue to vote? Would any vote count to give you legitimacy?

GRAGLIA: Your question, essentially, is: what is the best rule as to who gets to vote. John Stuart Mill suggested that people who work for the government or who are on welfare should not be allowed to vote, and that seems like an attractive proposition to me. The idea is that if you are living off the government's teat, you should not be able to vote just to be able to put more milk in the bag. The question of who should be permitted to vote can be an interesting and difficult one, but without going into detail, I favor a fairly universal suffrage. Having basic policy decisions made according to the common judgment of the mass of our fellow citizens is the safest and most sensible system of government we have available.

ABRAMS: Does it matter that less than half of the people who are eligible to vote do vote, or is that irrelevant as well?

GRAGLIA: I really do not think that is terribly important. Studies have apparently shown that if everyone who did not vote in the last election had voted, it would not have changed the results or even, surprisingly, the percentages. People who do not vote, I take it, are not interested in the issues, or are willing to leave the decisions to other people, which is certainly my attitude about a lot of issues.

ABRAMS: Does it matter that in Congress only a handful of seats are actually contested in each election? Some seats go unopposed, and most have only token opposition. So, in effect, the legislators have as secure a position to make policy as federal judges. Does that matter?

GRAGLIA: These questions do not lend themselves well to yes or no answers. On the one hand, congressmen are now more secure in office than members of the Supreme Soviet, with something like ninety-eight percent being re-elected, but the important thing is that the voter can always get rid of a congressman if he turns out to be an outrage. Unfortunately, we can not do that with federal judges. In school-board elections, for example, typically less than ten percent of the voters turn out to vote. Who cares who runs for and gets on school boards? But let a school board institute racial busing, as many have, and at the next election the voters will turn out en masse. That is all that is needed: the ability to vote if you have to and want to. So I am not sure that low voter turnout is a matter of great concern. On the other hand, I do think that we have campaign financing and other regulations that give incumbents an advantage beyond what they ought to have, and I would like to see that changed.

ABRAMS: Concluding this topic, what should a court do under the Graglia approach, when faced with a piece of legislation—a state statute which makes Islam the state religion and requires prayer five times a day—which is contested by a plaintiff on the ground that it is unconstitutional. Should the court uphold it because there is nothing in the first amendment which deals with that?

GRAGLIA: The answer is yes, with the qualification that precedent does have to be taken into account; settled expectations cannot just be ignored. It certainly seems shocking today to suggest that a state could make Islam the state religion and require prayer five times a day. But it is necessary to remember, nonetheless, that as recently as the 1920s, Justice Holmes could and did hold for a unanimous court that the first amendment simply has nothing to do with the states. That was not very long ago, and the country seemed to get along quite well at the time. No horrors occurred, no state required Islamic prayers five times a day. The protection of the Supreme Court did not seem to be necessary to have religious freedom, and I would be quite prepared to live without its protection today.

ABRAMS: Would you live with a statute that allowed the confiscation of the property of all persons who were worth more than a million dollars? Or a statute that required the abortion of all defective fetuses? Or a statute that resegregated the schools? Are all of those fine?

GRAGLIA: Your question, essentially, is: what would I have courts hold unconstitutional? My answer is that I would have them hold unconstitutional only what the Constitution in fact forbids. It is really a very simple matter. For example, suppose Congress passed a law that in federal criminal trials, the defendant must take the stand and give evidence just as every other citizen is compelled to give evidence in
tial policy must be made by an elected body. Am I right so far?

GRAGLIA: Yes.

ABRAMS: Because of the federalist part of your philosophy, that legislat"body which makes those decisions may be Congress, although you prefer state legislatures. If you had to choose between the Supreme Court and Congress, Congress would win all the time. Does it matter whether the persons who elect these representatives are informed or uninformed, or will any voter suffice, except those in Chicago who have died but still continue to vote? Would any vote count to give you legitimacy?

GRAGLIA: Your question, essentially, is: what is the best rule as to who gets to vote. John Stuart Mill suggested that people who work for the government or who are on welfare should not be allowed to vote, and that seems like an attractive proposition to me. The idea is that if you are living off the government’s teat, you should not be able to vote just to be able to put more milk in the bag. The question of who should be permitted to vote can be an interesting and difficult one, but without going into detail, I favor a fairly universal suffrage. Having basic policy decisions made according to the common judgment of the mass of our fellow citizens is the safest and most sensible system of government we have available.

ABRAMS: Does it matter that less than half of the people who are eligible to vote do vote, or is that irrelevant as well?

GRAGLIA: I really do not think that is terribly important. Studies have apparently shown that if everyone who did not vote in the last election had voted, it would not have changed the results or even, surprisingly, the percentages. People who do not vote, I take it, are not interested in the issues, or are willing to leave the decisions to other people, which is certainly my attitude about a lot of issues.

ABRAMS: Does it matter that in Congress only a handful of seats are actually contested in each election? Some seats go unopposed, and must have only token opposition. So, in effect, the legislators have as secure a position to make policy as federal judges. Does that matter?

GRAGLIA: These questions do not lend themselves well to yes or no answers. On the one hand, congressmen are now more secure in office than members of the Supreme Soviet, with something like ninety-eight percent being re-elected, but the important thing is that the voter can always get rid of a congressman if he turns out to be an outrage. Unfortunately, we can not do that with federal judges. In school-board elections, for example, typically less than ten percent of the voters turn out to vote. Who cares who runs for and gets on school boards? But let a school board institute racial busing, as many have, and at the next election the voters will turn out en masse. That is all that is needed: the ability to vote if you have to and want to. So I am not sure that low voter turnout is a matter of great concern. On the other hand, I do think that we have campaign financing and other regulations that give incumbents an advantage beyond what they ought to have, and I would like to see that changed.

ABRAMS: Concluding this topic, what should a court do under the Graglia approach, when faced with a piece of legislation—a state statute which makes Islam the state religion and requires prayer five times a day—which is contested by a plaintiff on the ground that it is unconstitutional. Should the court uphold it because there is nothing in the first amendment which deals with that?

GRAGLIA: The answer is yes, with the qualification that precedent does have to be taken into account; settled expectations cannot just be ignored. It certainly seems shocking today to suggest that a state could make Islam the state religion and require prayer five times a day. But it is necessary to remember, nonetheless, that as recently as the 1920s, Justice Holmes could and did hold for a unanimous court that the first amendment simply has nothing to do with the states. That was not very long ago, and the country seemed to get along quite well at the time. No horrors occurred, no state required Islamic prayers five times a day. The protection of the Supreme Court did not seem to be necessary to have religious freedom, and I would be quite prepared to live without its protection today.

ABRAMS: Would you live with a statute that allowed the confiscation of the property of all persons who were worth more than a million dollars? Or a statute that required the abortion of all defective fetuses? Or a statute that resegregated the schools? Are all of those fine?

GRAGLIA: Your question, essentially is: what would I have courts hold unconstitutional? My answer is that I would have them hold unconstitutional only what the Constitution in fact forbids. It is really a very simple matter. For example, suppose Congress passed a law that in federal criminal trials, the defendant must take the stand and give evidence just as every other citizen is compelled to give evidence in
criminal matters. I believe that such a law would be an enormous improvement in our criminal procedure; it would enhance our ability to control crime, which I consider the primary responsibility of government. Unfortunately, if I were a judge, I would have to hold the law unconstitutional because it happens to be prohibited by the fifth amendment. The privilege against self-incrimination is a big mistake, as are many constitutional restrictions, and we ought to get rid of it; but until we do, it provides a legitimate basis for judicial review. Similarly, if a state or the federal government enacts a gun control law saying that no one can have an AK-47 semi-automatic, I might think that there is something to be said for that; guns scare me, and I would be glad to live in a society without guns. But if someone says that he has a constitutional right to have guns, I am afraid—especially if we accept the nutty incorporation notion—that he might have a point, that history actually provides some basis for the argument.

ANDERSON: Will you permit an intervention at this point? The question of gun control is a very good example. You are absolutely positive that the role of the judiciary must be confined to declaring a law, statute, or ordinance, unconstitutional because it is unconstitutional. You know, I have read the second amendment many times and the fact that it gives the people, or the state, a right to maintain a militia, does not seem to sanction the proliferation of two hundred million handguns in the United States. Yet, you seem to be saying that such proliferation is sanctioned, that because of the right to maintain a militia, there really is not anything that we can do constitutionally to interfere with people having handguns, licensing them, registering them, and so on. It is not that clear.

GRAGLIA: No, you are right; it is not that clear.

ANDERSON: You interpret it one way: I interpret it another. What do we have courts for? Just to have the best reasoning power that we can bring to bear on a subject like that and say this is what the Constitution means?

GRAGLIA: The proper role of the courts is to interpret the law as best they can—to follow the intent of those responsible for the law as closely as possible. That is what interpretation means. But what is being done here, what is the implication of these questions, is confusing notions of good social policy with what the Constitution means. We think there are some things that just should not be. Suppose the government confiscates the property of everyone with over a million dol-

lers. Actually, that may be a good thing or a bad thing. Or what if everyone had to say Islamic prayers five times a day. That is clearly a bad thing. We imagine these terrible things and think: isn't it wonderful that there is an institution like the Supreme Court to protect us from them. What I am asking you to do, as mature adults, is to realize that we cannot rely on the Supreme Court for that protection. Our need is to set up a political system that protects us both from the government and from one another. We search for sages, for philosopher kings, for someone wiser than the mass of the people, and I am saying that history shows that it is a futile search.

John thinks that Griswold was a good case, an example of the Supreme Court saving us from a terrible law. Connecticut had a statute that supposedly prohibited the use of contraceptives, even by married people. That sounds a lot worse than it was, however, because Connecticut had not tried to enforce the law against anyone, married or unmarried, in ninety years, and would not have dreamed of trying to enforce it. Contraceptives were as readily available in Connecticut as everywhere else, but the Supreme Court held the law unconstitutional. John, disagreeing with Bork, thinks the Court's holding shows that there is a right of privacy in the Constitution. Justice Douglas, at least, found such a right in "the penumbra, formed by the emanations" of various Bill of Rights provisions. Well, you cannot say that in public without people laughing. It is a joke, just a gag, but John still thinks it is wonderful that we had so good and wise a man as William Douglas to protect us from the people of Connecticut.

