

Spring 3-1-1988

Law School Record, vol. 34, no. 1 (Spring 1988)

Law School Record Editors

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Recommended Citation

Law School Record Editors, "Law School Record, vol. 34, no. 1 (Spring 1988)" (1988). *The University of Chicago Law School Record*. Book 62.

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Four Faces of Conservative Legal Thought

Michael W. McConnell

This is the first article in a two-part series on contemporary legal thought. Professor Mary Becker (J.D. '80) will discuss aspects of liberal legal thought in the Fall issue of The Law School Record.



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The nominations of Robert Bork, Douglas Ginsburg, and Anthony Kennedy to fill the seat of retiring Supreme Court Justice Lewis Powell have drawn attention, much of it ill informed and misleading, to the character of conservative legal thought. Expecting to find a right-wing monolith, senators and other observers have instead been puzzled by the differences among legal thinkers on the right. Sometimes they have been surprised even by differences within the thought of a single conservative, as with Robert Bork's intellectual odyssey from libertarianism, through law and economics, to his mature espousal of democratic traditionalism. It often seems that debates among the various perspectives on the right—not debates between right and left—raise the most vital questions regarding the foundations of American constitutionalism.

Traditional jurisprudential conservatives, with their focus on judicial restraint; libertarians, with their commitment to individual liberties and hostility to big government; the law and economics movement, with its rigorous pursuit of economic efficiency; and social conservatives, with their loyalty to community and traditional

moral values—each of these schools of thought has developed a distinct set of legal principles. Each is a challenge and a threat to the still-dominant liberal orthodoxy; each has an uneasy relation with its allies on the right. Taken together, these schools of thought seek to redirect constitutional discourse toward the genuine issues of democracy, liberty, and the rule of law, which were so often neglected in the last decades' rush to use the courts to circumvent a political system perceived as resistant to social change.

Consider the subjects of legal controversy. Ten years ago the law reviews were filled with speculations about how to use the Constitution to expand welfare "rights," end capital punishment, and uproot traditional sexual mores. Today you are more likely to see symposia devoted to such questions as: the weight that should be given the original intention of the framers of the Constitution, the extent to which economic liberties should be protected by law, and the means by which moral (even religious) values in public life can be preserved.

So powerful has been the advance of conservative legal theory that we have seen a virtual reversal of roles in the legal debate. Now it is the left that cherishes stasis and precedent—that is

fighting a rear guard action against change. Joseph Biden's Judiciary Committee treated the Burger Court as the pinnacle of constitutional wisdom, and any criticism of the Court's decisions as a sign that the nominee was dangerously outside the "mainstream." That defensive posture, as much as anything, is evidence of the direction of movement in the legal debate.

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Traditional Conservatism

Two principles form the heart, and the common element, of conservative legal theory. First is commitment to the rule of law. Legal action and decisions must be grounded in neutral principles of general applicability. Constitutional principles do not change with the political climate; the task of judges, to the extent possible, is to discern what the law is, not to advance their policy preferences. The second principle is a democratic adherence to the consent of the governed. The legitimacy of our laws, including our Constitution, arises from the deliberate decisions of the people, made through their representative institutions. Laws, including the Constitution, must therefore be read, to the extent possible, as embodying the intentions of the people who adopted them rather than the opinions of those who hold judicial office today.

Restoring the proper relation between unelected courts and the elected representatives of the people is the foremost concern of traditional legal conservatives, exemplified by Chief Justice William H. Rehnquist and Attorney General Edwin Meese III. The central question is how to

read the Constitution of the United States. Is the Constitution, as some contend, an elastic and indefinite document that licenses judges—in the words of Justice Hugo Black—to “substitute their social and economic beliefs for the judgment of legislative bodies”? Or does it have some fixed, reasonably ascertainable meaning, which constrains both legislatures and judges?

