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SEVENTY-FIFTH ANNIVERSARY RETROSPECTIVE: MOST INFLUENTIAL ARTICLES

As we conclude the celebration of our seventy-fifth anniversary, the Editors of the *New York University Law Review* thought it would be fitting to take a look back at the first three-quarters of a century of our publication. In light of our commitment to publishing timely and influential scholarship, we have endeavored to highlight those articles that have had the greatest impact on academia, practitioners, the judiciary, and the world beyond. Our selection process looked to how often an article has been cited and also considered factors such as its age and extralegal appeal.

A member of the N.Y.U. School of Law community has written a short commentary on each of the twenty-five articles. These commentaries offer insightful legal, historical, sociological, and in several cases, personal perspectives, from Dean John Sexton's explanation of the philosophical underpinnings of Judge Henry Friendly's famous article on *Erie* to Professor Burt Neuborne's poignant reflections on his time as a young ACLU attorney mapping out the implications of Justice Earl Warren's speech on the Bill of Rights and the military. We are grateful to all of our faculty contributors for lending their invaluable time and prodigious intellectual talents to this project. We also owe special gratitude to Professor Norman Dorsen, who, through his enthusiasm, support, and guidance, has sustained this project from the start.

The Editors

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FREDERICK J. DE SLOOVÈRE, TEXTUAL INTERPRETATION OF
STATUTES, 11 N.Y.U. L.Q. REV. 538 (1934)

*Norman Dorsen**

Frederick de Sloovère's work on statutory interpretation has received considerable recognition. Dean Roscoe Pound wrote an introduction to his 1931 casebook,¹ and the most prominent contemporary legislation casebook, by William Eskridge and Philip Frickey, refers to the instant article.²

The reason is evident. In a mere twenty-two pages, de Sloovère, who was a professor at New York University School of Law, exhibits wide learning and touches on many themes that remain important today: the need for an overall theory of statutory interpretation, the implicit recognition that the subject is an art rather than a science, the doctrine of literalism as "the stumbling block at the threshold" of the subject,³ the necessary distinctions between "text" and "context," the limits of the plain meaning rule, the respective roles of judge and jury in statutory interpretation, the "relevant but inconsistent maxims" of interpretation that can lead to "superficial analysis,"⁴ and the insight that statutes can serve as valid starting points of judicial reasoning in nonstatutory cases.

Many of de Sloovère's observations are derived from the work of earlier scholars, scrupulously cited, particularly that of his apparent mentor, Dean Pound. In addition, there are portents of ideas more fully developed in Henry Hart and Albert Sacks's *The Legal Process*,⁵ which dominated the field in the 1950s and 1960s and today is making a comeback. These include the core principle that textual meanings

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¹ Roscoe Pound, Introduction to Frederick Joseph de Sloovere, *Cases on the Interpretation of Statutes* at v (1931).

² See William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation* 529 (2d ed. 1995).

³ Frederick J. de Sloovère, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. REV. 538, 540 (1934).

⁴ *Id.* at 547.

⁵ Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958).

should be confined to those that the words can “sensibly bear”⁶ and the central role that legislative purpose plays in resolving ambiguity.

But de Sloovère’s article does not realize its promise. It barely hints at the swirling controversy of his day over legal realism. More critically, the article completely fails to put factual meat on the bare bones of theory so that readers can understand just how de Sloovère’s ideas would play out in actual or hypothetical cases. In this respect, the article is the polar opposite of Hart and Sacks’s work, which teaches by the application of theoretical analysis to imaginative and concrete problems.

It remained for later generations to develop the concepts referred to in de Sloovère’s article and to go beyond them, not only through legal process and other centrist theories, but more recently in law and economics, critical legal studies, feminist and race theory, and other approaches to statutory interpretation.

KARL N. LLEWELLYN, *THROUGH TITLE TO CONTRACT AND A BIT BEYOND*, 15 N.Y.U. L.Q. REV. 159 (1938)

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The first sentence of Karl Llewellyn’s article, “Through Title to Contract and a Bit Beyond,” reveals that Llewellyn was writing about “Sales.”⁷ And, indeed, the article is among the most important written about sales law. The piece became an important source of what is now Article 2 of the Uniform Commercial Code, which governs the law of sales throughout the United States. But I choose to occupy this limited space with a different focus: I want to use “Through Title” to identify Llewellyn as an early proponent of what has come to be known as “law and economics.”

In addition to his role as a driving force behind the Uniform Commercial Code, Llewellyn is most widely known as a legal realist. This said, it was not, and never has been, entirely clear what it means to be a legal realist. Jack Balkin has called legal realism a Rorschach test, into which individuals project their own content.⁸ In Llewellyn’s own words, “[r]ealism was never a philosophy, nor did any group of realists as such ever attempt to present any rounded view or whole approach. . . . What realism was, and is, is a method, . . . not a philoso-

⁶ See de Sloovère, *supra* note 3, at 540-41, 544.

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⁷ K.N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159, 159 (1938).

⁸ See Jack Balkin, *Book Review*, 16 *Law & Hist. Rev.* 199, 201 (1998).

phy but a technology.”⁹ The method, or technology, according to Llewellyn, is to take a fresh look at the law, to “see it as it works.”¹⁰ In Llewellyn’s view, the “fresh inquiry into results is always the needed check-up.”¹¹

“Through Title” is such a check-up. It is importantly, and explicitly, a call for “sane” law.¹² For example, Llewellyn identifies the concept of “title” to property as useful “only in that rare case in which our economy resembles that of three hundred years ago: where the whole transaction can be accomplished at one stroke, shifting possession along with title, no strings being left behind—as in a cash purchase of an overcoat worn home.”¹³ In a more modern commercial economy, by contrast, sometimes a seller receives instructions from a buyer on how to manufacture a good, then sets about the task, ultimately handing the good to a third party for shipment to the buyer. Is the seller free to use the good for its own purposes prior to delivery? Does it matter whether the buyer has paid in advance? Imagine the good is lost in transit, but the carrier either is not responsible for the loss or lacks the funds to meet such responsibility. Should the seller or the buyer suffer? More important than any specific answer provided by “Through Title” is the article’s proffered *approach* to the questions. Title, Llewellyn concludes, represents the wrong approach, as that concept was never designed to address a situation where ultimate ownership is in “flux or suspension.”¹⁴ According to Llewellyn, “[w]hat is to be striven for, if it can be produced, is some other and different integrated base-line concept which does fit the normality of the seller-buyer relation.”¹⁵ Failing any single integrated concept, Llewellyn recommended rules that fit the circumstance of parties or transactions by type.¹⁶

In other words, “Through Title” rejects a doctrine’s wooden application in favor of a continually fresh analysis of a doctrine’s consequences. The law should be flexible enough to change with those consequences, taking into account, of course, the consequences of change itself. That is, regardless of whether “Through Title” is a good exemplar of legal realism, it is an early example of law and economics. As Alan Schwartz put it recently, Llewellyn’s early contracts scholar-

⁹ Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* app. B at 509-10 (1960).

¹⁰ *Id.* at 510.

¹¹ *Id.*

¹² See Llewellyn, *supra* note 7, at 165.

¹³ *Id.* at 167.

¹⁴ *Id.* at 169.

¹⁵ *Id.*

¹⁶ See *id.* at 169-70.

ship provides an invitation to the use of modern economic tools.¹⁷ The important influence of law and economics in American law schools has been controversial, primarily, I think, because economic analysis sometimes yields controversial conclusions. But the approach, shared by Llewellyn in "Through Title" and today's law and economics scholarship, seems hard to fault, at least to me. The approach is little more than a call to what Llewellyn terms "sane" law.