KUTLER: Professor Graglia seems to have great faith in what the people want. Our opinion polls show that people do not particularly like the fifth amendment until they learn a bit more about its historical roots, such as the attempt to prevent the torture of accused persons. But if the majority is so unhappy with the fifth amendment, then why do we simply get rid of it? That would be "democratic," would it not?

ABRAMS: Why is the fifth amendment still around?

GRAGLIA: Part of the answer is simple. It is extremely difficult to amend the Constitution. Constitutional amendments require a two-thirds vote of each house of Congress, or a request by two-thirds of the states just for an amendment to be proposed. Then it is necessary that

20. Griswold, 381 U.S. at 484.
criminal matters. I believe that such a law would be an enormous improvement in our criminal procedure; it would enhance our ability to control crime, which I consider the primary responsibility of government. Unfortunately, if I were a judge, I would have to hold the law unconstitutional because it happens to be prohibited by the fifth amendment. The privilege against self-incrimination is a big mistake, as are many constitutional restrictions, and we ought to get rid of it; but until we do, it provides a legitimate basis for judicial review. Similarly, if a state or the federal government enacts a gun control law saying that not everyone can have an AK-47 semi-automatic, I might think that there is something to be said for that; guns scare me, and I would be glad to live in a society without guns. But if someone says that he has a constitutional right to have guns, I am afraid—especially if we accept the nutty incorporation notion—that he might have a point, that history actually provides some basis for the argument.

ANDERSON: Will you permit an intervention at this point? The question of gun control is a very good example. You are absolutely so positive that the role of the judiciary must be confined to declaring a law, statute, or ordinance, unconstitutional because it is unconstitutional. You know, I have read the second amendment many times and the fact that it gives the people, or the state, a right to maintain a militia, does not seem to sanction the proliferation of two hundred million handguns in the United States. Yet, you seem to be saying that such proliferation is sanctioned, that because of the right to maintain a militia, there really is not anything that we can do constitutionally to interfere with people having handguns, licensing them, registering them, and so on. It is not that clear.

GRAGLIA: No, you are right; it is not that clear.

ANDERSON: You interpret it one way; I interpret it another. What do we have courts for? Just to have the best reasoning power that we can bring to bear on a subject like that and say this is what the Constitution means?

GRAGLIA: The proper role of the courts is to interpret the law as best they can—to follow the intent of those responsible for the law as closely as possible. That is what interpretation means. But what is being done here, what is the implication of these questions, is confusing notions of good social policy with what the Constitution means. We think there are some things that just should not be. Suppose the government confiscates the property of everyone with over a million dollars. Actually, that may be a good thing or a bad thing. Or what if everyone had to say Islamic prayers five times a day. That is clearly a bad thing. We imagine these terrible things and think: isn't it wonderful that there is an institution like the Supreme Court to protect us from them. What I am asking you to do, as mature adults, is to realize that we cannot rely on the Supreme Court for that protection. Our need is to set up a political system that protects us both from the government and from one another. We search for sages, for philosopher kings, for someone wiser than the mass of the people, and I am saying that history shows that it is a futile search.

John thinks that Griswold was a good case, an example of the Supreme Court saving us from a terrible law. Connecticut had a statute that supposedly prohibited the use of contraceptives, even by married people. That sounds a lot worse than it was, however, because Connecticut had not tried to enforce the law against anyone, married or unmarried, in ninety years, and would not have dreamed of trying to enforce it. Contraceptives were as readily available in Connecticut as everywhere else, but the Supreme Court held the law unconstitutional.

John, disagreeing with Bork, thinks the Court's holding shows that there is a right of privacy in the Constitution. Justice Douglas, at least, found such a right in "the penumbral, formed by the emanations" of various Bill of Rights provisions. Well, you cannot say that in public without people laughing. It is a joke, just a gag, but John still thinks it is wonderful that we had so good and wise a man as William Douglas to protect us from the people of Connecticut.

KUTLER: Professor Graglia seems to have great faith in what the people want. Our opinion polls show that people do not particularly like the fifth amendment until they learn a bit more about its historical roots, such as the attempt to prevent the torture of accused persons. But if the majority is so unhappy with the fifth amendment, then why do not we simply get rid of it? That would be "democratic," would it not?

ABRAMS: Why is the fifth amendment still around?

GRAGLIA: Part of the answer is simple. It is extremely difficult to amend the Constitution. Constitutional amendments require a two-thirds vote of each house of Congress, or a request by two-thirds of the states just for an amendment to be proposed. Then it is necessary that...
the proposal be ratified by three-quarters of the states. This means that if one of the two houses of one quarter of the states plus one opposes the amendment, it will be defeated. The result is that amendments that are at all controversial are extremely difficult to obtain. In addition, there is the widespread notion that the Constitution, and especially the Bill of Rights, is sacred writ, and that it would be sacrilegious to change it. Constitutional law professors would be sure to run down to Congress en masse to testify that we should not tinker with the Constitution.

KUTLER: But it once took a two-thirds vote of both Houses of Congress and three-fourths of the state legislatures to adopt those amendments.

GRAGLIA: Well, the first ten amendments were adopted all at once, of course. Some amendments, like the one permitting 18-year-olds to vote, are adopted quickly; however, substantially controversial ones, like the equal rights amendment, are difficult to get.

I did not mean to say that I think the second amendment prohibits all gun control; I hope it does not. I said that I was surprised to learn that the anti-gun control people seem to have a fairly strong case on the basis of history. To me, this illustrates that constitutional restrictions on self-government can be a very bad idea—that constitutional rights are not necessarily good things. To the extent that they are restrictions, such as the constitutional grant of the privilege against self-incrimination, constitutional rights represent the control of the living by the dead. Why shouldn't the living make their own policy decisions? Presumably, we are better informed as to our needs than whoever is responsible for the privilege against self-incrimination.

I want to raise the question of what justifies restrictions on self-government. Consider, for example, the fact that Senator Rudy Bochwitz of Minnesota or Henry Kissinger could not be President of the United States because they are not native-born as required by the Constitution. We have a very short constitution with relatively few restrictions, but it still manages to cause unnecessary trouble. As far as I can see, there is nothing to be said for the requirement that you have to be native-born to be elected president and that you have to be twenty-five years of age to be elected to the House of Representatives.

In fact, some very good people were elected to the House before they were twenty-five, illustrating that even constitutional restrictions will cause no trouble if they are not enforced.

To take another example, President Nixon wanted to make Senator William Saxbe his attorney general; Saxbe wanted to be attorney general. No one was opposed to this, but unfortunately it was unconstitutional. The “emoluments clause” prohibits a member of Congress from taking an office during the constitutional term in which the salary of the office was raised. We do not have time, unfortunately, to go into the interesting question of the theory of constitutional restrictions, but I would have you understand that they can be problematic. What I am saying is that if we are to have constitutional restrictions enforceable by a court, those restrictions must be knowable and definite. The court must apply the restrictions in good faith according to their intended meaning if the court is, in fact, to perform the judicial function of interpreting and applying the law, and not the legislative function of making the law.

ABRAMS: Any comment, Professor White.

WHITE: I would just like to intervene before these views seem to settle, as if there were tacit approval of them. I have been sitting here thinking that no matter how outrageous or provocative Professor Graglia is this afternoon, I am going to be quiet because I do not want to give him the further opportunity to speak; but, as usual, he is gone past the point. One of the things that is deceptively attractive about Professor Graglia’s line of talk is that he sets up this apparent dichotomy between social policy-making on the one hand and constitutional interpretration on the other. According to Graglia, the real problem with constitutional interpretation is that a lot of well-intentioned people, like John Anderson, would like to reach enlightened and progressive results, but the Constitution does not provide a vehicle. As a result, they make up something through the United States Constitution.

Whereas Professor Graglia finds the task of discerning the Constitution’s meaning absurdly simple, as if the Constitution had abundantly clear directions on everything. Professor Graglia’s test for unconstitutionality seems to be something like Potter Stewart’s test for obscenity. Potter Stewart knew it was obscene when he saw it, and
the proposal be ratified by three-quarters of the states. This means that if one of the two houses of one quarter of the states plus one opposes the amendment, it will be defeated. The result is that amendments that are at all controversial are extremely difficult to obtain. In addition, there is the widespread notion that the Constitution, and especially the Bill of Rights, is sacred writ, and that it would be sacrilegious to change it. Constitutional law professors would be sure to run down to Congress en masse to testify that we should not tinker with the Constitution.

KUTLER: But it once took a two-thirds vote of both Houses of Congress and three-fourths of the state legislatures to adopt those amendments.

GRAGLIA: Well, the first ten amendments were adopted all at once, of course. Some amendments, like the one permitting 18-year-olds to vote, are adopted quickly; however substantially controversial ones, like the equal rights amendment, are difficult to get.

I did not mean to say that I think the second amendment prohibits all gun control; I hope it does not. I said that I was surprised to learn that the anti-gun control people seem to have a fairly strong case on the basis of history. To me, this illustrates that constitutional restrictions on self-government can be a very bad idea—that constitutional rights are not necessarily good things. To the extent that they are restrictions, such as the constitutional grant of the privilege against self-incrimination, constitutional rights represent the control of the living by the dead. Why shouldn't the living make their own policy decisions? Presumably, we are better informed as to our needs than whoever is responsible for the privilege against self-incrimination.

I want to raise the question of what justifies restrictions on self-government. Consider, for example, the fact that Senator Rudy Boshwitcz of Minnesota or Henry Kissinger could not be President of the United States because they are not native-born as required by the Constitution.\textsuperscript{21} We have a very short constitution with relatively few restrictions, but it still manages to cause unnecessary trouble. As far as I can see, there is nothing to be said for the requirement that you have to be native-born to be elected president and that you have to be twenty-five years of age to be elected to the House of Representatives.\textsuperscript{22}

In fact, some very good people were elected to the House before they were twenty-five, illustrating that even constitutional restrictions will cause no trouble if they are not enforced.

To take another example, President Nixon wanted to make Senator William Saxbe his attorney general; Saxbe wanted to be attorney general. No one was opposed to this, but unfortunately it was unconstitutional. The "emoluments clause" prohibits a member of Congress from taking an office during the constitutional term in which the salary of the office was raised.\textsuperscript{23} We do not have time, unfortunately, to go into the interesting question of the theory of constitutional restrictions, but I would have you understand that they can be problematic. What I am saying is that if we are to have constitutional restrictions enforceable by a court, those restrictions must be knowable and definite. The court must apply the restrictions in good faith according to their intended meaning if the court is, in fact, to perform the judicial function of interpreting and applying the law, and not the legislative function of making the law.