Traditional conservatives contend that the Constitution is principally a framework for democratic decision-making and not a blueprint for specific social and economic policies. Outside of a few important, well-defined personal liberties set forth in the document, the Constitution allows the people to make public policy through their elected representatives. When the Court ventures into policymaking in the guise of constitutional interpretation, it oversteps the role assigned to it under the Constitution.

In response to the liberals' open-ended view of constitutional interpretation, traditional conservatives have articulated an “interpretivist” theory, dubbed by Attorney General Meese the “Jurisprudence of Original Intent.” According to the interpretivist view, when the text and structure of the Constitution leaves room for doubt about its meaning, it should be read in light of the meaning ascribed to those words by the people who wrote and ratified it.

Notwithstanding the caricatures in the press, the interpretivist model is neither an invention of the Attorney General's nor a plot to further the right wing agenda. Interpretivism was the dominant, the assumed, the unquestioned premise of judicial review for the nation's first hundred years, and much of its second. James Madison, the principal framer of the Constitution, stated that “if the sense in which the Constitution was accepted and ratified by the nation is not the guide to expounding it, there can be no security for a faithful exercise of its powers.” Thomas Jefferson wrote that “on every question of construction, [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may be squeezed out of the

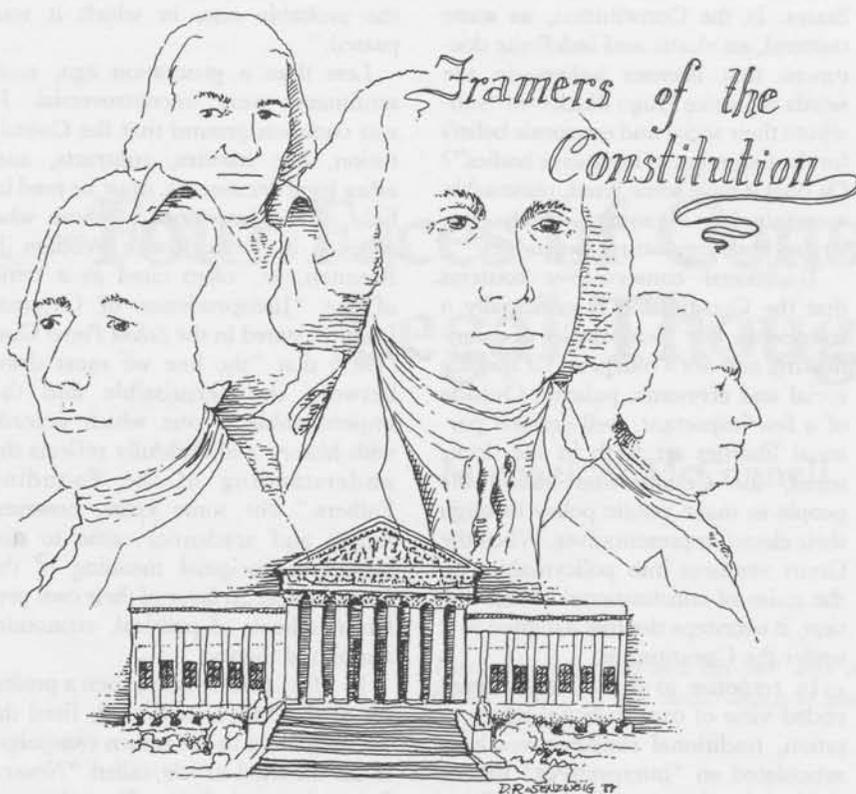
text, or invented against it, conform to the probable one, in which it was passed.”

Less than a generation ago, such sentiments were uncontroversial. It was common ground that the Constitution, like statutes, contracts, and other legal documents, must be read in light of the intentions of those who adopted it. Even Justice William J. Brennan, Jr., often cited as a critic of the “Jurisprudence of Original Intent,” stated in the *School Prayer Cases* (1963) that “the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.” For some years, however, judges and academics came to disregard the original meaning of the Constitution, in favor of their own preferred schools of political, economic, and moral theory.