EDMUND CAHN, JURISPRUDENCE, 30 N.Y.U. L. REV. 150 (1955)

Professor Edmund Cahn's discussion of jurisprudence for the *Law Review's* 1954 Annual Survey of American Law focused on the most significant Supreme Court cases of that (or most any) year: the School Segregation Cases.¹⁸ Cahn praised the Court's decisions both for their immediate results, which he believed "added to the dignity and stature of every American,"¹⁹ and for the political pragmatism with which Chief Justice Warren crafted the opinions.²⁰

More than half of Cahn's article, however, was critical of the role that, according to many interpreters, social science had played in the Court's reasoning.²¹ The received wisdom, both at the time²² and today,²³ is that psychological studies demonstrating the psychic harm inflicted by segregation on African-American children were a key factor in demolishing the pretense of *Plessy v. Ferguson*²⁴ that "separate" could be "equal." For Cahn, the single footnote in *Brown* that credited the psychological experts²⁵ was merely "the kind of gesture a magnanimous judge would feel impelled to make."²⁶ In fact, as scientific evidence, the findings of the psychologists were weak and equivocal at best, as Cahn demonstrates in some detail.²⁷ If, as Cahn

¹⁷ See Alan Schwartz, Karl Llewellyn and the Origins of Contract Theory, in *The Jurisprudential Foundations of Corporate and Commercial Law* 12 (Jody S. Kraus & Steven D. Walt eds., 2000).

¹⁸ *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹⁹ Edmund Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150, 150 (1955).

²⁰ See *id.* at 151.

²¹ See *id.* at 157-68.

²² See *id.* at 159-60 (citing Kenneth Clark, *Desegregation: An Appraisal of the Evidence*, J. Soc. Issues, 1953 no. 4, at 2, 3). Professor Clark was the social science consultant for the NAACP in the desegregation cases.

²³ See, e.g., David J. Armour, *Forced Justice: School Desegregation and the Law* 115 (1995) (describing continuing influence of harm theories in desegregation litigation).

²⁴ 163 U.S. 537 (1896).

²⁵ *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954).

²⁶ Cahn, *supra* note 19, at 160.

²⁷ See *id.* at 161-65.

suggested, the evidence was useful only as a face-saving excuse for overruling *Plessy*, its importance would fade over time.²⁸

Cahn did not believe that fundamental rights should be subject to the findings of social scientists: Just as Justice Holmes famously had stated that the Constitution enacted no particular theory of economics,²⁹ so too for Cahn the equal protection of the laws ought not to depend on the social scientific trends of the day.³⁰ For Cahn, the injustice of segregation was manifest for all to see, as even the defense experts in *Brown* were forced to acknowledge.³¹ The justice of *Brown* is rooted, not in the vagaries of the "soft" sciences, but in the moral force of the principle of equality enshrined in the Constitution and the "prophetic" teaching of the first Justice Harlan's dissent in *Plessy*³² that *Brown* vindicated.³³

Cahn's essentially moral view of *Brown*'s jurisprudence also led him to celebrate, rather than decry, the fact that *Brown* dealt only with public discrimination, while leaving private discrimination and racism untouched.³⁴ He believed that the Court's rejection of Jim Crow exemplified the challenge that the Constitution continually made to all citizens:

Far from being merely "minimum standards," the substantive and procedural requirements of the Bill of Rights are so high that virtually no citizen lives up to them consistently in his personal relations and transactions. In the forum of conscience and private judgment, due process is violated continually by every one of us, including the lawyers and jurists who seek most earnestly to impose it on official action.³⁵

For us who live in a perhaps less hypocritical, more cynical age, the work of Edmond Cahn³⁶ is a pointed reminder that the law, at its best, is about bringing justice to every level of society and human life.

²⁸ See *id.* at 168 n.32.

²⁹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); Cahn, *supra* note 19, at 167.

³⁰ See Cahn, *supra* note 19, at 167-68.

³¹ See *id.* at 165.

³² *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

³³ See Cahn, *supra* note 19, at 169.

³⁴ See *id.* at 155-57.

³⁵ *Id.* at 156.

³⁶ See, e.g., Edmond Cahn, *The Moral Decision: Right and Wrong in the Light of American Law* (1955); *Confronting Injustice: The Edmond Cahn Reader* (Lenore L. Cahn ed., 1966).

ROBERT B. MCKAY, THE PREFERENCE FOR FREEDOM,
34 N.Y.U. L. REV. 1182 (1959)

When Justice Douglas wrote in *Brandenburg v. Ohio*³⁷ that the "clear and present danger" test had been distorted "beyond recognition," it was to this article by Robert McKay that the Justice turned for support.³⁸ In *Dennis v. United States*,³⁹ the Court had adopted Judge Learned Hand's formulation: "'[T]he gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"⁴⁰ While Judge Hand's balancing test well might have its place in analyzing torts of negligence,⁴¹ according to Professor McKay, the test is completely inappropriate to the unique circumstances that give rise to First Amendment arguments.⁴²

That is not to say that McKay was opposed to attempts to balance interests in First Amendment cases; for him striking the correct balance among competing rights and concerns was the essence of the art of judging.⁴³ Indeed, he noted that even First Amendment absolutists such as Alexander Meiklejohn and Justices Douglas and Black all admit cases in which some weighing of interests is required.⁴⁴ But where First Amendment rights are concerned, the scales are tilted in favor of the freedoms the First Amendment protects. In areas such as the presumption of the constitutionality of legislation,⁴⁵ the strict construction of legislation restricting expression,⁴⁶ limits on prior restraint,⁴⁷ looser standing requirements in First Amendment challenges,⁴⁸ and heightened procedural standards in matters of criminal law touching on expressive rights (such as vagueness and intent),⁴⁹ the Supreme Court consistently has considered First Amendment rights to be of fundamental importance.

³⁷ 395 U.S. 444 (1969).

³⁸ See *id.* at 453 & n.1 (Douglas, J., concurring).

³⁹ 341 U.S. 494 (1951).

⁴⁰ *Id.* at 510 (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (Hand, J.), *aff'd*, 341 U.S. 494 (1951)).

⁴¹ See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (comparing burden to loss discounted by probability in negligence case).

⁴² See Robert B. McKay, *The Preference for Freedom*, 34 N.Y.U. L. Rev. 1182, 1212 (1959).

⁴³ See *id.* at 1193-94.

⁴⁴ See *id.* at 1194-96.

⁴⁵ See *id.* at 1212-13.

⁴⁶ See *id.* at 1214-15.

⁴⁷ See *id.* at 1215-17.

⁴⁸ See *id.* at 1217-18.

⁴⁹ See *id.* at 1218-22.

This privileging of the First Amendment, that McKay (following the usage of the day) calls its “preferred position,”⁵⁰ is not for him merely a modern development, but part of the deeper structure of the Constitution and the American legal and political order itself.⁵¹ Even Justice Frankfurter, who considered the vocabulary of “preferred position” to be a “‘mischievous phrase,’”⁵² in practice recognized that the individual liberties fundamental to an open society took priority over economic and utilitarian freedoms.⁵³ For McKay, the label was less important than the reality: “The freedoms of the first amendment, particularly the freedoms of speech and thought, are so vital to the tradition of the free society that their primacy must be recognized in sufficiently varied ways to accommodate to the various contexts in which these crucial rights may be challenged.”⁵⁴ In the 1950s, the “clear and present danger” test had failed to preserve this primacy, but McKay had confidence that the Court and the country would find ways to continue to promote and defend the rights enshrined in the First Amendment.

HUGO L. BLACK, THE BILL OF RIGHTS,
35 N.Y.U. L. REV. 865 (1960)

*Marci A. Hamilton**

In 1960, Justice Hugo Black delivered the first James Madison Lecture at New York University School of Law, entitled “The Bill of Rights.”⁵⁵ He declared that the rights enumerated in the Bill of Rights are plain in their meaning and intended to institute “absolute” prohibitions on government.⁵⁶ He chastised those who rejected an absolute reading of the Bill of Rights by factoring the public interest into judicial review of rights as embracing “the English doctrine of legislative omnipotence.”⁵⁷ While his endorsement of an across-the-board absolutist reading of the Bill of Rights never has captured a majority,

⁵⁰ Id. at 1185 (citing *Jones v. Opelika*, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting) (using “preferred position” terminology)).