ABRAMS: Any comment, Professor White.

WHITE: I would just like to intervene before these views seem to settle, as if there were tacit approval of them. I have been sitting here thinking that no matter how outrageous or provocative Professor Graglia is this afternoon, I am going to be quiet because I do not want to give him the further opportunity to speak; but, as usual, he is gone past the point. One of the things that is deceptively attractive about Professor Graglia's line of talk is that he sets up this apparent dichotomy between social policy-making on the one hand and constitutional interpretation on the other. According to Graglia, the real problem with constitutional interpretation is that a lot of well-intentioned people, like John Anderson, would like to reach enlightened and progressive results, but the Constitution does not provide a vehicle. As a result, they make up something through the United States Constitution.

Whereas Professor Graglia finds the task of discerning the Constitution's meaning absurdly simple, as if the Constitution had abundantly clear directions on everything. Professor Graglia's test for unconstitutionality seems to be something like Potter Stewart's test for obscenity.\textsuperscript{24} Potter Stewart knew it was obscene when he saw it,\textsuperscript{25} and

\textsuperscript{21} U.S. Const. art. II, § 2, cl. 4.
\textsuperscript{22} U.S. Const. art. I, § 1, cl. 5.
\textsuperscript{23} U.S. Const. art. I, § 6, cl. 2.
\textsuperscript{24} Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).
Lino knows it is unconstitutional because the Constitution says so. The trouble with this Graglia dichotomy is that with respect to all of the frequently litigated provisions of the Constitution—the first amendment and the due process and equal protection clauses. Questions of interpretation arise from the very meaning of the text, and any efforts to deflect that problem by appealing to the intent of the framers is problematic. Sometimes it seems the framers do not have any specific intent with respect to a provision; sometimes there is change in our society, and problems arise—such as the effect of the fourth amendment's searches and seizures provision on eavesdropping—because the framers had no contemplation of electronic surveillance mechanisms. Simply stated, our problem is that we want to advance social policy and to say that we have to stop trying to achieve social policy and just look at what the Constitution says just begs the question. In fact, I think Professor Graglia's agenda is not that he wants literal constitutionality, but rather as limited as possible a role for the judiciary. If one has a very limited Constitution, with only the most clear and unambiguous import, then one has the most limited role for judicial policymaking. Then policymaking gets shifted to what Professor Graglia regards as the other, more democratic branch of government. That shift, of course, raises the obvious problems. The first is that Graglia is assuming that the legislature is democratic—that it represents the people. Yet, there is a lot of evidence that legislatures overwhelmingly favor incumbent representatives and special interests, and that the "people" rarely penetrate the legislative process. Further, Graglia's view assumes that the Constitution is a majoritarian document; however the Constitution is as much a minoritarian as it is a majoritarian document. That is the reason why we test legislative provisions against the Constitution, so that minority rights are not unduly infringed in the majoritarian process.

GRAGLIA: That states the issue rather well, and I agree with a great deal of it. Government by elected representatives indeed presents many problems. I agree with Winston Churchill that democracy is the worst form of government, except for its alternatives. That is our general situation in life, a matter of selecting from among bad choices. Professor White is correct that I favor a very limited role for the Court—minimum judicial policymaking—and a high degree of democracy. I even question whether we need any constitutional restrictions at all, and certainly whether we need as many as we have.

The difference between White and myself is simply that he disagrees with my position that the Supreme Court should not declare law unconstitutional unless it is unconstitutional—that is—unless one can say in good faith that it is fairly clear that the Constitution disallows the policy choice involved, something which is almost never the case. White objects that in order to take this position, I must claim to know what the Constitution means, and that this is difficult or impossible. "What did the framers really intend?" he asks. How can we know; there were so many of them and it was so long ago? In any event, the Constitution was only a proposal when it came out of the Convention; it became authoritative only when ratified. Thus, the question is: what did the ratifiers intend, or rather, what did they understand the Constitution would do? The difficulties of determining this, White says, are enormous.

It is indeed often difficult to interpret documents, so difficult that we often hear today about hermeneutics, the science of interpretation. But the Constitution, happily, is not one of these documents, and the difficulties White claims to see rarely arise in constitutional law. I want to make just two points. First, we do, in fact, know the answer to most real constitutional questions that arise in actual cases. For example, does the Constitution limit the ability of the states to restrict abortion? That is not a difficult question: there is absolutely nothing in the Constitution to indicate that the states cannot restrict the practice of abortion. It is simply silly for a grown-up legal historian to contend that that question presents an issue of constitutional interpretation and that it can be resolved by studying the words "due process." Can the states provide for prayer in the schools? As I have already said, that, too is not a difficult question. We are not interpreting the Bible, the Talmud, or even the Tax Code, mysterious tomes in which many things may be found with a sufficient search. The Constitution is a very short and apparently straightforward document. The answer to whether it prohibits a policy choice actually made by an American legislature is almost always clearly "no." The mere fact that nearly all of constitutional law purports to turn on the four words "due process" and "equal protection" should give a substantial hint, even to the minimally sophisticated, that no question of interpretation is in fact involved.

The second point I would like to make is that if it is true that we do not know what the Constitution means on any issue, the result should be that the political choice made by the legislature on that issue is allowed. If a judge cannot say that the Constitution prohibits the legislature's choice, he simply has no basis for saying that it is prohibited. An unknowable constitutional provision is a nullity as a provision
Lino knows it is unconstitutional because the Constitution says so.

The trouble with this Graglian dichotomy is that with respect to all of the frequently litigated provisions of the Constitution—the first amendment and the due process and equal protection clauses. Questions of interpretation arise from the very meaning of the text, and any efforts to deflect that problem by appealing to the intent of the framers is problematic. Sometimes it seems the framers do not have any specific intent with respect to a provision; sometimes there is change in our society, and problems arise—such as the effect of the fourth amendment's searches and seizures provision on eavesdropping—because the framers had no contemplation of electronic surveillance mechanisms. Simply stated, our problem is that we want to advance social policy and to say that we have to stop trying to achieve social policy and just look at what the Constitution says just begs the question. In fact, I think Professor Graglia's agenda is not that he wants literal constitutionality, but rather as limited as possible a role for the judiciary. If one has a very limited Constitution, with only the most clear and unambiguous import, then one has the most limited role for judicial policymaking. Then policymaking gets shifted to what Professor Graglia regards as the other, more democratic branch of government. That shift, of course, raises the obvious problems. The first is that Graglia is assuming that the legislature is democratic—that it represents the people. Yet, there is a lot of evidence that legislatures overwhelmingly favor incumbent representatives and special interests, and that the "people" rarely penetrate the legislative process. Further, Graglia's view assumes that the Constitution is a majoritarian document; however, the Constitution is as much a minoritarian as it is a majoritarian document. That is the reason why we test legislative provisions against the Constitution, so that minority rights are not unduly infringed in the majoritarian process.

GRAGLIA: That states the issue rather well, and I agree with a great deal of it. Government by elected representatives indeed presents many problems. I agree with Winston Churchill that democracy is the worst form of government, except for its alternatives. That is our general situation in life, a matter of selecting from among bad choices. Professor White is correct that I favor a very limited role for the Court—minimum judicial policymaking—and a high degree of democracy. I even question whether we need any constitutional restrictions at all, and certainly whether we need as many as we have.

The difference between White and myself is simply that he disagrees with my position that the Supreme Court should not declare a law unconstitutional unless it is unconstitutional—that is—unless one can say in good faith that it is fairly clear that the Constitution disallows the policy choice involved, something which is almost never the case. White objects that in order to take this position, I must claim to know what the Constitution means, and that this is difficult or impossible. "What did the framers really intend?" he asks. How can we know; there were so many of them and it was so long ago? In any event, the Constitution was only a proposal when it came out of the Convention; it became authoritative only when ratified. Thus, the question is: what did the ratifiers intend, or rather, what did they understand the Constitution would do? The difficulties of determining this, White says, are enormous.

It is indeed often difficult to interpret documents, so difficult that we often hear today about hermeneutics, the science of interpretation. But the Constitution, happily, is not one of these documents, and the difficulties White claims to see rarely arise in constitutional law.

I want to make just two points. First, we do, in fact, know the answer to most real constitutional questions that arise in actual cases. For example, does the Constitution limit the ability of the states to restrict abortion? That is not a difficult question: there is absolutely nothing in the Constitution to indicate that the states cannot restrict the practice of abortion. It is simply silly for a grown-up legal historian to contend that that question presents an issue of constitutional interpretation and that it can be resolved by studying the words "due process." Can the states provide for prayer in the schools? As I have already said, that, too is not a difficult question. We are not interpreting the Bible, the Talmud, or even the Tax Code, mysterious tomes in which many things may be found with a sufficient search. The Constitution is a very short and apparently straightforward document. The answer to whether it prohibits a policy choice actually made by an American legislature is almost always clearly "no." The mere fact that nearly all of constitutional law purports to turn on the four words "due process" and "equal protection" should give a substantial hint, even to the minimally sophisticated, that no question of interpretation is in fact involved.

The second point I would like to make is that if it is true that we do not know what the Constitution means on any issue, the result should be that the political choice made by the legislature on that issue is allowed. If a judge cannot say that the Constitution prohibits the legislature's choice, he simply has no basis for saying that it is prohibited. Constitutional provision is a nullity as a provision.
of law. It is not an invitation for judges to apply their notions of natural law or moral philosophy, as Ronald Dworkin, for example, one of our leading constitutional commentators, suggests. An uncertain constitutional provision enforceable by judges is not a substantive provision of law but simply a transference of policymaking power. The Constitution would then play no further role in the judges' decisions. The people of this country believe that constitutional law is somehow the product of the Constitution and that it is not simply the result of judges' policy preferences. That is how it is represented to them. I am saying that these representations are false.

ABRAMS: So you would follow the advise I give my 15 year old and you feel that judges should follow the advise —"when in doubt, don't!"

GRAGLIA: I think that in a system where the presumption is in favor of the democratic political process, that is the correct rule.