In 1971, Robert Bork, then a professor at the Yale Law School, fired the opening salvo in the return campaign, in an oft-cited article called “Neutral Principles and Some First Amendment Problems.” In it, he reasoned that interpretivist jurisprudence follows from “the resolution of the seeming anomaly of judicial supremacy in a democratic society.” The courts are authorized to invalidate decisions by

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the elected representatives of the people if and only if the people have, through the deliberate act of constitution making, placed certain matters beyond the cognizance of their representatives. The Court's power is there-



fore legitimate, Bork wrote, "only if it has, and can demonstrate that it has, a valid theory derived from the Constitution." If it "merely imposes its own value choices," it violates the democratic postulates of the Constitution. If a judge cannot conclude, in good faith, that the people have made a prior constitutional judgment against a given act of the legislature, there is only one alternative: the judge must defer to the legislature and enforce the law. It cannot matter that the judge believes the law to be unwise, unfair, or oppressive. His job is not to make moral judgments, but to enforce constitutional principles that have been chosen by others.

Perhaps the most important sphere in which the original understanding of the Constitution has been invoked by the Supreme Court over the past ten years to reverse its prior course has been the area of separation of powers—the way in which the Constitution maintains the mutual independence of the legislative, executive, and judicial branches of government. From the 1930s until recently, the Court had largely disregarded these features of the Constitution, despite the fact that

the framers of the Constitution believed that the separation of powers was the most important element of the constitutional design.

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Thus, the Court had approved such constitutional aberrations as so-called "independent" regulatory agencies, had gutted the President's ability to obtain confidential advice from even his closest aides, and had watered down the Constitution's express limitations on judicial power, extending court jurisdiction beyond actual "cases and controversies" (cases involving the concrete rights of individuals) to include generalized grievances of a political nature. (In the most flagrant

case, a group of law students was given standing to challenge railroad rates for recyclable materials on the ground that the amount of recycling that takes place would indirectly affect their use and enjoyment of the national parks.)

Over the past decade, the Supreme Court has revived the doctrine of separation of powers in a series of important cases, often quoting at length from *The Federalist Papers* and other writings that demonstrate the original purpose and meaning of the constitutional provisions at issue. Among the most important were *Immigration and Naturalization Service v. Chadha* (1983), which invalidated the legislative veto, *Buckley v. Valeo* (1976), which reaffirmed the President's power to appoint subordinate executive officers, *Allen v. Wright* (1984), which limited the right of ideological plaintiffs to challenge executive decisions that do not affect their legal rights, and *Bousher v. Synar* (1986), which precluded Congress from assuming the power to discharge officials who perform executive functions.

On the other hand, by a five to four vote, the Court in *Garcia v. San Antonio Metropolitan Transit Authority* (1985) overruled prior precedent that the states retain certain constitutionally protected spheres of sovereign authority, which the federal government cannot invade. This flies in the face of the intention of those who drafted and ratified the 1787 Constitution and Bill of Rights. The Court explained that the "principal and basic limit" on federal power over the states will henceforward be the self-restraint of Congress. Good luck, states.

Liberal attacks on interpretivism have caused some to assume, mistakenly, that a jurisprudence of original intent would always produce substantive results that accord with conservative politics. But most important constitutional controversies have at least two sides. Conservative advocates may argue for the correctness of their positions, but principled interpretivists must be prepared to accept that in some instances they may not prevail. A line item veto is an example of an excellent idea that is probably unconstitutional (because it treats as a "Bill" something that has not been approved in that form by both the Senate and the

House in accordance with Article I, Section 7), and affirmative racial preference by the federal government is an example of something that ought to be unconstitutional, but probably is not (because Congress has express authority to determine the best means of enforcing equal protection, even assuming, contrary to the text, that the Fourteenth Amendment applies to Congress at all).