⁵¹ See id. at 1187-88.

⁵² Id. at 1191 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring)).

⁵³ See id. at 1192.

⁵⁴ Id. at 1222.

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⁵⁵ Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960).

⁵⁶ See id. at 867.

⁵⁷ Id. at 866.

or even a plurality, of the Supreme Court, his framing of the issues has enduring importance.

The 2000 James Madison Lecture was delivered by the Lord Chancellor of England, Lord Irvine, who also framed the issue of judicial review of rights violations in the context of parliamentary supremacy, effectively updating Black's discussion. Because of the recent enactment of a Human Rights Act (HRA) in England, which authorizes judicial review of rights violations, Irvine argued that the English system of legislative omnipotence, or parliamentary supremacy, had evolved into a system like that of the United States. The Human Rights Act requires courts to read statutes to make them constitutional and, in the event of failure on that score, to declare an act of Parliament incompatible with the rights articulated in the HRA.⁵⁸

Neither gets it just right, though the framing of the issues is quite helpful. Black is engaging in hyperbole when he accuses those who would weigh rights against government or societal interest of endorsing legislative omnipotence. Irvine exaggerates the change in English law effected by the HRA since a judicial determination that law is incompatible with the HRA results in that law being referred back to the Parliament, rather than stricken.⁵⁹ Thus England retains the essential character of its parliamentary supremacy, while U.S. courts continue to operate, even in the absence of an absolutist reading of the Bill of Rights, as effective checking mechanisms on legislative overreaching.

In the same era that England has been moving closer to a judicially protected set of human rights, the Supreme Court has refused to embrace Black's absolutist reading of the Bill of Rights. He advocated a bright-line rule that would have lightened the burdens on the judiciary by permitting its members to answer "yes" or "no" to cases brought under the Bill of Rights and therefore would seem to be inherently attractive to the rational jurist.⁶⁰ It is well worth asking today why such a compact formula has not become the accepted approach to most rights questions.

The principle at the base of the Constitution, which is vindicated every time the Court refuses to embrace an across-the-board, absolute approach, is that power is malleable and people are fallible.⁶¹ The

⁵⁸ See Lord Irvine of Lairg, *Sovereignty in Perspective: Historical Foundations*, New Horizons, 76 N.Y.U. L. Rev. (forthcoming 2001).

⁵⁹ See Human Rights Act, 1998, c. 42, §§ 4, 6, 10, sched. 2, para. 2 (Eng.).

⁶⁰ See Black, *supra* note 55, at 879.

⁶¹ See Marci A. Hamilton, *The Reformed Constitution: Calvinism, Representation, and Congressional Responsibility* (forthcoming).

Framers believed that all concentrations of power are dangerous, and that placing the right kind and quantum of power in the right hands will achieve the tandem goal of empowering each of these actors to act in the public good while limiting their capacity to overreach. This understanding of constitutional and power dynamics makes the Bill of Rights not a set of absolute restrictions, but rather an expressed hope of achieving a balance of power between the government and the people in situations that could not have been predicted by the Framers. This is not to say that the Court has not identified any arenas of absolute rights. There is, in fact, an absolute right to believe whatever one wants: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."⁶² Although wrapped in the language of levels of scrutiny, there also appears to be an absolute right not to be discriminated against on the basis of belief or religious identity.⁶³

While Black was right that a balancing approach opened the door to a diminution in certain rights, he failed to explain why such a diminution is inconsistent with the constitutional design in certain circumstances involving the rights or needs of others. His formula inevitably sacrifices others' interests at the altar of the one claiming the protections of the Bill of Rights and reaches incoherence when there are two claimants under the Bill of Rights, one claiming a positive right to do something, the other claiming a negative right not to have the other person do it. As he ought to have done as a Supreme Court Justice, Black eschewed addressing any situations that involved particular facts,⁶⁴ but that approach may have been his undoing, because it permitted him to avoid the hard questions about competing rights.

As Lord Irvine's Madison Lecture made clear, Black's framing of the issues continues to have contemporary relevance. Black's admonitions regarding legislative supremacy are particularly significant in this constitutional system, in which judicial enforcement of absolute rights may be infeasible and unwise.

⁶² *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); accord *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that state may not require individual to participate in dissemination of ideological message); *Reynolds v. United States*, 98 U.S. 145, 164 (1878) ("Congress was deprived of all legislative power over mere opinion . . .").

⁶³ See, e.g., *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (upholding principle that government may not pass laws designed to suppress religious belief or practice).

⁶⁴ See Black, *supra* note 55, at 867.

EARL WARREN, THE BILL OF RIGHTS AND THE MILITARY,
37 N.Y.U. L. REV. 181 (1962)

*Burt Neuborne**

Many democracies suffer from military poisoning. Some die from it. The Founders understood the gravity of the threat to democratic governance posed by standing armies. That is why the right to bear arms and the right to be free from quartered troops are given pride of place in the Bill of Rights immediately after the quintessential rights of religious conscience and free speech. But time has eroded the efficacy of the Second and Third Amendments as serious protections against military tyranny. Even the staunchest defender of the right to bear arms concedes that it does not cover a private air force or heavy artillery in the garage. It is no secret that the right to bear arms has been trivialized into a right to hunt bears.⁶⁵

The importance of Chief Justice Earl Warren's seminal 1962 Madison Lecture on "The Bill of Rights and the Military" was its demonstration that, in the modern world, the only way to harmonize the need for a strong military with the dynamics of a free, democratic state is to assure that the military operates under the rule of law. In most democracies, including ours for much of our history, that is a revolutionary idea. Military courts are usually separate institutions, subject to little or no control by civilian tribunals.⁶⁶ Military jurisdiction is usually extensive.⁶⁷ And military necessity, sometimes couched as national security, is usually a trump, even in civilian courts.⁶⁸ The

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⁶⁵ I have argued that the modern role of the Second Amendment is not to prevent the regulation of handguns, but to assure an equal right to serve in the institutions of armed coercion that have evolved in the years since the Second Amendment—the citizen army and the police. See Burt Neuborne, *Reading the Bill of Rights as a Poem* (forthcoming 2001). As long as the institutions of armed coercion look like the people they are intended to serve, the danger of a hostile, occupying force is minimized. If, however, segments of the population are excluded from the authorized "bearers of arms," the excluded segments of the polity become vulnerable to systematic oppression.

⁶⁶ Until 1953, the Supreme Court observed a "hands off" doctrine concerning military courts martial. See *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 251-52 (1863); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82-83 (1857). Habeas corpus review over courts martial was recognized in *Burns v. Wilson*, 346 U.S. 137, 142 (1953).

⁶⁷ Until 1957, the Supreme Court recognized wide military jurisdiction over civilians who interacted with the military. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 45-46 (1942) (upholding military court martial of alleged Nazi spies). But see *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (rejecting military jurisdiction over civilian when civil courts are open and functioning). The modern limits on military jurisdiction were imposed in *Reid v. Covert*, 354 U.S. 1, 23 (1957) (rejecting military jurisdiction over military dependents).

⁶⁸ The most dramatic example of such a trump is the Supreme Court's willingness to uphold the internment of Japanese-Americans during World War II in *Korematsu v.*

Chief Justice's Madison Lecture marked the beginning of the end for all three efforts to place the military outside the reach of the Bill of Rights. His assertion that civilian courts must exercise significant habeas corpus jurisdiction over military courts martial to assure that fundamental constitutional guarantees are respected is the foundation of the modern ground rules governing military justice. His caution that military jurisdiction must be conceived narrowly is the accepted wisdom today. And his warning (perhaps based on his own experience with having supported the wartime internment of Japanese-Americans on the basis of grossly overblown claims of military necessity) that assertions of military necessity must be viewed skeptically is the key to preventing assertions of national security from overwhelming democratic governance.