KUTLER: We have had too much loose talk about "history"—talk that amounts to trash ing. The prayer and religion questions have been used as an example. It is not difficult to determine what Madison and Jefferson had in mind with the religion clauses of the first amendment. William Rehnquist and his clerks notwithstanding, Madison and Jefferson clearly opposed aid to religion, whether it be preferential or nonpreferential. They specifically rejected non-preferential aid in Virginia, and the evangelicals, who were the driving force behind the amendment, likewise rejected it. Now, of course, the fourteenth amendment applies the restraints of the first amendment against the states—a concept terribly repugnant to the literalists. But since the first announcement of incorporation in the Gitlow v. New York opinion, rendered by a very conservative Justice, no Justice, as I understand it, has ever repudiated the point. Incorporation is simply wrapped into the Constitution today. If the state of Florida passed a law requiring everyone to observe Islamic ritual, certainly we would expect the Supreme Court to strike down the law and the Court should strike it down. That is, what we want—and expect.

ANDERSON: I just wanted to say that I am amazed at Professor Graglia's conception of the Constitution as being simply words without any real meaning—words per se. One of the great conservative jurists surely of this century was John Harlan, who was deeply dedicated to the idea of something he referred to as "ordered liberty." You will not find that precise phrase in the Constitution, but certainly the fourth amendment, and the guarantees and protections under the fifth amendment, exist in order to give us the framework for the kind of "ordered liberty" that Harlan had in mind. The old idea—that which governs least is that which governs best, is the best idea. To translate that into the idea that the less we have of the Constitution, the less we have of any real framework other than just bare structural definition of three departments of government is inconsistent with the whole idea of "ordered liberty" and the ideas that Locke talks about in his great second treatise on civil government. Professor Graglia, you referred to Ronald Dworkin and his idea that we have to interpret the Constitution in terms of moral philosophy, but maybe we would rather not have a moral philosophy in constitutional interpretation. Yet, Felix Frankfurter, who certainly became a great conservative jurist as I recall, was the author of the phrase the "gloss with life." We have the "gloss of life" on the interpretation of our Constitution, and it just seems to me that it means more than just the words themselves. It has to be viewed with the spirit of the men who sit there in Philadelphia and labored and produced it.

GRAGLIA: I am saying that it is very important to avoid the standard move of all defenders of judicial activism, which is to substitute for the fairly definite and meaningful terms of the Constitution something very abstract that is capable of meaning anything. All defenders of judicial activism make this move. The result of putting judges in charge of an abstraction is not to give them something to interpret in any meaningful sense, but simply to transfer to them decision-making power. Problems arise and decisions have to be made only because interests seen as legitimate come into conflict and cannot simultaneously be maximized. To say that a judge is authorized to resolve disputes by doing justice in each case, or by applying the principles of "ordered liberty"—an oxymoronic phrase—is to say that he is entitled to make the policy choices involved. The only question remaining to be dis-

---

27. Palco v. Connecticut, 302 U.S. 319, 325 (1937). The concept of "ordered liberty" implicitly consists of immunities that are valid as against the federal government, due to specific pledges of particular amendments such as the first and sixth amendment. Id. at 324-25.


of law. It is not an invitation for judges to apply their notions of natural law or moral philosophy, as Ronald Dworkin, for example, one of our leading constitutional commentators, suggests. An uncertain constitutional provision enforceable by judges is not a substantive provision of law but simply a transference of policymaking power. The Constitution would then play no further role in the judges' decisions. The people of this country believe that constitutional law is somehow the product of the Constitution and that it is not simply the result of judges' policy preferences. That is how it is represented to them. I am saying that these representations are false.

ABRAMS: So you would follow the advice I give my 15 year old and you feel that judges should follow the advice—that in doubt, don't?

GRAGLIA: I think that in a system where the presumption is in favor of the democratic political process, that is the correct rule.

KUTLER: We have had too much loose talk about "history"—talk that amounts to trashing. The prayer and religion questions have been used as an example. It is not difficult to determine what Madison and Jefferson had in mind with the religious clauses of the first amendment. William Rehnquist and his clerks notwithstanding, Madison and Jefferson clearly opposed aid to religion, whether it be preferential or non-preferential. They specifically rejected non-preferential aid in Virginia, and the evangelicals, who were the driving force behind the amendment, likewise rejected it. Now, of course, the fourteenth amendment applies the restraints of the first amendment against the states—a concept terribly repugnant to the literalists. But since the first announcement of incorporation in the Gitlow v. New York opinion, delivered by a very conservative Justice, no Justice, as I understand it, has ever repudiated the point. Incorporation is simply wrapped into the Constitution today. If the state of Florida passed a law requiring everyone to observe Islamic ritual, certainly we would expect the Supreme Court to strike down the law and the Court should strike it down. That is what we want—and expect.

ANDERSON: I just wanted to say that I am amazed at Professor Graglia's conception of the Constitution as being simply words without any real meaning—words per se. One of the great conservative jurists surely of this century was John Harlan, who was deeply dedicated to

the idea of something he referred to as "ordered liberty." You will not find that precise phrase in the Constitution, but certainly the fourth amendment, and the guarantees and protections under the fifth amendment, exist in order to give us the framework for the kind of "ordered liberty" that Harlan had in mind. The old idea—that which governs least is that which governs best, is the best idea. To translate that into the idea that the less we have of the Constitution, the less we have of any real framework other than just bare structural definition of three departments of government is inconsistent with the whole idea of "ordered liberty" and the ideas that Locke talks about in his great second treatise on civil government. Professor Graglia, you referred to Ronald Dworkin and his idea that we have to interpret the Constitution in terms of moral philosophy, but maybe we would rather not have a moral philosophy in constitutional interpretation. Yet, Felix Frankfurter, who certainly became a great conservative jurist as I recall, was the author of the phrase the "gloss with life." We have the "gloss of life" on the interpretation of our Constitution, and it just seems to me that it means more than just the words themselves. It has to be viewed with the spirit of the men who sat there in Philadelphia and labored and produced it.

GRAGLIA: I am saying that it is very important to avoid the standard move of all defenders of judicial activism, which is to substitute for the fairly definite and meaningful terms of the Constitution something very abstract that is capable of meaning anything. All defenders of judicial activism make this move. The result of putting judges in charge of an abstraction is not to give them something to interpret in any meaningful sense, but simply to transfer to them decision-making power. Problems arise and decisions have to be made only because interests seen as legitimate come into conflict and cannot simultaneously be maximized. To say that a judge is authorized to resolve disputes by doing justice in each case, or by applying the principles of "ordered liberty"—an oxymoronic phrase—is to say that he is entitled to make the policy choices involved. The only question remaining to be dis-

27. Palko v. Connecticut, 302 U.S. 399, 409, 68 S.Ct. 999, 1004, 92 L.Ed. 1147, 1155 (1948). The concept of "ordered liberty" implies a system of immunities that are valid as against the federal government, due to specific provisions of the Bill of Rights as the first and sixth amendments. Id. at 324-25.

cussed, then, in an intellectually sophisticated group, is whether and why that transference of power should be made. Maybe there are reasons to leave certain types of policy decisions to the Supreme Court, but if we are to speak honestly about judicial review as practiced today, that is the only significant question to be addressed.

WHITE: Let me add something here. That again is a typical Graglia move. He has moved from the literal and the concrete—that is to say the constitutional text—to some abstract phrase, "ordered liberty," and tied this contrast between specificity and abstraction to the bogey of judicial "policymaking." The move thus shifts the discussion to the ground with which Graglia is most comfortable, the attack from democracy.

But let us linger for a moment on the issue of interpretation itself. We are dealing with a highly ambiguous text that does not compel concrete answers in many instances. If one is at least persuaded minimally that there are several provisions of the Constitution where the principal questions are questions of interpretation itself, and not just questions of who makes the decision to interpret, then we can suspend questions of institutional arrangements, and ask: what are the best possible interpretations, given the fact that the Constitution is a historical document and does not have answers in every instance for the present. I am suggesting that in Professor Graglia's scheme, he wants to move away from interpretation, or give easy answers to hard interpretive questions.

GRAGLIA: I deny that.

WHITE: We could debate that and give various examples. But, if you are at least persuaded minimally that there are several provisions of the Constitution where the principal question is a question of interpretation itself, and not just a question of who makes the decision, we then suspend the question of institutional arrangements and ask: what are the best possible interpretations, given the fact that the Constitution is a historical document, and does not have answers in every instance for the present. I am only suggesting that in Professor Graglia's scheme, he wants to move away from that area as quickly as possible by claiming that there are easy answers to interpretation or that there is a whole range of hard questions which should not be interpreted.

GRAGLIA: I am suggesting that the whole idea of interpreting an abstraction or a highly ambiguous text is an obfuscation. If a text is so abstract or ambiguous or problematic as to be capable of meaning almost anything, there is nothing to interpret, and it is simply misleading to speak of interpretation. An abstract or ambiguous text cannot guide the decision-maker. All it can do is transfer policy-making power to him if he is authorized to act on the basis of it. White is misleading when he insists that a judicial decision, supposedly based on a vague, wide-open, uncertain text, is a matter of interpretation. For example, if the Constitution provided that the Supreme Court was to do justice or what is right or good in each case—which certainly sounds attractive—I think we would all understand and agree that as a practical matter, the Constitution would simply be transferring policy-making power to the Court. As I have said, problems arise only because of the conflict of legitimate interests. We want free speech, for example, but we also want clean and orderly streets. There is, therefore, a problem as to what extent to permit leafleting, parades, and demonstrations in the streets. How high a price should a community or society pay in litter and disorder in order to get more free speech? This is not a question of logic or an empirical question; it can only be answered by making a policy decision. Why should this policy decision be made by judges, unelected and unremovable government officials, rather than through the processes of representative self-government? That, I insist, is the only relevant question. The defenders of judicial activism should not be permitted to mislead the American people to believe that these decisions come from the Constitution, and not, as is true in almost every constitutional case, merely from the judges.