Nonetheless, given the nature of our constitutional heritage, an interpretivist jurisprudence will, more often than not, be consistent with a philosophy of decentralized government, judicial restraint, racial equality, and respect for life. It is no coincidence that advocates of radical social change have more to lose from a jurisprudence of original meaning than those who wish to conserve and affirm the traditional values of the political community.

Libertarianism

A second major strain in conservative legal theory over the past ten years is libertarianism. Libertarians understand the Constitution principally as an instrument of limited government, and support an active judicial role in preventing legislatures from overstepping the bounds of their authority. Libertarians therefore tend to be more hospitable to challenges to governmental authority, less deferential to majoritarian institutions. If the animating principle of interpretivism is democratic rule, that of libertarianism is individual rights.

In theory there is no necessary conflict between libertarians and interpretivists. If the libertarians are correct—if it was the intention of the framers and ratifiers of the Constitution to limit dramatically the authority of government over the economic and other decisions of individuals—then the two approaches coincide. The main arena of debate is the issue of economic liberties: the right to hold and use property and to make and enforce private agreements, without government interference, unless it is necessary to protect the rights of nonconsenting third parties.



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Economic libertarians look to certain explicit provisions of the Constitution that protect economic rights: especially the contracts clause (no state may "impair the obligation of contracts"), the takings clause ("nor shall private property be taken for a public use without just compensation"), and the due process clauses (neither the states nor the federal government may deprive any person of "property" without "due process of law"). They buttress the plain language of these provisions with analysis of the philosophical sources of these principles: mainly John Locke, William Blackstone, and, more distantly, Thomas Hobbes. Their conclusion is that the

Constitution was intended to preclude many forms of modern economic regulation that interfere with the liberties of property and contract.

University of Chicago law professor Richard Epstein has offered the most comprehensive account of this position. In his 1985 book, *Takings: Private Property and the Power of Eminent Domain*, Epstein argues that the words of the takings clause have one simple, unavoidable core meaning, derived from the Lockean philosophy of the Framers: that the property of one person may not be taken from him for the benefit of another. If allowed its full intended sweep, the takings clause would prohibit progressive taxation, unemployment compensation schemes, requirements of unisex annuity tables, welfare transfer payments, zoning laws, and much, much more. One need not go as far as Epstein has to recognize that the property and contracts clauses of the Constitution are part of the document, that they were intended, like the others, to have force and effect, and that the modern Court's usual refusal to enforce them is unprincipled.

Professor Bernard Siegan, of the University of San Diego Law School (whose nomination to the United States Court of Appeals for the Ninth Circuit faces serious opposition in the Senate Judiciary Committee) reaches many of the same conclusions, but on the basis of very different jurisprudential assumptions. Despite the radicalism of his conclusions, Epstein places himself squarely in the interpretivist camp. "Judges," he says, "must be able to provide authoritative interpretations of the constitutional text that are not simply manifestations of their own private beliefs about what legislation should accomplish."

Siegan advocates a far more discretionary version of judicial review. In his book *Economic Liberties and the Constitution*, Siegan places principal reliance on "substantive due process," ironically the same constitutional doctrine used in *Roe v. Wade* (1973), the abortion decision. The due process clauses of the Fifth and Fourteenth Amendments prohibit the government

from depriving any person of "life, liberty, or property without due process of law." Under the theory of substantive due process, some (though of course not all) species of liberty and property are protected against legislative action, whether there has been "due process" or not. Traditional jurisprudential conservatives are skeptical of substantive due process, both because of its inconsistency with the text and purposes of the due process clauses and because it invests judges with unconstrained power to decide which "liberties" will receive judicial protection. Siegan, however, does not hesitate to invoke the modern Court's activist decisions, like *Roe*, to support his argument that there is nothing "unique" or "extraordinary" about the notion that substantive due process protects rights not mentioned in the constitutional text or explicitly intended by the framers.