Even more broadly, the Chief Justice's challenge to the idea that the military exists as an enclave exempt from the rules of law that govern the relationship of the individual to the state triggered a searching reexamination of the relationship between the Bill of Rights and segments of American society that traditionally had been deemed beyond its protection. As a young ACLU lawyer, I remember a group of us sitting at lunch one afternoon in late 1967 with the Chief Justice's article and sketching on the back of a napkin the "enclaves" of American life from which the Bill of Rights had been excluded. We talked about the military, the police, mental institutions, prisons, the schools, and government workplaces. We asked why, if the Chief Justice was right about applying the Bill of Rights to the military, his reasoning also did not hold for the other "enclaves." From such discussions were born the prisoners' rights and students' rights movements and the historic effort to provide real legal protection to persons confined to mental institutions. While efforts to apply the Bill of Rights to the "enclaves" have known successes and failures over the years, the process began with the Chief Justice's path-breaking perception that no institution in American life can be permitted to function outside the influence of the Bill of Rights.

United States, 323 U.S. 214 (1944). Congress has recognized that the hysteria and racism that led to the mass internment of Japanese Americans during the war was fueled by grossly exaggerated claims of military necessity. Earl Warren, then a popular Republican Governor of California, fully supported the internment. In 1988, Congress provided reparations to the survivors of the Japanese-American internment. See Civil Liberties Act of 1988, Pub. L. No. 100-383, tit. I, 102 Stat. 903, 904-11 (codified as amended at 50 U.S.C. §§ 1989b to 1989b-9 (1994)).

CLYDE W. SUMMERS, INDIVIDUAL RIGHTS IN COLLECTIVE
AGREEMENTS AND ARBITRATION,
37 N.Y.U. L. REV. 362 (1962)

*Samuel Estreicher**

Clyde Summers's article is a good example of his career-long dedication—beginning with his LL.D. thesis at Columbia and perhaps culminating in his intellectual stewardship of Congress's 1959 decision requiring unions to live up to their democratic ideals⁶⁹—to the cause of advancing the rights of the individual worker in the collective bargaining context. For Professor Summers, collective bargaining is a good because it strengthens the bargaining power of the many and promotes a spirit of industrial democracy in the workplace. But the goal of an effective collective bargaining agent, he would insist, never can be purchased at the sacrifice of individual rights. The article thus maintains that individuals retain enforceable rights in the collective bargaining agreement chosen by their agent, including the right to press grievances to arbitration even when their representative would prefer to compromise their claims for good or bad utilitarian reasons.

Professor Summers's article certainly influenced the Supreme Court to recognize jurisdiction over individual employee claims for breach of the collective agreement pursuant to § 301 of the Labor Management Relations Act of 1947.⁷⁰ Most importantly, it prompted the Court's 1967 ruling in *Vaca v. Sipes*⁷¹ that when employees can prove their union has not represented their claims, they can proceed directly against their employer for breach of contract under § 301 in either federal or state court.

The *Vaca* Court, of course, did not go as far as Professor Summers would have liked. His article argues for an individual's right to press grievances to arbitration in *all* cases, a position Justice Black embraced in dissent: "I simply fail to see how the union's legitimate role as statutory agent is undermined by requiring it to prosecute all serious grievances to a conclusion or allowing the injured employee to sue his employer after he has given the union a chance to act on his behalf."⁷² Rather, the Court struck a compromise in the interest of protecting union control of the grievance and arbitration process:

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⁶⁹ See Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401-531 (1994)).

⁷⁰ See *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). Section 301 of the Labor Management Relations Act is codified as amended at 29 U.S.C. § 185(a).

⁷¹ 386 U.S. 171 (1967).

⁷² *Id.* at 209-10 (Black, J., dissenting).

Employees have no right to pursue grievances on their own, unless and until the union violates its duty of fair representation (DFR) to them.

The *Vaca* compromise was not compelled by the statutory language or legislative history, and Professor Summers's article makes good use of a position closer to the one that evolved under the Railway Labor Act (RLA),⁷³ the statute governing labor relations in the railroad and airline industries.⁷⁴ In that context, the law recognizes an individual worker's right to press grievances to arbitration.⁷⁵ This rule apparently has had no negative effect on the ability of unions to function in those industries. The RLA is somewhat different from the National Labor Relations Act (NLRA) in a way relevant to the issue in *Vaca*, for the government in fact pays for the costs of the arbitration system, at least for the railroads. Hence, unlike unions under the NLRA, rail unions never face the issue whether they should be compelled to pay for the costs of grievance and arbitration process when they have determined that collective interests are not advanced by pressing the individual worker's grievance.

Would we have a better regime for reconciling individual and collective rights if the Court in *Vaca* had embraced the Summers-Black position? Arguably, we might have, for we could have saved unions and employers the costs and disruption of collateral DFR litigation, and union-negotiated dispute resolution processes might have been better positioned to deal with claims raised under federal and state antidiscrimination and other employment laws. For such claims, the collectively bargained procedures have been deemed inappropriate in substantial part because individual employees have no right to press their claims without the consent of a majoritarian bargaining agent.⁷⁶ Professor Summers's prescient article would have helped the system better to navigate this shoal, and thus enhanced the utility of collective bargaining for our new era of mushrooming growth in employment law.

⁷³ Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1994)).

⁷⁴ Clyde W. Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. Rev. 362, 385-95 (1962).

⁷⁵ See, e.g., *Elgin, Joliet, & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945).

⁷⁶ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The issue is discussed in Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. Rev. 827, 845-49 (1996).

ROGER J. TRAYNOR, GROUND LOST AND FOUND IN CRIMINAL
DISCOVERY, 39 N.Y.U. L. REV. 228 (1964)

*Paul G. Chevigny**

It is easy to see why "Ground Lost and Found in Criminal Discovery" has been so popular. It was an article by no less an authority than an Associate Justice of the California Supreme Court on an issue of perennial concern, especially to criminal defense lawyers: the discovery of the prosecution's evidence. As a result of a series of decisions by its supreme court in which Justice Traynor played an active role, California in 1964 was one of a minority of states that allowed almost complete pretrial discovery of the prosecution's evidence, including the names of witnesses to be called at trial and copies of their prior statements. At the time Justice Traynor published the article, moreover, California recently had extended the scope of discovery to reciprocal discovery by the prosecution of evidence in the possession of the defense, insofar as it was not insulated by privilege. In his article, Justice Traynor took advantage of the opportunity to push for broader criminal discovery throughout the United States, especially under the restrictive rules of federal criminal procedure, which only allowed pretrial discovery to the defendant of his own statements, but not statements by others, nor even the names of prosecution witnesses. Lawyers in the intervening years who have sought to enlarge the scope of discovery of prosecution evidence have found the article to be an authoritative touchstone for advocacy in favor of that expansion.

Justice Traynor concluded that "[p]erhaps the experience in California and in other states that are experimenting with criminal discovery will lead to its widespread acceptance in the United States."⁷⁷ Reading his article now, however, thirty-six years later, the most striking thing about the landscape of procedure is that so little has changed. There have been statutory reforms, U.S. Supreme Court decisions, and thousands of motions for pretrial discovery, but the situation remains much as it was in 1964. Those who are opposed to the discovery by the defense of the names of prosecution witnesses, not to speak of their actual statements, continue to argue, as they always have, that the information would tempt defendants to intimidate the state's witnesses or to suborn perjury. And those who favor expanded

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⁷⁷ Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. Rev. 228, 250 (1964).

discovery continue to argue, as Justice Traynor did, that a criminal case ought not to be a "theater of hide-and-go seek."⁷⁸

Justice Traynor's position has powerful supporters. The ABA Standards for Criminal Justice Discovery provide that prior to trial the prosecution should disclose to the defendant the names and addresses of witnesses known to the prosecution, together with their statements, and the names of witnesses the prosecution intends to use.⁷⁹ Yet the Federal Rules of Criminal Procedure hardly have yielded to such suggestions. Rule 16 continues to provide for discovery of the defendant's statements, as well as documents, objects, and scientific tests that are known to the prosecution; Rule 16(a)(2) specifically provides that the rule does not "authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500."⁸⁰ At the time of the last amendment to the Rules, a House bill provided for pretrial discovery of witness statements three days before trial, but the conference committee rejected this feeble change, stating that "[d]iscouragement of witnesses and improper contacts directed at influencing their testimony[] were deemed paramount concerns."⁸¹ And that is the end of it in the federal system.