KUTLER: Throughout our history, we have constantly had institutions acquiesce to another institution taking over its role; Witness the transformation of tariff policy, a transformation from total political involvement by Congress in the 19th and early 20th century. Yet the very first words of the Constitution decree that legislative power belongs to Congress and, according to Lockeana doctrine, cannot be delegated. The Constitution requires the Senate to confirm presidential nominees. The First Congress had a spirited debate over whether senatorial consent was necessary to remove such officers. That argument raged for eighty years, until we had a President in 1867 who was so weak that he could not prevent Congress from decreeing such a policy. Fifty years later, the Court said that Congress was wrong. Ted White has a point:

31. U.S. CONST. art. II, § 1, cl.2.
32. Andrew Johnson, the seventeenth President of the United States, served from 1864 to 1869.
cussed, then, in an intellectually sophisticated group, is whether and why that transference of power should be made. Maybe there are reasons to leave certain types of policy decisions to the Supreme Court, but if we are to speak honestly about judicial review as practiced today, that is the only significant question to be addressed.

WHITE: Let me add something here. That again is a typical Graglia move. He has moved from the literal and the concrete—that is to say the constitutional text—to some abstract phrase, "ordered liberty," and tied this contrast between specificity and abstraction to the bogey of judicial "policymaking." The move thus shifts the discussion to the ground with which Graglia is most comfortable, the attack from democracy.

But let us linger for a moment on the issue of interpretation itself. We are dealing with a highly ambiguous text that does not compel concrete answers in many instances. If one is at least persuaded minimally that there are several provisions of the Constitution where the principal questions are questions of interpretation itself, and not just questions of who makes the decision to interpret, then we can suspend questions of institutional arrangements, and ask: what are the best possible interpretations, given the fact that the Constitution is a historical document and does not have answers in every instance for the present. I am suggesting that in Professor Graglia's scheme, he wants to move away from interpretation, or give easy answers to hard interpretive questions.

GRAGLIA: I deny that.

WHITE: We could debate that and give various examples. But, if you are at least persuaded minimally that there are several provisions of the Constitution where the principal question is a question of interpretation itself, and not just a question of who makes the decision, we then suspend the question of institutional arrangements and ask: what are the best possible interpretations, given the fact that the Constitution is a historical document, and does not have answers in every instance for the present. I am only suggesting that in Professor Graglia's scheme, he wants to move away from that area as quickly as possible by claiming that there are easy answers to interpretation or that there is a whole range of hard questions which should not be interpreted.

GRAGLIA: I am suggesting that the whole idea of interpreting an abstraction or a highly ambiguous text is an obfuscation. If a text is so abstract or ambiguous or problematic as to be capable of meaning almost anything, there is nothing to interpret, and it is simply misleading to speak of interpretation. An abstract or ambiguous text cannot guide the decision-maker. All it can do is transfer policy-making power to him if he is authorized to act on the basis of it. White is misleading when he insists that a judicial decision, supposedly based on a vague, wide-open, uncertain text, is a matter of interpretation. For example, if the Constitution provided that the Supreme Court was to do justice or what is right or good in each case—which certainly sounds attractive—I think we would all understand and agree that as a practical matter, the Constitution would simply be transferring policy-making power to the Court. As I have said, problems arise only because of the conflict of legitimate interests. We want free speech, for example, but we also want clean and orderly streets. There is, therefore, a problem as to what extent to permit leafletting, parades, and demonstrations in the streets. How high a price should a community or society pay in litter and disorder in order to get more free speech? This is not a question of logic or an empirical question; it can only be answered by making a policy decision. Why should this policy decision be made by judges, unelected and unremovable government officials, rather than through the processes of representative self-government? That, I insist, is the only relevant question. The defenders of judicial activism should not be permitted to mislead the American people to believe that these decisions come from the Constitution, and not, as is true in almost every constitutional case, merely from the judges.

KUTLER: Throughout our history, we have constantly had institutions acquiesce to another institution taking over its role; Witness the transformation of tariff policy, a transformation from total political involvement by Congress in the 19th and early 20th century. Yet the very first words of the Constitution decree that legislative power belongs to Congress and, according to Lockean doctrine, cannot be delegated. The Constitution requires the Senate to confirm presidential nominees. The First Congress had a spirited debate over whether senatorial consent was necessary to remove such officers. That argument raged for eighty years, until we had a President in 1867 who was so weak that he could not prevent Congress from decreeing such a policy. Fifty years later, the Court said that Congress was wrong. Ted White has a point:

31. U.S. Const. art. II, § 1, cl.2.
32. Andrew Johnson, the seventeenth President of the United States, served from 1864 to 1869.
the Constitution lacks precision in numerous areas, and the fortunes of interpretation and institutional determination will vary from time to time.

ABRAMS: Let me move the focus to the future. John Anderson and I first met in 1987 when he came to a faculty workshop luncheon during the early days of the Democratic primary campaign. All the polls showed that Gary Hart was a sure bet to be the Democratic nominee. John Anderson told us, in the privacy of the Dean's conference room, that it would not happen. I do not know if he had inside information, but he certainly knew the future.

ANDERSON: I was there on the “Monkey Business.”

ABRAMS: Not on your lap, too, John! Getting back to the future, it is best to ask historians about the future because they at least understand the past. First of all, John, what is going to happen with Ollie North? Is he going to be tried? Is the Attorney General going to pull the rug out? This is going to happen next week, I assume.

ANDERSON: As you know, the Justice Department has already asked the Court of Appeals for the District of Columbia to stop the trial now on grounds of national security. I have been around Washington for the better part of twenty-eight years, and Gerhard Gesell has been there even longer. If during the Watergate affairs, John Sirica was the example of the kind of rock hard courage found in the courts, it seems to me that we have somebody else with similar caliber and character in Gerhard Gesell (pardon me, Professor Graglia, you were not too happy about the lauding of the courage of these men on the Court). My prediction would be that if this turns out as well as the one you referred to, that the government is not going to succeed in derailing the prosecution of Ollie North.

KUTLER: I would disagree. The same issues were present in the

1989] Roundtable Discussion 295

“Plumbers” trial in 1974, before the same Judge Gesell. At that time, Gesell threw the ball back to President Nixon and, in effect, let him determine the nature of “national security” materials. But the times were different. The words “national security” in the mouth of Richard Nixon were like the word “love” in the mouth of a prostitute, and he simply lacked the credibility to impose any such determination. Nixon had the opportunity to stop that trial; the fact is that, politically, it was impossible for him to do so. Now, the Administration has a similar choice, or it can at least make the trial very difficult, something that it clearly is doing. The Bush Administration does not have the onus of the Nixon Administration, and I expect them to blanket some of the evidence.

ANDERSON: Would you not agree that the Appeals Court will not ultimately restrict the court (and ultimately the Supreme Court) any more than Warren Burger restricted the Court in the first tapes case, United States v. Nixon, from applying this balancing test and, from saying that, as against the security interest being asserted by the Administration, there is, nevertheless, the need for the criminal justice system to go forward? I would suggest, and maybe this is a little far out, that people feel concern right now about the ability of that system to function in a way that justice will be meted out to everyone, no matter who they are. You say the courts are very anxious to promote this countervailing interest, among the men in the street, in seeing that even the government, in the name of national security, cannot derail the criminal justice system and prevent justice from being administered.

KUTLER: It is my understanding that it is not the man in the street who is going to be judging this; it is going to be Judge Gesell. Although we talk about the process going forward, he has emphasized that North is entitled to a fair trial, and that if he cannot have these materials that are essential to his defense, then he can not have a fair trial. I am just going by what he has indicated—the Administration withholds materials. I think all the maneuvers have been to put the ball in the Administration’s court.

ABRAMS: And so the first move of the Ford Administration was to pardon Richard Nixon and the first move of the Bush Administration is

33. “Monkey Business” is the name of the boat where photographs of Donna Rice and the then presidential candidate Gary Hart were taken. These photographs subsequently helped to bring about Hart’s withdrawal of his bid for the Democratic nomination for president.

34. Oliver North, the former Marine lieutenant colonel and National Security Council staff member, was sentenced to two years probation, a fine of $150,000 and 1200 hours of community service in July, 1989. He is currently appealing this decision.


the Constitution lacks precision in numerous areas, and the fortunes of interpretation and institutional determination will vary from time to time.

ABRAMS: Let me move the focus to the future. John Anderson and I first met in 1987 when he came to a faculty workshop luncheon during the early days of the Democratic primary campaign. All the polls showed that Gary Hart was a sure bet to be the Democratic nominee. John Anderson told us, in the privacy of the Dean's conference room, that it would not happen. I do not know if he had inside information, but he certainly knew the future.

ANDERSON: I was there on the "Monkey Business."*  
ABRAMS: Not on your lap, too, John! Getting back to the future, it is best to ask historians about the future because they at least understand the past. First of all, John, what is going to happen with Ollie North? Is he going to be tried? Is the Attorney General going to pull the rug out? This is going to happen next week, I assume.**

ANDERSON: As you know, the Justice Department has already asked the Court of Appeals for the District of Columbia to stop the trial now on grounds of national security. I have been around Washington for the better part of twenty-eight years, and Gerhard Gesell has been there even longer. If during the Watergate affairs, John Sirica was the example of the kind of rock hard courage found in the courts, it seems to me that we have somebody else with similar caliber and character in Gerhard Gesell (pardon me, Professor Graglia, you were not too happy about the lauding of the courage of these men on the Court). My prediction would be and I hope this turns out as well as the one you referred to, that the government is not going to succeed in derailing the prosecution of Ollie North.

KUTLER: I would disagree. The same issues were present in the "Plumbers" trial in 1974, before the same Judge Gesell.*** At that time, Gesell threw the ball back to President Nixon and, in effect, let him determine the nature of "national security" materials. But the times were different. The words "national security" in the mouth of Richard Nixon were like the word "love" in the mouth of a prostitute, and he simply lacked the credibility to impose any such determination. Nixon had the opportunity to stop that trial; the fact is that, politically, it was impossible for him to do so. Now, the Administration has a similar choice, or it can at least make the trial very difficult, something that it clearly is doing. The Bush Administration does not have the onus of the Nixon Administration, and I expect them to blanket some of the evidence.

ANDERSON: Would you not agree that the Appeals Court will not ultimately restrict the court (and ultimately the Supreme Court) any more than Warren Burger restricted the Court in the first tapes case, United States v. Nixon,** from applying this balancing test and, from saying that, as against the security interest being asserted by the Administration, there is, nevertheless, the need for the criminal justice system to go forward? I would suggest, and maybe this is a little far out, that people feel concern right now about the ability of that system to function in a way that justice will be meted out to everyone, no matter who they are. You say the courts are very anxious to promote this countervailing interest, among the men in the street, in seeing that even the government, in the name of national security, cannot derail the criminal justice system and prevent justice from being administered.