Both Epstein and Siegan have clashed with the interpretivist advocates of judicial restraint. In 1984, then-Judge Scalia warned in a widely noted debate with Epstein, a former colleague at Chicago, that a judiciary powerful enough to enforce Epstein's libertarian vision of government would also be powerful enough to impose "judicially prescribed economic liberties that are worse than the pre-existing economic bondage." "What would you think," he asked, of a "constitutionally guaranteed, economic right of every worker to 'just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity?'"

Siegan's style of libertarianism comes into still deeper conflict with interpretivism. Robert Bork, for example, has agreed that the intention of the contracts and takings clauses "has been a matter of dispute and perhaps they have not been given their proper force." But he claims that to return to substantive due process would work "a massive shift away from democracy and toward judicial rule." "This version of judicial review," Bork argues, "would make judges platonic guardians subject to nothing that can properly be called law."

Especially among younger conservatives, economic libertarianism is often combined with broader social

libertarianism. The commitment to limited government leads many scholars of the right to an expansive understanding of noneconomic individual liberties. Liberals are frequently surprised by the depth of support for supposedly "liberal" positions on basic civil liberties, such as freedom of speech, association, and religion. In fact, libertarians often make their liberal counterparts look timid and inconsistent by comparison. They oppose restrictions on speech that liberals often tend to support: campaign finance limitations, regulation of commercial speech, prohibitions on employer speech in the course of a labor organizing campaign, regulation of the political balance of broadcasting and cablecasting, restrictions on religious speech on public property, legal harassment of peaceful protestors against abortion clinics, and the like.

Libertarians also tend to oppose government restrictions on pornography and homosexual conduct, which are generally supported by social as well as many traditionalist conservatives. Many also support legalized abortion—though there is a significant libertarian minority that recognizes the right of the unborn to protection against physical assaults from others. Some libertarians believe in promoting these objectives through constitutional litigation. Others, who combine libertarian political principles with a more traditional conservative jurisprudence, believe that they can legitimately be attained only through the democratic process.

Much of the drama and excitement in the conservative legal community is generated by the tension between the libertarians and the "traditionalists." The Cato Institute, for example, has hosted fascinating exchanges between the camps: the Epstein-Scalia debate already mentioned, or a more recent confrontation between traditionalist Gary McDowell and Stephen Macedo, libertarian author of a book entitled *The New Right Versus the Constitution*. The libertarians and traditionalists are carrying on a debate that has been with us from the very beginning—the never-resolved tension between individual rights and democratic rule.



Law and Economics

Few developments in legal analysis are broad enough or important enough to change the face of legal education. But the law and economics movement, born some twenty-five years ago and brought to prominence in the past ten years by such scholars as Richard Posner (now judge on the United States Court of Appeals for the Seventh Circuit), Ronald Coase, Aaron Director, Guido Calabresi, and Gary Becker, has profoundly affected the way we think and talk about law. Not just constitutional law, and not just law pertaining to economic transactions, but the entire corpus of law, from antitrust to family law to torts to criminal law, has been touched or even transformed by the law and economics movement.

The persuasive strength of law and economics comes from the analytical power of the economic model. Economics is now the preeminent social science. It generates verifiable answers to questions (not all questions, to be sure, but many) and thereby provides an objective basis for decisionmaking. Law and economics is an attractive legal movement because it provides a basis for legal decisionmaking that is not dependent on the subjective will of the judge. It thus conforms to the fundamental principle of the rule of law.

Particularly for those who despair of reaching conclusive answers to constitutional questions from the historical record, law and economics can serve as an alternative way to preserve judicial review without inviting judicial tyranny.

It may be a mistake to label law and economics part of the conservative movement, for it has no overt ideological element. However, it is usually associated with the right because of a shared belief in the efficiency and justice of a market based on consensual transactions rather than government fiat. Law and economics has assumed a twofold task: to explain, and thus bring intellectual coherence to, the body of common law that lies at the heart of our system of private rights; and to provide an objective basis for critique of legal arrangements that fail the test of economic efficiency.