The situation in California is more interesting. In 1990, the state adopted Proposition 115, the Crime Victims Justice Reform Act, intended to limit the rights of suspects in criminal cases; for example, it forbade interpretation of the California Constitution to afford defendants greater constitutional protections than those afforded by the U.S. Constitution.⁸² Despite its draconian purposes, however, the proposition provides for pretrial discovery of the names and statements of prosecution and other witnesses.⁸³ After more than thirty years of the administration of criminal justice under the standards that Justice Traynor had promoted, it was apparently all but unimaginable for the drafters of Proposition 115 to deprive the defendant of rights so basic in California jurisprudence.

For the nation as a whole, the sad thing is that the federal system does not rely on the California experience to guide proposed changes

⁷⁸ *Id.* at 249.

⁷⁹ See ABA Standards for Criminal Justice Discovery and Trial by Jury Standard 11-2.1(a)(ii) (3d ed. 1996).

⁸⁰ Fed. R. Crim. P. 16(a)(2). The statute referred to is the "Jencks Act," which provides for statements to be supplied after witnesses have testified. See 18 U.S.C. § 3500 (1994).

⁸¹ H.R. Rep. No. 94-414, at 12 (1975), reprinted in 1975 U.S.C.A.N. 674, 716.

⁸² See Lauta Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 Am. U. L. Rev. 465, 466 (1998).

⁸³ See Cal. Penal Code § 1054.1 (West 1990).

in federal rules, and California does not rely on the federal experience. If there were any evidence that pretrial discovery of the prosecution's witnesses would give rise to the distortion of testimony, as the opponents of pretrial criminal discovery claim, surely the decades of experience in California would have revealed it. Yet the lack of such evidence, despite its important implications, has had no effect on federal policymaking.

HENRY J. FRIENDLY, IN PRAISE OF ERIE—AND OF THE NEW
FEDERAL COMMON LAW, 39 N.Y.U. L. REV. 383 (1964)

*John E. Sexton**

Henry Friendly's "In Praise of Erie—And of the New Federal Common Law" is one of the classics of American legal scholarship. In part, the speech's classical quality lies in Friendly's identification of an emerging trend in the law, his elaboration of that trend, and the resulting consolidation of that trend in the legal mainstream.

The speech also reflected classicism in its adherence to a conservative legal tradition that can be traced back to Story and Lincoln. Friendly did not share the populist anti-elitism of late twentieth-century conservatives such as Nixon or Reagan. Never an advocate of states' rights, Friendly, like Lincoln and Story before him, unabashedly believed in the use of national power to uphold elite governance and social order despite the emergence of societal equality and upward mobility. Above all, Friendly was no ideologue: He never let his ideas and beliefs obstruct his clarity of vision or the objectivity of his analysis.

The speech reflected these beliefs. On the twenty-fifth anniversary of *Erie Railroad Co. v. Tompkins*,⁸⁴ Friendly's nationalism did not obscure his objective recognition that Brandeis's opinion was both right and necessary. He fully appreciated Brandeis's wisdom in holding *Swift v. Tyson*⁸⁵ wrong in permitting the creation of federal common law within the realm of state legislative competence. At the same time, Friendly comprehended that, in cases like *Clearfield Trust Co. v. United States*,⁸⁶ the Supreme Court had granted federal judges authority to create new federal common law rules as capacious as the legislative power of Congress. Friendly also observed that the new federal common law authorized by *Clearfield*, unlike that of *Swift*,

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⁸⁴ 304 U.S. 64 (1938).

⁸⁵ 41 U.S. (16 Pet.) 1 (1842).

⁸⁶ 318 U.S. 363 (1943).

would be binding by virtue of the Supremacy Clause on state as well as federal judges.

All told, *Erie* and the new federal common law were, in Friendly's view, a cause for celebration. As he wrote:

The complementary concepts—that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed—seem so beautifully simple, and so simply beautiful, that we must wonder why a century and a half were needed to discover them, and must wonder even more why anyone should want to shy away once the discovery was made.⁸⁷

As a result of Friendly's classic scholarship, few over the past thirty-five years have shied away.

EDWARD J. BLOUSTEIN, PRIVACY AS AN ASPECT OF HUMAN
DIGNITY: AN ANSWER TO DEAN PROSSER,
39 N.Y.U. L. REV. 962 (1964)

Samuel Warren and Louis Brandeis, in what may have been "the most influential law review article ever published,"⁸⁸ argued in favor of a general right to privacy,⁸⁹ which Brandeis later would defend in one of the most celebrated Supreme Court dissents ever written as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."⁹⁰ Tort law, however, recognizes not just one tort of the invasion of privacy, but four: intrusion upon seclusion, public disclosure of embarrassing private facts, "false light" publicity, and appropriation of name or likeness.⁹¹ This fourfold classification of the tort law of privacy derives from William Prosser, who proposed it in a classic 1960 article.⁹² For Prosser, these four distinct torts have different historical roots and protect at least three different interests.⁹³ Therefore, on Prosser's view, there is no single "right of privacy" that is recognized as such in the law of torts.⁹⁴

⁸⁷ Henry J. Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 422 (1964).

⁸⁸ Edward J. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. Rev. 962, 971 (1964).

⁸⁹ Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

⁹⁰ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

⁹¹ See Restatement (Second) of Torts §§ 652B-652E (1977).

⁹² William L. Prosser, Privacy, 48 Cal. L. Rev. 383 (1960).

⁹³ See *id.* at 422-23 (identifying interests as reputation, mental tranquility, and intangible property in one's likeness).

⁹⁴ See Bloustein, *supra* note 88, at 971-72.

Edward Bloustein's reply to Dean Prosser remains a landmark exposition of the alternative view that the various torts of invasion of privacy form a single tort, with a "common thread of principle" running throughout.⁹⁵ This unifying factor, according to Bloustein, is that the right to privacy protects human dignity.⁹⁶ While the various torts surrounding this right have grown up in response to the evolving threats posed at different times by the growth of the mass media,⁹⁷ each tort attempts to serve essentially the same interest, an actual right to privacy.

Thus, when courts provide for damages for unwarranted intrusions upon seclusion, they do not intend to compensate for emotional distress but rather to vindicate the moral outrage perceived by an affront to personal dignity.⁹⁸ Likewise, the tort of public disclosure of embarrassing private facts does not arise from the loss of reputation but rather from the insult to individuality, the "damage . . . to an individual's self-respect in being made a public spectacle,"⁹⁹ that modern mass media makes possible.¹⁰⁰ The same is true for publication that portrays a person's character or beliefs in a false light.¹⁰¹ Finally, the unauthorized use of someone's name or image is not simply a monetary loss, but the loss of the very personal right to determine whether to waive one's basic right to privacy for commercial gain.¹⁰²

For Bloustein, the question of whether the torts of invasion of privacy are doctrinally unified is more than a mere academic question. The way courts and academics conceive the interests at stake in these torts will affect the future development of the law,¹⁰³ as well as the values that must be considered by courts in deciding privacy cases.¹⁰⁴ Moreover, while Bloustein wrote his article just before the Supreme Court's controversial recognition of a constitutional right to privacy in *Griswold v. Connecticut*,¹⁰⁵ he was aware of the constitutional implica-

⁹⁵ Id. at 1000.

⁹⁶ See id. at 1003.

⁹⁷ See id. at 984.

⁹⁸ See id. at 1002-03.

⁹⁹ Id. at 981.

¹⁰⁰ See id. at 984.

¹⁰¹ See id. at 991-93.

¹⁰² See id. at 989.

¹⁰³ See id. at 1004.

¹⁰⁴ See id. at 1005 ("If [preserving human dignity and individuality], rather than emotional tranquility, reputation or the monetary value of a name or likeness is involved, courts will be faced by the need to compromise and adjust an entirely different set of values . . .").