KUTLER: It is my understanding that it is not the man in the street who is going to be judging this; it is going to be Judge Gesell. Although we talk about the process going forward, he has emphasized that North is entitled to a fair trial, and that if he cannot have these materials that are essential to his defense, then he can not have a fair trial. I am just going by what he has indicated—the Administration withholds materials. I think all the maneuvers have been to put the ball in the Administration's court.

ABRAMS: And so the first move of the Ford Administration was to pardon Richard Nixon and the first move of the Bush Administration is...
to, in effect, pardon Ollie North?

ANDERSON: That is not a very healthy precedent for George Bush to want to follow. Many people believe, and I tend to think they are correct, that pardoning Nixon was the thing that defeated Mr. Ford in that close race in 1976 against Jimmy Carter. And I doubt very much that Mr. Bush is going to want to rely on that precedent as a good reason for tapping North on the shoulder and saying go for it.

ABRAMS: Regarding the future of the Bush Administration and the judiciary, are we going to get more nominees like Judge Bork? Professor White, what do you think? Is it going to be a whole string of these folks? Is the University of Chicago Law School going to empty out down to the Senate hearing rooms?

WHITE: We are going to get some nominees. The actuarial tables are such that there are going to be some retirements or deaths during President Bush's tenure. Now, are we going to get some Bork types? I think not.

My instincts are that Bush will nominate moderate-conservative and experienced judges; judges of the Kennedy stand. He will certainly not appoint a liberal. He will not be fooled in his appointments—he is not going to take a chance on somebody whose ideas are not well known. He is not going to take a chance on somebody who does not have enough paper record that he can not predict which way the person is going to go. That says to me that it will probably be a sitting judge. And it will be a moderate, conservative sitting judge of which, given the large number of Reagan appointees to the federal bench, there are a fair amount.

The second question is whether Bush will be attracted to "single-issue nominees." That is, will he look for somebody who has "sound views" on abortion or on some other issues? I think that is a very dangerous thing for a president to do. Take, for example, the appointment of John Noonan. John was appointed by the Reagan Administration because he was perceived to have a "sound view" on abortion. He wrote a book defending the pro-life position. John Noonan is, of course, too complicated and intelligent a person to be a "single-issue" judge, and he has not been a particularly conservative judge up to this point. So, given that almost surely there will be some Court appointments during Bush's tenure, the ultimate question is how well informed the President will be.

ANDERSON: There is one heartening sign. My successor in Congress, a young woman by the name of Lynn Martin, has been very prominently identified with the pro-choice position. She was appointed national co-chair of the Bush presidential campaign. Then Candidate Bush said he did not believe that she should be disqualified from playing a prominent role in his campaign on the basis of a single issue. Now, it is a far cry to go from co-chairing a campaign to a court appointment, I grant you, but at least it is some straw in the wind. It is some indication that I think he may refrain from this very narrow single-issue test simply to appease a particular group, in this case the pro-life group, and put someone on the court prominently identified as pro-life. The other thing that I believe is that with a strongly Democratic Congress and with all the noise that is going on currently about bipartisanship, the quickest way to blow that out of the water would be to have a repetition of the Bork episode of a couple of years ago. So President Bush really has larger interests at stake than the Court itself. It is his ability to conduct his administration odds against him in both the House and the Senate which I think is going to temper his views on Court appointments, and I would be very hopeful that he would pick fairly reasonable people.

KUTLER: Let me pick up on one point that Ted made. The nominees probably will come from the circuit court level. This signifies that nominees for the Supreme Court must first audition. Prior judicial experience seems to be the required try-out camp. Bork recognized that when he came to the District of Columbia Circuit Court of Appeal. Every Reagan nominee has had prior judicial experience—O'Connor obtained her judicial experience on the state level. However, the historical record of prior judicial experience is terribly mixed. We have had wonderful judges who had such experience, and wonderful judges who did not. Equally, we have mediocrities from both sides of the fence. Historically, nominees have been quite unpredictable. Presidents would appoint men expecting certain results—and then be disappointed. Theodore Roosevelt and Oliver Wendell Holmes offer the classic example. Teddy Roosevelt told Henry Cabot Lodge he wanted a man who would be right on the "trust question." Well, one of Holmes' first decisions was to oppose Teddy Roosevelt's first venture in trust-busting. The President was furious, and refused to invite Holmes to the White House. This, however, was no loss to Holmes, who wrote more opinions and read more French novels. The present inclination is to develop
to, in effect, pardon Ollie North?

ANDERSON: That is not a very healthy precedent for George Bush to want to follow. Many people believe, and I tend to think they are correct, that pardoning Nixon was the thing that defeated Mr. Ford in that close race in 1976 against Jimmy Carter. And I doubt very much that Mr. Bush is going to want to rely on that precedent as a good reason for tapping North on the shoulder and saying go for it.

ABRAMS: Regarding the future of the Bush Administration and the judiciary, are we going to get more nominees like Judge Bork? Professor White, what do you think? Is it going to be a whole string of these folks? Is the University of Chicago Law School going to empty out down to the Senate hearing rooms?

WHITE: We are going to get some nominees. The actuarial tables are such that there are going to be some retirements or deaths during President Bush's tenure. Now, are we going to get some Bork types? I think not.

My instincts are that Bush will nominate moderate-conservative and experienced judges: judges of the Kennedy stand. He will certainly not appoint a liberal. He will not be fooled in his appointments—he is not going to take a chance on some with whose ideas are not well known. He is not going to take a chance on some who does not have enough paper record that he can not predict which way the person is going to go. That says to me that it will probably be a sitting judge. And it will be a moderate, conservative sitting judge of which, given the large number of Reagan appointees to the federal bench, there are a fair amount.

The second question is whether Bush will be attracted to "single-issue nominees." That is, will he look for somebody who has "sound views" on abortion or on some other issues? I think that is a very dangerous thing for a president to do. Take, for example, the appointment of John Noonan. John was appointed by the Reagan Administration because he was perceived to have a "sound view" on abortion. He wrote a book defending the pro-life position. John Noonan is, of course, too complicated and intelligent a person to be a "single-issue judge", and he has not been a particularly conservative judge up to this point. So, given that almost surely there will be some Court appointments during Bush's tenure, the ultimate question is how well informed the President will be.

ANDERSON: There is one heartening sign. My successor in Congress, a young woman by the name of Lynn Martin, has been very prominently identified with the pro-choice position. She was appointed national co-chair of the Bush presidential campaign. Then Candidate Bush said he did not believe that she should be disqualified from playing a prominent role in his campaign on the basis of a single issue. Now, it is a far cry to go from co-chairing a campaign to a court appointment, I grant you, but at least it is some straw in the wind. It is some indication that I think he may refrain from this very narrow single-issue test simply to appease a particular group, in this case the pro-life group, and put someone on the court prominently identified as pro-life. The other thing that I believe is that with a strongly Democratic Congress and with all the noise that is going on currently about bipartisanship, the quickest way to blow that out of the water would be to have a repetition of the Bork episode of a couple of years ago. So President Bush really has larger interests at stake than the Court itself. It is his ability to conduct his administration odds against him in both the House and the Senate which I think is going to temper his views on Court appointments, and I would be very hopeful that he would pick fairly reasonable people.

KUTLER: Let me pick up on one point that Ted made. The nominees probably will come from the circuit court level. This signifies that nominees for the Supreme Court must first audition. Prior judicial experience seems to be the required try-out camp. Bork recognized that when he came to the District of Columbia Circuit Court of Appeal. Every Reagan nominee has had prior judicial experience—O'Connor obtained her judicial experience on the state level. However, the historical record of prior judicial experience is terribly mixed. We have had wonderful judges who had such experience, and wonderful judges who did not. Equally, we have mediocrities from both sides of the fence. Historically, nominees have been quite unpredictable. Presidents would appoint men expecting certain results—and then be disappointed. Theodore Roosevelt and Oliver Wendell Holmes offer the classic example. Teddy Roosevelt told Henry Cabot Lodge he wanted a man who would be right on the "trust question." Well, one of Holmes' first decisions was to oppose Teddy Roosevelt's first venture in trust-busting. The President was furious, and refused to invite Holmes to the White House. This, however, was no loss to Holmes, who wrote more opinions
more refined litmus tests.

ABRAMS: Would you like to predict?

GRAGLIA: I can not help but be struck by the silliness of asking a liberal like White to comment on what is happening in a Reagan Administration or a Republican Administration. To White, a Republican Administration is a subject of antipathy, a deplorable situation in need of rectification. He is the enemy of all things conservative, and cannot be expected to begin to understand what can be said for a conservative administration. For example, he makes remarks about Judge Noonan that are little short of scurrilous: “Noonan was a one-issue candidate for a judgeship.” I know the people who were selecting judges in the Reagan Administration, and the fact is that Noonan was selected because he was known to be a man of great intellectual ability and integrity. They were not unaware, for example, that Noonan was on the Berkeley faculty. They knew more about Noonan than is known about most judicial candidates, not just, as White thinks, that he was opposed to abortion.

There was no so-called litmus test in the selection of judges by the Reagan Administration. Indeed, if you need a litmus test as to any candidate, you have already made a mistake. It does no good to ask a person what his view is on Roe v. Wade, for example, because he knows what is the right answer in that context. You will have made no progress at all in getting good people as judges.

White tells us that Noonan was a one-issue candidate, but what do you know? Has he turned out to be a good judge after all, and even surprisingly liberal. To White, the idea that a good judge could be conservative and a non-activist is a contradiction in terms. To expect White to understand and usefully appraise Republican judicial appointments is to ask the impossible.

On the question of whether President Bush will get the opportunity to make appointments to change the direction of the Supreme Court, I must say I am getting very weary of waiting for these opportunities to occur. What is the life expectancy of an 82-year-old white male? Discouraging is what it is; he may well last to the age of 92. I remember Jimmy Carter running in 1976 on the platform that it was important to elect him, so that he could make Supreme Court appointments. Carter’s argument was, in effect, that whatever else you might think of him as a president, he would appoint good Justices, and it was the Justices, after all, who would really run the country. In this country, we have arrived at the situation, agreeable to liberals, where we have to be careful in electing our presidents, primarily because they get to appoint the officials who really count. Carter ran against Ford in 1976 on the platform that Brennan, Marshall, and Blackmun were getting old; well, thirteen years have gone by, and all that has happened is that they have gotten older. With officials appointed for life, all we can do is wait. The liberal judges have, I am afraid, declared the mortality tables unconstitutional.