The most obvious successes of the law and economics movement have, not surprisingly, been in the fields of business law such as antitrust and securities. The impact can scarcely be overstated. Fifteen years ago, the main effect of the antitrust laws seemed to be to protect businesses from the threat of hard competition. Small businesses were protected against large; distributors were protected against suppliers; competitive price cutting was treated with suspicion. Bork's *The Antitrust Paradox* and Posner's *Antitrust Law: An Economic Perspective* changed all that. Antitrust was reoriented toward protection of the consumer from agreements among competitors to cut production and raise prices.

Similarly, our understanding of capital markets and the role of securities regulation has been greatly enhanced by the work of law and economics scholars such as Daniel Fischel and Frank Easterbrook (now a judge on the United States Court of Appeals for the Seventh Circuit). Takeovers, for example, are now understood to be powerful market forces in favor of managerial efficiency—not, as a previous generation thought, as unproductive shuffling of assets.

In a broader sense, the law and economics movement has influenced judicial thought by emphasizing the fact that legal rules influence future conduct. A judge cannot simply apportion the gains and losses from past events,

adopting a retrospective theory of justice. He must consider how future actors will respond to the decision. Comparing the Supreme Court's decisions in the 1983 term to those in the 1973, 1963, and 1953 terms, then Professor Easterbrook concluded that "[t]he Justices today are more sophisticated in economic reasoning, and they apply it in a more thoroughgoing way, than at any other time in our history." To the law and economics movement belongs the credit.

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The most radical subgroup within law and economics is the "Public Choice" school. Recently brought to public notice by Nobel Prize winner James Buchanan, public choice theory subjects government to the same skeptical private interest analysis long accorded to economic markets. The theory demonstrates that government power can and will be used to enrich powerful private interests at the expense of the public. Regulation, which masquerades as protection of the public interest, more frequently serves special interests. Public choice theorists have sparked a renewed interest in legal and constitutional mechanisms for cabinining the power of majoritarian institutions. The analytical justifications for the proposed Balanced Budget Amendment, for example, are an outgrowth of public choice theory.

Both traditionalist and libertarian conservatives look upon the law and economics movement with a degree of suspicion, because its philosophical premises are frankly utilitarian (the greatest good for the greatest number). This creates a tension with traditional

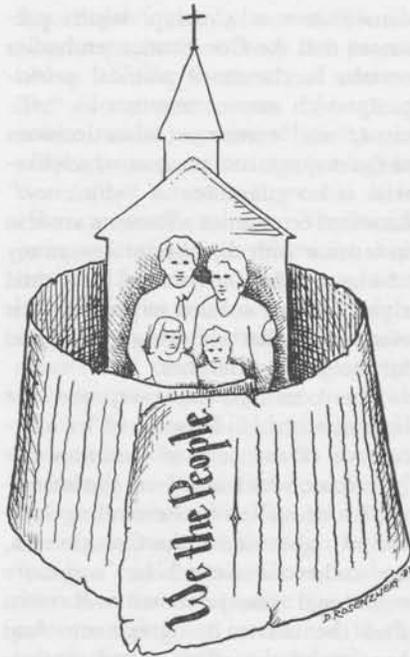
conservative scholarship, which presumes that the Constitution embodies certain fundamental political principles, which may or may not be "efficient," and leaves most other decisions to the majoritarian process, which likewise is no guarantee of "efficiency." Law and economics adherents are also in tension with the libertarians, many of whom uphold a vision of individual rights that are entitled to prevail, even when in conflict with the greatest good for the greatest number.

The conflicts, however, are not insurmountable. Because of its affirmation of the core of common law principles, which also form the historical backdrop for understanding individual rights under the Constitution, law and economics scholars and more traditional interpretivists will often find themselves in agreement. And because of the efficiency of markets and systems of private ordering, law and economics scholars will—with only rare exceptions—take positions compatible with libertarian conservatives. Indeed, some libertarians justify their position on a utilitarian basis not unlike that underlying the law and economics movement.