¹⁰⁵ 381 U.S. 479 (1965).

tions of the tort theory of privacy and supported its recognition.¹⁰⁶ Ultimately, Bloustein was concerned to stress his agreement with the original thesis of Warren and Brandeis that privacy is not a material value but a spiritual one,¹⁰⁷ that is, that the violation of privacy is an injury "to our dignity as individuals, and [that] the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered."¹⁰⁸

ROBERT A. LEFLAR, CHOICE-INFLUENCING CONSIDERATIONS IN
CONFLICT LAW, 41 N.Y.U. L. REV. 267 (1966)

*Andreas F. Lowenfeld**

Robert Leflar's article appeared at a pivotal time in what came to be known as the Conflicts Revolution in choice-of-law jurisprudence. Brainerd Currie had published his collected essays advocating governmental interest analysis,¹⁰⁹ David Cavers had published his lectures advocating principles of preference,¹¹⁰ the second Restatement reflecting Reese's emphasis on contacts was nearing completion,¹¹¹ and the New York Court of Appeals was well on its way in the extraordinary series of choice-of-law cases beginning with *Kilberg v. Northeast Airlines*¹¹² and *Babcock v. Jackson*.¹¹³

For Leflar, the various theories were too sophisticated and lacked candor. Why not "tell it like it is"? Having been a judge as well as an academic, he could do so more openly than the professors who needed theories. But even Leflar listed five choice-influencing considerations,¹¹⁴ though he is remembered only for the fifth one, application of the better rule of law. Search for the better law might lead courts to apply the law they knew and loved—i.e., the law of the forum—but would not always. "Judges can appreciate as well as can

¹⁰⁶ See Bloustein, *supra* note 88, at 994-95 (discussing constitutional dimensions of privacy); *id.* at 1001 n.222 (citing with approval *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting)). Justice Harlan's dissent in *Poe* formed the basis of the Court's opinion in *Griswold* and the subsequent line of cases recognizing a constitutional right to privacy. See *Griswold*, 381 U.S. at 484 (majority opinion); *id.* at 495, 499 (Goldberg, J., concurring); *id.* at 500 (Harlan, J., concurring); *id.* at 506 (White, J., concurring).

¹⁰⁷ See Warren & Brandeis, *supra* note 89, at 196.

¹⁰⁸ Bloustein, *supra* note 88, at 1003.

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¹⁰⁹ Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963).

¹¹⁰ David F. Cavers, *The Choice-of-Law Process* (1965).

¹¹¹ Restatement (Second) of Conflict of Laws (1969).

¹¹² 172 N.E.2d 526 (N.Y. 1961).

¹¹³ 191 N.E.2d 279 (N.Y. 1963).

¹¹⁴ See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267, 282 (1966).

anyone," he wrote, "the fact that their forum law in some cases is anachronistic, behind the times, a drag on the coat tails of civilization."¹¹⁵ "A court sufficiently aware of the relation between law and societal needs . . . will seldom be restrained in its choice by the fact that the outmoded rule happens still to prevail in its own state."¹¹⁶

A number of courts relied on Leflar, and particularly on the instant article, in order to justify their own decisions in favor of such choices as nonapplication of guest statutes in suits arising out of motor vehicle accidents or damages ceilings in airplane accidents.¹¹⁷ On these issues, both the national trend and simple justice make it easy to discern which is the better law. But making that decision is, I think, more difficult when one sees modern countertrends, for instance the requirement of peer review prior to bringing a medical malpractice suit, or indeed the introduction of no-fault insurance in place of jury trials for certain types of personal injury claims. But Leflar's plea for candor and open acknowledgement of manipulation remain fresh four decades later, and the *New York University Law Review* can be proud of having published this article.

WALTER V. SCHAEFER, THE CONTROL OF "SUNBURSTS":
TECHNIQUES OF PROSPECTIVE OVERRULING,
42 N.Y.U. L. REV. 631 (1967)

*David L. Shapiro**

Any reasonably informed person undoubtedly would list Walter Schaefer as one of the outstanding state court judges—indeed, one of the outstanding judges on any court—during the last century. The reason lies not only in his wise and progressive leadership of the Illinois Supreme Court, but also in his thoughtful essays on issues of theoretical and practical importance. And his essay on prospective overruling ranks among the best.

Framed as a tribute to Benjamin Cardozo, another great judge of the century, this relatively short essay—written when a law review article did not have to be book-length to get the attention it deserved—in fact built on Cardozo's thoughts and helped chart a course for the future. Schaefer began by developing Cardozo's idea that courts should be more willing to consider whether a change in the law an-

¹¹⁵ Id. at 299 (internal quotation marks and footnotes omitted).

¹¹⁶ Id. at 300.

¹¹⁷ For a detailed discussion, see Symposium, Robert A. Leflar: Symposium on Conflict of Laws, 52 Ark. L. Rev. 1 (1999).

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nounced not by a legislature but by judicial decision should depart from the accepted norm—should in appropriate cases make a new rule “prospective” only, in light of the purposes of the change and the interests affected.¹¹⁸ Cardozo, he noted, lived long enough that, during his brief service on the U.S. Supreme Court, he was able, in his opinion for the Court in *Great Northern Railway v. Sunburst Oil & Refining Co.*,¹¹⁹ to affirm the authority of a state court to “make a choice for itself between the principle of forward operation and that of relation backward.”¹²⁰

Schaefer went on to enumerate justifiable instances of “prospective” judicial action;¹²¹ to reject as “not substantial” the objections raised to the technique;¹²² to suggest that application of a newly declared rule to the litigants in the case at hand (rather than just a declaration that it is likely to follow in some future case) had the advantages of making the change more than just a possibility and of rewarding the litigant who had successfully fought for it;¹²³ and to contend that the most critical factor in the choice was the impact of the newly declared rule on action taken in reliance on prior law.¹²⁴ In view of this last point, he concluded, the critical time from which to measure prospectivity was “the moment of reliance.”¹²⁵

Schaefer’s essay, which probes a basic question of the nature of law, shines with the bright light of an awareness of practical needs and consequences. Law, even law “declared” by judges, is inevitably (and desirably) dynamic, and that quality should be considered in determining what the impact of a change should be. That courts ordinarily articulate rules applicable to all cases not yet final (and even to some that may be reopened) is taken as a given—as an important aspect of the judicial process and a reasonable restraint on the tendency of judges (who are only human) to want to leave their mark by remaking the rules as they “ought” to be. But the norm is not an absolute. Occasionally, it should yield to the need to protect the interests of the public and of the individuals affected by the change.

A generation of courts, including the nation’s highest Court, has profited from the thoughts of Cardozo and Schaefer. In recent years, however, a majority of the Supreme Court has tied itself into a formal-

¹¹⁸ See Walter V. Schaefer, *The Control of “Sunbursts”: Techniques of Prospective Overruling*, 42 N.Y.U. L. Rev. 631, 633-34 (1967).

¹¹⁹ 287 U.S. 358 (1932).

¹²⁰ *Id.* at 364.

¹²¹ See Schaefer, *supra* note 118, at 636-37.

¹²² See *id.* at 637.

¹²³ See *id.* at 638.

¹²⁴ See *id.* at 642-43.

¹²⁵ *Id.* at 646.

ist knot and disavowed the notion that a new rule of federal law may be applied to the case at hand (or perhaps declared only prospectively), but not to all other cases that have yet to be disposed of by final judgment.¹²⁶ And the Court also appears to reject the power of the thesis that the problem conceptually may be viewed not as one of applying the "new" rule or the "old," but rather as one of the choice of appropriate remedies in light of the purposes of the rule and the interests affected.¹²⁷

Yet *Sunburst* is still good law (knock on wood): The states remain free to follow their own bent with respect to questions of state law. And among the scores of citations of Schaefer's article to be found in *Shepard's*, one of the most recent is in a unanimous opinion of the New Mexico Supreme Court, rejecting the formalism of the U.S. Supreme Court and analyzing with meticulous care the appropriateness of applying a newly declared rule to conduct occurring before the change was announced.¹²⁸

Thus, the insights of Justice Schaefer in his fine article have survived, and, though they have taken some knocks here and there, will, I am sure, continue to serve the cause of a fair and effective system of justice. Fortunately, such insights almost always do.