When these students listen to White on Reagan’s appointment of judges, they will think they are listening, I am afraid, to an academic analysis. They must understand they are listening only to the ideological complaints of a political enemy of the Reagan Administration.

ABRAMS: Let me give the audience a chance to ask some questions.

AUDIENCE: I am very surprised that all of you are very reluctant to defend Roe v. Wade as far as judicial review is concerned. I think we have a real problem with a stagnant legislature; we have a lot of members of Congress afraid to take a stand because they come up for re-election every two years. We have lobbyists in there like the National Rifle Association condemning gun control, which is a major issue in this country, but the legislature is too afraid to take any action. You have questions on abortion, with a very loud minority in the right-for-lifers, but there is no real authority to decide these questions. An act of the judiciary could solve a lot of these problems, since the judiciary is without the concerns of what the constituents may think. Referring back to what Elizabeth Holtzman was talking about, the courageous judges of the Eleventh Circuit Court of Appeals were more willing and capable than the legislature to go out and do something, without worrying about what their constituents thought. They were looking at justice, which is something I have not heard very much of today. And I do not understand how we can rely on one document written 200 years ago to adequately answer today's most controversial questions, which are very serious. The Constitution is definite on some points and ambiguous in a lot of others. I think the courts have to come in and fill in the blanks. And as Graglia said, if convention rules the living, why can the courts not use active discretion to solve some of these prior problems through
more refined litmus tests.

ABRAMS: Would you like to predict?

GRAGLIA: I can not help but be struck by the silliness of asking a liberal like White to comment on what is happening in a Reagan Administration or a Republican Administration. To White, a Republican Administration is a subject of antipathy, a deplorable situation in need of rectification. He is the enemy of all things conservative, and cannot be expected to begin to understand what can be said for a conservative administration. For example, he makes remarks about Judge Noonan that are little short of scurrilous: "Noonan was a one-issue candidate for a judgeship." I know the people who were selecting judges in the Reagan Administration, and the fact is that Noonan was selected because he was known to be a man of great intellectual ability and integrity. They were not unaware, for example, that Noonan was on the Berkeley faculty. They knew more about Noonan than is known about most judicial candidates, not just, as White thinks, that he was opposed to abortion.

There was no so-called litmus test in the selection of judges by the Reagan Administration. Indeed, if you need a litmus test as to any candidate, you have already made a mistake. It does no good to ask a person what his view is on Roe v. Wade, for example, because he knows what is the right answer in that context. You will have made no progress at all in getting good people as judges.

White tells us that Noonan was a one-issue candidate, but what do you know? He has turned out to be a good judge after all, and even surprisingly liberal. To White, the idea that a good judge could be conservative and a non-activist is a contradiction in terms. To expect White to understand and usefully appraise Republican judicial appointments is to ask the impossible.

On the question of whether President Bush will get the opportunity to make appointments to change the direction of the Supreme Court, I must say I am getting very weary of waiting for these opportunities to occur. What is the life expectancy of an 82-year-old white male? Discouraging is what it is; he may well last to the age of 92. I remember Jimmy Carter running in 1976 on the platform that it was important to elect him, so that he could make Supreme Court appointments. Carter's argument was, in effect, that whatever else you might think of him as a president, he would appoint good Justices, and it was the Justices, after all, who would really run the country. In this country, we have arrived at the situation, agreeable to liberals, where we have to be careful in electing our presidents, primarily because they get to appoint the officials who really count. Carter ran against Ford in 1976 on the platform that Brennan, Marshall, and Blackmun were getting old; well, thirteen years have gone by, and all that has happened is that they have gotten older. With officials appointed for life, all we can do is wait. The liberal judges have, I am afraid, declared the mortality tables unconstitutional.

When these students listen to White on Reagan's appointment of judges, they will think they are listening, I am afraid, to an academic analysis. They must understand they are listening only to the ideological complaints of a political enemy of the Reagan Administration.

ABRAMS: Let me give the audience a chance to ask some questions.

AUDIENCE: I am very surprised that all of you are very reluctant to defend Roe v. Wade as far as judicial review is concerned. I think we have a real problem with a stagnant legislature; we have a lot of members of Congress afraid to take a stand because they come up for re-election every two years. We have lobbyists in there like the National Rifle Association condemning gun control, which is a major issue in this country, but the legislature is too afraid to take any action. You have questions on abortion, with a very loud minority in the right-filers, but there is no real authority to decide these questions. An act of the judiciary could solve a lot of these problems, since the judiciary is without the concerns of what the constituents may think. Referring back to what Elizabeth Holtzman was talking about, the courageous judges of the Eleventh Circuit Court of Appeals were more willing and capable than the legislature to go out and do something, without worrying about what their constituents thought. They were looking at justice, which is something I have not heard very much of today. And I do not understand how we can rely on one document written 200 years ago to adequately answer today's most controversial questions, which are very serious. The Constitution is definite on some points and ambiguous in a lot of others. I think the courts have to come in and fill in the blanks. And as Graglia said, if convention rules the living, why can the courts not use active discretion to solve some of these prior problems through
judicial review? What about justice?

ABRAMS: John, do you see justice in any of this?

ANDERSON: There is much misplaced faith on the part of Professor Graglia in pure majoritarianism as the way to secure justice in this country. We saw some very sad examples in the last political campaigns of people attacking, for example, the ACLU. There are people who believe that minority rights are not secure against a majoritarian surge of power, unless we have the kind of judiciary of which you spoke. I would commend you for what I think was a very good statement of the fact that this is not pure democracy. This is a representative democracy, and as one who took part at the table of that system for a long time, I see all of its defects. I see all of the mistakes that are capable of being made in the name of appeasing popular fashions and so on. So I very much hope that we will continue to have a Court construing the Constitution in a way that sometimes the majority will not like, and that will end up nevertheless defending the rights of the minorities.

WHITE: I do not want this audience to assume that no one at the table is prepared to make an affirmative case on behalf of Roe v. Wade. I did not say anything when the question was asked, because I had just given a lengthy answer to a previous question. It seems to me there is a case for Roe v. Wade. One starts with the presumption that there is a constitutional right to autonomy, privacy, call it what you will—that the "liberty" in the due process clause embraces a liberty to express one's personality, to engage in intimate relationships, and to make fundamental decisions involving life's choices. One then assumes further that the meaning of "liberty" is broad enough to subsume the right of a woman to make a decision not to bear a child. The question that abortion therefore raises is not whether there is no such constitutional right. If one is prepared to grant, as Professor Graglia surely would not, that justices can give substantive content to the word liberty in the due process clause, it seems to be an easy step to find a liberty to make a choice not to bear a child.

The difficult problem about abortion is the question of balancing rights, not creating them. If one believes that murder is illegal, one could not argue that one had a constitutional right to kill a living person. The question then is, At what point do you allow a person to have a constitutional right to, in effect, terminate the life of another "person," assuming that a fetus is deemed a "person?" The decision to designate the fetus a person—to give a fetus constitutional personhood status—is thus a decision made by balancing two putative constitutional rights.

I am prepared to say that, on some kind of sliding scale of worth, the mother's right to choose outweighs the right of the fetus to be born. The problem with Roe v. Wade is that the Court, faced with this issue of balancing, looked for some "neutral" solution. They settled on medical technology and the advice of doctors, and made the "rights" turn on vulnerable and arbitrary criteria. That was an unfortunate, yet understandable, mistake. The fact is, in abortion cases, one ultimately has to choose. Take the example that is often brought out in discussions of abortion—a criminal rape in which the mother's life would be in danger. Should you terminate the fetus in that case? The fetus may be fairly far along. At that point, you simply have to choose. It may be easier to say, "We don't consider the fetus a person," but that is just as much a cover-up as saying there is some kind of medical technology that ought to be controlling.

However, it is a very different thing to say that because choices must be made in abortion cases, and because these choices are hard, there is no constitutional right to an abortion at all.

AUDIENCE: There are certain tensions between operating the government through the Constitution, and instances where that operation is extremely inefficient or maybe even unrealistic. Do you see any particular areas where this is so? We have talked a little bit about the cynics of the constitutional obligation to scrutinize lower federal court appointments. I think maybe we have talked enough about that one, but let us discuss another instance—where the Senate has constitutionally been given judicial duties. For example, the Constitution requires the Senate to have impeachment power, and if Judge Alcee Hastings could appropriately make the argument that means the whole Senate, not just a few senators, has that power, then we might have a situation where realistic fidelity to the Constitution—which here would require that all 100 Senators spend three or four weeks deciding whether Hastings should be removed from office—would just be impractical. There may be other instances where, arguably, Article III powers have been given to non Article III judges. Where do you see certain instances of

39. Roe, 410 U.S. at 149.
judicial review? What about justice?

ABRAMS: John, do you see justice in any of this?

ANDERSON: There is much misplaced faith in the part of Professor Graglia in pure majoritarianism as the way to secure justice in this country. We saw some very sad examples in the last political campaign of people attacking, for example, the ACLU. There are people who believe that minority rights are not secure against a majoritarian surge of power, unless we have the kind of judiciary of which you spoke. I would commend you for what I think was a very good statement of the fact that this is not pure democracy. This is a representative democracy, and as one who took part at the table of that system for a long time, I see all of its defects. I see all of the mistakes that are capable of being made in the name of appeasing popular fashions and so on. So I very much hope that we will continue to have a Court constraining the Constitution in a way that sometimes the majority will not, and that will end up nevertheless defending the rights of the minorities.

WHITE: I do not want this audience to assume that no one at the table is prepared to make an affirmative case on behalf of Roe v. Wade. I did not say anything when the question was asked, because I had just given a lengthy answer to a previous question. It seems to me there is a case for Roe v. Wade. One starts with the presumption that there is a constitutional right of autonomy, privacy, call it what you will—that the "liberty" in the due process clause embraces a liberty to express one's personality, to engage in intimate relationships, and to make fundamental decisions involving one's choices. One then assumes further that the meaning of "liberty" is broad enough to subsume the right of a woman to make a decision not to bear a child. The question that abortion therefore raises is not whether there is no such constitutional right. If one is prepared to grant, as Professor Graglia surely would not, that justices can give substantive content to the word "liberty" in the due process clause, it seems to be an easy step to find a liberty to make a choice not to bear a child.