Social Conservatism

Another strain in American constitutionalism seeks to preserve the independence of so-called "mediating" institutions, such as families, churches and synagogues, communities, private colleges and universities, and voluntary associations, from the homogenizing influences of national life. Communitarian, or "social," conservatives tend to prefer local, decentralized decisionmaking over national, substantial autonomy for private associations, latitude for community standards of justice and morality, and—perhaps most of all—enhanced protection for the free exercise of religion.

While interpretivists focus on democracy, libertarians on individual liberty, and the law and economics movement on efficiency, social conservatives see community as the heart of the American constitutional order. It is vital, they believe, for groups of people (whether defined by belief, membership, or geography) to be able to establish mutually binding rules for



themselves—even if those rules conflict with the views of a wider national majority or the interests of some individuals within the groups. Dissenting individuals, after all, can choose some other community, some other faith, some other organization.

Enforcement of community standards for pornography is illustrative. To the social conservative, anti-pornography laws are legitimate and important, because to allow each individual to choose for himself whether to purvey pornography denies every person the right to live in an environment free from pornography; and to set the standard nationally (for example, by a constitutional rule) would eliminate diversity and the possibility of choice from the American scene. Community control offers the only genuinely pluralistic alternative. Neither Manhattan nor Des Moines should be forced to conform to the other's mores.

Social conservative theorists, frequently of a religious bent, have focused their energies on rolling back constitutional theories of interpretation that squeeze the autonomy of

communities between the twin pressures of individualism and statism. Social conservatives are virtually unrepresented in elite academia, but they have scored major victories in court, such as the constitutional right of ministers to counsel their flock without fear of suit for "clergy malpractice," the legitimacy of tax deductions for private schools, the right of religious organizations to control their own internal governance, the right of communities to outlaw child pornography, and the right of states to refuse to fund abortions.

The most obvious contribution of social conservatives to legal thought over the past ten years has been in the field of church and state. On this subject, the Supreme Court has heaped confusion upon confusion. It has drawn lines where no coherent line can be drawn (for example, states can provide textbooks but not maps to parochial schools). It has treated the

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establishment clause as if it were directly contrary to the free exercise clause. Perhaps most important, it has elevated the notion of "a wall of separation between church and state" to the point where it eclipses the more central value of religious liberty. Social conservatives have played a major part in bringing about a reexamination of these issues. Their central theme is that religion has a legitimate place in American public life—that the Constitution does not embody what Justice Arthur Goldberg once described as "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."

Social conservatives share much common ground with interpretivists, since the principal barrier to community self-determination is noninterpretivist constructions of the Constitution. The abortion decision, *Roe v. Wade* (1973), for example, is both the galvanizing issue for social conservatives and the exemplar of judicial overreaching for interpretivists. And the separationist decisions under the Religion Clauses are a prime example of departure from the original meaning.

The relation of social conservatives to libertarians is more complicated. Their substantive preferences about social policy frequently differ, and libertarians are often opposed to social regulation even at the local community level. Nonetheless, the two groups have a common hostility to the dominant feature of modern law—increasing national homogeneity—and also share significant common principles, such as vigorous protection of the free exercise of religion.

Conservative legal thought gained ground during the past ten years mostly in opposition to increasing assertions of power by the federal judiciary. As conservative thinkers become conservative judges, and as the movement changes from critic to actor, it will face a different set of problems. It must resolve or accommodate the tensions within its ranks. It must come to terms with over twenty-five years of precedents, many of which, rightly or wrongly decided, have become part of our governmental framework. The conservative commitment to stability and institutional integrity makes them less free than their liberal counterparts to depart dramatically from past decisions with which they disagree. Most of all, the conservative movement must be prepared to overcome the temptation of political expediency that comes with judicial power. Conservatives must not forget that judicial power must be guided by an external principle of law, precisely because it is not accountable to the people in any other way. ■