ANTHONY G. AMSTERDAM, THE SUPREME COURT AND THE
RIGHTS OF SUSPECTS IN CRIMINAL CASES,
45 N.Y.U. L. REV. 785 (1970)

The conventional wisdom, both in 1970 when Anthony Amsterdam wrote this article and today, is that the decisions of the Warren Court during the 1960s significantly expanded the rights of persons suspected of crimes in the United States. In fact, Professor Amsterdam suggested that the Court had "created more the possibility of rights (and the appearance of rights) than actual rights," and offered a "lugubrious prognosis" for the future development of suspects' rights by an increasingly conservative Court.¹²⁹ The remarkable accuracy with which he predicted the course of the Court's criminal procedure doctrine over the past thirty years renders his reasoning and analysis fresh and relevant even today.

¹²⁶ See, e.g., *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

¹²⁷ This thesis, developed in Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1733, 1789-91 (1991), was given short shrift in *Reynoldsville Casket*, 514 U.S. at 753.

¹²⁸ *Beavers v. Johnson Controls World Servs., Inc.*, 881 P.2d 1376, 1377 n.1 (N.M. 1994).

¹²⁹ Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. Rev. 785, 802-03 (1970).

As Amsterdam noted, the power of the Supreme Court to supervise the daily practices of local police departments is quite limited.¹³⁰ Many of these practices simply never become the subject of a lawsuit, either because those whose rights have been violated are usually unwilling to mount a direct legal challenge,¹³¹ or because their cases end up, as do most criminal matters, with a guilty plea.¹³² Factual issues, such as whether the defendant tripped when entering a cell or was hit on the head by a police officer, are made by factfinders who are largely predisposed to find police testimony credible and whose decisions generally are not reviewable.¹³³ Moreover, the lack of formal rules and other mechanisms of administrative oversight governing police behavior makes it impossible for the Court to understand the broader policy framework in which it acts or to predict accurately how its decisions will affect real-world police behavior.¹³⁴

But the particular form of the Warren Court's suspects' rights decisions also led Amsterdam to worry, largely correctly as later events would demonstrate, that the decisions would prove relatively easy to roll back.¹³⁵ While the Court had extended the safeguards of the Bill of Rights to apply to the states, in such celebrated cases as *Mapp v. Ohio*¹³⁶ and *Gideon v. Wainwright*,¹³⁷ the content of those rights was not similarly broadened at all.¹³⁸ Indeed, the Court defined most of these protections flexibly and pragmatically, and Amsterdam foresaw (in the early days of the Burger Court) that the decisions easily could be interpreted narrowly by a more conservative Court.¹³⁹ Moreover, by suggesting that Congress and state legislatures step into the breach and begin to regulate police conduct more directly, the Court seemed to invite legislative overruling of its criminal procedure decisions.¹⁴⁰ The *Miranda* decision,¹⁴¹ for example, suggested that a statute could provide a legitimate alternative to the procedures required by the

¹³⁰ See id. at 786.

¹³¹ See id. at 787.

¹³² See id. at 789.

¹³³ See id. at 789-90.

¹³⁴ See id. at 791.

¹³⁵ See id. at 794.

¹³⁶ 367 U.S. 643 (1961) (incorporating at state level Fourth Amendment exclusionary rule).

¹³⁷ 372 U.S. 335 (1963) (incorporating at state level Sixth Amendment right to counsel).

¹³⁸ See Amsterdam, *supra* note 129, at 797 (concluding that "a broad survey of the Supreme Court's decisions giving content to the criminal procedure guarantees of the Constitution during the past decade discloses nothing resembling the popularly supposed 'Mad March to Liberalism'").

¹³⁹ See id. at 799-803.

¹⁴⁰ See id. at 802-03.

¹⁴¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Court.¹⁴² While Amsterdam suggested that the specific congressional attempt to overturn *Miranda*¹⁴³ was of dubious constitutionality¹⁴⁴—a position that the Court accepted just this past Term¹⁴⁵—other restrictive statutes well might pass constitutional muster, and in any case the expression of the legislative “mood” made progress beyond the skeletal rights embodied in decisions like *Miranda* unlikely.¹⁴⁶

If the institutional and doctrinal limits of Supreme Court control over the administration of justice are so limited, Amsterdam concluded, the best hope for constraining police discretion and enforcing rights lies in local attempts to control police practices by formal rules.¹⁴⁷ Local citizens, especially minority groups particularly subject to abuse of rights, as well as courts, can play a role in developing and enforcing effective administrative regulations, perhaps even through citizen lawsuits.¹⁴⁸ While the tension Amsterdam describes between *ex ante* general administrative oversight and *ex post*, case-specific judicial review to control police behavior continues to be a matter of major discussion,¹⁴⁹ his article has not only shaped the debate, but is of continuing relevance in understanding the issues at stake.

HOMER KRIPKE, THE SEC, THE ACCOUNTANTS, SOME MYTHS AND SOME REALITIES, 45 N.Y.U. L. REV. 1151 (1970)

*John J. Slain**

Nobody now would be likely to read in any systematic way securities law scholarship before 1970, that is to say, before “The SEC, the Accountants, Some Myths and Some Realities.” The first thirty-five years of securities literature addressed questions of interpretation of the statutes and the implementing rules of the Securities and Exchange Commission (Commission); with rare exceptions, those writing

¹⁴² See Amsterdam, *supra* note 129, at 802 (stating that *Miranda* requires procedures for taking suspects’ confessions “‘unless other fully effective means are devised to inform accused persons of their right of silence’” (quoting *Miranda*, 384 U.S. at 444)).

¹⁴³ See Omnibus Crime Control and Safe Streets Act of 1968, § 701, Pub. L. No. 90-351, 82 Stat. 197, 210-11 (codified as amended at 18 U.S.C. § 3501 (1994)) (setting forth procedures to govern use of confessions in federal cases).

¹⁴⁴ See Amsterdam, *supra* note 129, at 810.

¹⁴⁵ See *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (holding § 3501 unconstitutional).

¹⁴⁶ See Amsterdam, *supra* note 129, at 810.

¹⁴⁷ See *id.* at 810, 812-13.

¹⁴⁸ See *id.* at 812-14.

¹⁴⁹ See, e.g., Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, 74 N.Y.U. L. Rev. 956, 998-1012 (1999) (proposing legal doctrinal reform and reform of police culture as solutions to racial profiling problems).

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in that era accepted uncritically the premises of the statutory scheme and the assumptions underlying the Commission's administrative regimen.¹⁵⁰

Homer Kripke's 1970 article essentially begins the modern era of securities law study. Structurally it owes more to Martin Luther than to the usual form of law review scholarship; it is not a sustained argument on a single topic, but a series of propositions asserted for the stated purpose of beginning research and debate. The range is from somewhat controversial to extremely so. The first thesis nailed to the door was the most contentious. A combination of circumstances, including the liability structure of the 1933 Securities Act and the policy of the Commission, had combined to make the statutory 1933 prospectus a company-limited document containing only historical information. The Commission's assumption was that such documents were the usual basis for investment decision and that investors should be told nothing in them not susceptible of objective proof. Kripke's observation that "[i]t has taken the Commission over thirty-five years to reach the point where disclosure has a long history of tradition and a result of near uselessness"¹⁵¹ was about as inflammatory in its context as anything Luther said about indulgences.

Kripke's argument was that the Commission's conclusions on investor information needs were based on unrealistic assumptions as to how people buy securities. People, he asserted, do not usually read disclosure documents; instead they act on advice that derives mediately or directly from securities analysts. The analysts, Kripke posited, were the real market for disclosure. Therefore, the Commission's focus should be on the disclosures that the analysts needed to do their job. Analysts were interested in the future, not the past; a relevant guess was of more use to them than irrelevant exactitude. This would suggest a refocus of disclosure on predictive, judgmental, and similar "soft" information.