The difficult problem about abortion is the question of balancing rights, not creating them. If one believes that murder is illegal, one could not argue that one had a constitutional right to kill a living person. The question then is: At what point do you allow a person to have a constitutional right to, in effect, terminate the life of another "person," assuming that a fetus is deemed a "person"? The decision to designate the fetus a person—to give a fetus constitutional personhood status—is thus a decision made by balancing two putative constitutional rights.

I am prepared to say that, on some kind of sliding scale of worth, the mother's right to choose outweighs the right of the fetus to be born. The problem with Roe v. Wade is that the Court, faced with this issue of balancing, looked for some "neutral" solution. They settled on medical technology and the advice of doctors, and made the "rights" turn on vulnerable and arbitrary criteria. That was an unfortunate, yet understandable, mistake. The fact is, in abortion cases, one ultimately has to choose. Take the example that is often brought out in discussions of abortion—a criminal rape in which the mother's life would be in danger. Should you terminate the fetus in that case? The fetus may be fairly far along. At that point, you simply have to choose. It may be easier to say, "We don't consider the fetus a person," but that is just as much a cover-up as saying there is some kind of medical technology that ought to be controlling.

However, it is a very different thing to say that because choices must be made in abortion cases, and because these choices are hard, there is no constitutional right to an abortion at all.

AUDIENCE: There are certain tensions between operating the government through the Constitution, and instances where that operation is extremely inefficient or maybe even unrealistic. Do you see any particular areas where this is so? We have talked a little bit about the cynics of the constitutional obligation to scrutinize lower federal court appointments. I think maybe we have talked enough about that one, but let us discuss another instance—where the Senate has constitutionally been given judicial duties. For example, the Constitution requires the Senate to have impeachment power, and if Judge Alcee Hastings could appropriately make the argument that means the whole Senate, not just a few senators, has that power, then we might have a situation where realistic fidelity to the Constitution—which here we would require that all 100 Senators spend three or four weeks deciding whether Hastings should be removed from office—would just be impractical. There may be other instances where, arguably, Article III powers have been given to non Article III judges. Where do you see certain instances of
inefficiency or inability to govern through the Constitution?

KUTLER: The Senate defines its own quorum. During Andrew Johnson's trial, senators floated in and out, yet the debate always proceeded.

ABRAMS: But the system set up for Judge Hastings is quite different. It is just a small committee that is going to hear all the testimony and then report to the full Senate, because that is more efficient, and the Constitution is too burdensome.

KUTLER: Certainly the Constitution provides that each House shall make its own rules. As far as I know, only once has the judiciary intervened on that matter.

AUDIENCE: Your response to that seems to be that you do not think very much of Judge Hastings.

KUTLER: I do not know much about the case.

AUDIENCE: In any case, what I am interested in is some other areas which you could identify—instances where we cannot operate efficiently under the Constitution because the Constitution is not so well thought out.

GRAGLIA: I disagree. The Constitution is far from a prescription for efficiency. More basically, there is the question of whether there should be any constitutional restrictions on self-government at all. It is easy to see why there should be restrictions on kings or emperors, but why should people ever limit their own ability to govern themselves in accordance with their current insights and current conditions? The Constitution—for example, the requirement that the President be native-born ties our hands in ways that are very difficult to justify today. (An interesting question, by the way, is how the Constitution can prevent us from changing the Constitution itself. After all, it was not adopted in accordance with the requirements of the Articles of Confederation, which could only be changed with unanimous consent.) Professor Kutler said that we need some flexibility in interpreting the Constitution, and he is clearly correct. The flexibility, however, must be supplied by Congress; it is important that Congress be able to prevent the Constitution from becoming a straitjacket. The Constitution must

be made a living document—by reason of infusions by the representatives of the people—so that it does not excessively restrain self-government. The Constitution should not, however, be flexibly "interpreted" by the Supreme Court so as to create new rights and new restrictions on self-government. Creation of new rights by the Court does not make the Constitution more flexible; it makes it even more of a straitjacket. It is intolerable that a majority of the nine justices of the Supreme Court should take from the people and arrogate to themselves the power to make policy on such basic social issues as the availability of abortion and pornography, and the enforcement of the criminal law.

ANDERSON: It seems to me that in the area of economic policy making, we may face some additional problems. The Constitution says nothing about political parties, yet they have developed. One of the policy questions over which they differ is the subject of taxes. The power to raise revenue is lodged by the Constitution in the House of Representatives where revenue-raising measures must originate. It may be at total odds with the view of the President and his economic policy makers who see certain actions as being absolutely vital, if we are going to get anywhere in this battle for improving our competitiveness in world markets. I see some real problems. John Kennedy, when he came into the White House in 1961, wanted the power, within certain limits, to raise and lower taxes, rather than have a Congress, like a dog worrying over a bone, chewing on a tax bill for two years, and finally coming up with something that may not have fit within the kind of economic policy that their advisors thought as best. He did not get anywhere with that idea, and George Bush would have even less success, of course. At least Kennedy had a Democratic Congress and was a Democratic President; here, we have a divided government. So I think there are some real problems unless we somehow develop new forms of institutional power sharing and cooperation that will allow both sides of the equation to see that they ought to have a voice, and work together for the common good. Otherwise, the Constitution very definitely, and particularly in the present situation, poses some real impediments.

ABRAMS: These two days have been what might be described as an "orgy of intellectualism"—just an extraordinary event in the history of our law school in which we all had the opportunity to participate. The creativity of the Framers gave birth to a system of government unlike

inefficiency or inability to govern through the Constitution?

KUTLER: The Senate defines its own quorum. During Andrew Johnson's trial, senators floated in and out, yet the debate always proceeded.

ABRAMS: But the system set up for Judge Hastings is quite different. It is just a small committee that is going to hear all the testimony and then report to the full Senate, because that is more efficient, and the Constitution is too burdensome.

KUTLER: Certainly the Constitution provides that each House shall make its own rules. As far as I know, only once has the judiciary intervened on that matter.

AUDIENCE: Your response to that seems to be that you do not think very much of Judge Hastings.

KUTLER: I do not know much about the case.

AUDIENCE: In any case, what I am interested in is some other areas which you could identify—instances where we cannot operate efficiently under the Constitution because the Constitution is not so well thought out.

GRAGLIA: I disagree. The Constitution is far from a prescription for efficiency. More basically, there is the question of whether there should be any constitutional restrictions on self-government at all. It is easy to see why there should be restrictions on kings or emperors, but why should people ever limit their own ability to govern themselves in accordance with their current insights and current conditions? The Constitution—for example, the requirement that the President be native-born—ties our hands in ways that are very difficult to justify today. (An interesting question, by the way, is how the Constitution can prevent us from changing the Constitution itself. After all, it was not adopted in accordance with the requirements of the Articles of Confederation, which could only be changed with unanimous consent.) Professor Kutler said that we need some flexibility in interpreting the Constitution, and he is clearly correct. The flexibility, however, must be supplied by Congress; it is important that Congress be able to prevent the Constitution from becoming a straitjacket. The Constitution must

be made a living document—by reason of infusions by the representatives of the people—so that it does not excessively restrain self-government. The Constitution should not, however, be flexibly "interpreted" by the Supreme Court so as to create new rights and new restrictions on self-government. Creation of new rights by the Court does not make the Constitution more flexible; it makes it even more of a straitjacket. It is intolerable that a majority of the nine justices of the Supreme Court should take from the people and arrogate to themselves the power to make policy on such basic social issues as the availability of abortion and pornography, and the enforcement of the criminal law.

ANDERSON: It seems to me that in the area of economic policy making, we may face some additional problems. The Constitution says nothing about political parties, yet they have developed. One of the policy questions over which they differ is the subject of taxes. The power to raise revenue is lodged by the Constitution in the House of Representatives where revenue-raising measures must originate. It may be at total odds with the view of the President and his economic policy makers who see certain actions as being absolutely vital, if we are going to get anywhere in this bill for improving our competitiveness in world markets. I see some real problems. John Kennedy, when he came into the White House in 1961, wanted the power, within certain limits, to raise and lower taxes, rather than have a Congress, like a dog worrying over a bone, chewing on a tax bill for two years, and finally coming up with something that may not have fit within the kind of economic policy that their advisors thought was best. He did not get anywhere with that idea, and George Bush would have even less success, of course. At least Kennedy had a Democratic Congress and was a Democratic President; here, we have a divided government. So I think there are some real problems unless we can somehow develop new forms of institutional power sharing and cooperation that will allow both sides of the equation to see that they ought to have a voice, and work together for the common good. Otherwise, the Constitution very definitely, and particularly in the present situation, poses some real impediments.

ABRAMS: These two days have been what might be described as an "orgy of intellectualism"— just an extraordinary event in the history of our law school in which we all had the opportunity to participate. The creativity of the Framers gave birth to a system of government unlike

41. U.S. Const. art. I, § 5, cl. 2.
42. U.S. Const. art. II, § 1, cl. 5.
any that the world had seen before. But what we have seen is that the
process of building our country and creating our government continues.
As we have discussed over the last two days, the ideas of the Framers
and those who carried out their work remain controversial. But that is,
after all, what they expected. Americans are not of one mind; that is
what makes us who we are. Through the interchange of ideas, we seek
a better way. Through discussion, we hope to move toward consensus
while we tolerate dissent.

Courts reflect American society with all its promise and all its
faults. We thank our participants for sharing their thoughts with us
about the role of courts in American society. Let me thank in particu-
lar John Anderson, Ted White, Lino Graglia, and Stanley Kutler for
their participation this afternoon and our other participants in this
symposium, Judge Noonan and Elizabeth Holtzman. In addition, mem-
bers of the faculty who have spent days and nights preparing for this
deserve our thanks, John Sanchez, Johnny Burris, Randolph Brac-
cialarge, Steve Friedland, Phyllis Coleman, Bruce Rogow, and first
among equals, Tony Chase, whose memos still fill my desk. Thank you
all.