The second main thesis in "Some Myths," from which many others follow, is that the Commission had taken an inadequately active role in accounting, the most important part of disclosure. The Commission's undoubted power to establish accounting rules for reporting companies had been delegated, in effect, to the accounting

¹⁵⁰ The principal exceptions are cited in Homer Kripke, *The SEC, the Accountants, Some Myths and Some Realities*, 45 N.Y.U. L. Rev. 1151, 1152 nn.2-3 (1970). Notable among them is Milton Cohen's sensible and original observation that the 1934 Securities Exchange Act continuous reporting system is of greater general importance than 1933 Securities Act registration. See Milton H. Cohen, "Truth in Securities" Revisited, 79 Harv. L. Rev. 1340 (1966).

¹⁵¹ Kripke, *supra* note 150, at 1201.

profession's own Accounting Principles Board (APB), and "Some Myths" both challenged the delegation and challenged the independence of the APB. "Some Myths" also challenged much of the APB's work; coming hard on the heels of the APB's most important announcement, Opinion 16 (dealing with acquisition accounting), it argued that the opinion was fatally flawed because it lacked any coherent underlying idea.¹⁵²

Still more fundamentally, Kripke challenged the cost basis of modern accounting, arguing for a value-based system. It now seems to be generally forgotten that, in the 1930s, American accounting was balanced finely between cost and value and that it was the Commission, in one of its rare direct interventions, which decided the issue in favor of cost. It was, Kripke wrote, a mistaken judgment that should be reversed.¹⁵³

It is hardly surprising that "Some Myths" has remained alive. To summarize the issues raised in this 1970 article is largely to describe the agenda for securities law and accounting scholarship for the next thirty years. Some of the questions are now settled. The Commission no longer bars forward-looking and other "soft" information in issuer filings. Over the years it moved, first to permitting inclusion of some such information, and then to requiring it as Management Discussion and Analysis. The APB gave way in 1973 to the Financial Accounting Standards Board, which met the article's requirements both for independence and for a commitment to empirical research. The issue of cost or value is still unresolved, but there continues to be major movement in Kripke's direction. While Opinion 16 lasted for thirty years, not without constant controversy, it seems about to disappear for a replacement closer to the views set out in "Some Myths."

In short, with a single exception, Homer Kripke's opinions set forth in "Some Myths" either have prevailed outright or are now being considered seriously on the issues still not resolved. The exception is the proposal that the Commission directly set accounting standards; there appears to be no constituency, in government or out, supporting this. On each of the many other issues raised in "Some Myths,"

¹⁵² It is still uncommon and was then rare for a law review article to discuss technical accounting issues. Accounting, Homer often said (paraphrasing Georges Clemenceau), is too important to be left to the accountants.

¹⁵³ Unmentioned in the article was the fact that Kripke himself, as Assistant Solicitor of the Commission, played a major role in bringing the Commission down on the side of cost. See Homer Kripke, *Accountants' Financial Statements and Fact-Finding in the Law of Corporate Regulation*, 50 *Yale L.J.* 1180, 1194-97 (1941). In later years Homer often said that he felt destined to spend the rest of his life correcting this mistake.

Homer either has won outright or is now winning. It is a remarkable impact for a fifty-four page article.

THEODORE EISENBERG, DISPROPORTIONATE IMPACT AND ILLICIT
MOTIVE: THEORIES OF CONSTITUTIONAL ADJUDICATION,
52 N.Y.U. L. REV. 36 (1977)

When does the uneven impact of a facially neutral official act on a particular racial, religious, or other minority group render the act unconstitutional? When should a reviewing court consider the motive behind a legislative or executive action? Is there any relationship between these two inquiries? Writing in the aftermath of two landmark Supreme Court cases holding that disproportionate impact is constitutionally relevant only when accompanied by an illicit motive,¹⁵⁴ Theodore Eisenberg criticized the Court's decisions and set forth a new theory to address these perennial questions of constitutional law.

Eisenberg framed his response to the Court by placing his argument in the context of two important academic responses to these questions, each of which he also criticized. John Hart Ely had proposed a limited role for judicial inquiry into the legislative and executive intent: Acts that treat some people differently from others on some rational basis should be unreviewable, but actions that ought to be random by nature (e.g., jury selection or the drawing of electoral districts) could be invalidated if inspired by illicit motives.¹⁵⁵ Eisenberg criticized Ely's approach, which he considered so narrow that it would fail to reach many actual cases of discriminatory intent.¹⁵⁶ Paul Brest, by contrast, had advocated a more expansive role for judicial review, not only of enactments based on racist or other improper motivation,¹⁵⁷ but also actions that would not have had a disproportionate impact on individuals "but for" factors such as race, even in the absence of present, conscious discrimination.¹⁵⁸ For Eisenberg, Brest's theory was flawed because it was difficult to extend beyond cases of racial discrimination without opening the door to the

¹⁵⁴ *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁵⁵ See John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *Yale L.J.* 1205, 1228-30 (1970).

¹⁵⁶ See Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 *N.Y.U. L. Rev.* 36, 124 (1977).

¹⁵⁷ See Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 *Sup. Ct. Rev.* 95, 130-31.

¹⁵⁸ See Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 *Harv. L. Rev.* 1, 28 (1976).

kind of wide-ranging judicial review of legislative intent that characterized the pre-1937 Court.¹⁵⁹

The article proposes a middle way between Ely's and Brest's theories that, Eisenberg hoped, also would permit a more expansive judicial review of discriminatory state action than that expressed in the Court's decisions. Borrowing a concept from tort law, Eisenberg suggested that heightened judicial scrutiny is appropriate when a suspect characteristic is the proximate cause of the disproportionate impact.¹⁶⁰ The propriety of judicial review of legislative or executive motive, Eisenberg argued, should not be triggered by the uneven effects of an action, but by the action's subject matter: Inquiry into motive is relevant when rights of equality are at stake, but not in other cases, such as those involving the scope of governmental power or free expression, unless they in fact raise issues of equality rights.¹⁶¹

Eisenberg's concrete proposals have had little, if any, direct effect on the development of impact and motive analysis in the courts. However, the Court itself has not found its way to a coherent theory in its jurisprudence surrounding impact and motive. Although in some cases, the Court has been willing to consider at least some disproportionate impact cases without reference to legislative motive,¹⁶² the cases Eisenberg criticized have not been overruled. Despite the Court's continued confusion in this area, the sheer breadth of Eisenberg's analysis, applying his proposals to cases involving the Equal Protection, Free Exercise, Establishment, and Free Expression Clauses, has guaranteed a continued hearing for this article among all who continue to grapple with the fundamental constitutional issues it addresses.

LINDA J. SILBERMAN, *SHAFFER v. HEITNER: THE END OF AN ERA*,
53 N.Y.U. L. REV. 33 (1978)

*Alan B. Morrison**

Among the many ways to evaluate a law review article, I have chosen to focus on two predictions that Linda Silberman made and to conclude with an observation on the resilience of law and lawyers in

¹⁵⁹ See Eisenberg, *supra* note 156, at 131.

¹⁶⁰ See *id.* at 57.

¹⁶¹ See *id.* at 132-46.

¹⁶² See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 126-27 (1996) (holding that *Washington v. Davis*, 426 U.S. 229 (1976), does not bar finding unconstitutionally disproportionate impact on poor persons).

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adapting to change, even one as momentous as "*Shaffer v. Heitner*: The End of an Era."

In her essay, Silberman expressed concern that the Court had tied jurisdiction too closely to choice of law,¹⁶³ and that the latter issue might be brushed aside once jurisdiction was found.¹⁶⁴ But just a few years later, her fears were allayed in *Phillips Petroleum Corp. v. Shutts*,¹⁶⁵ when the Court upheld the right of Kansas to conduct a national damages class action, provided class members received notice and had an opportunity to exclude themselves from the class,¹⁶⁶ but then rejected the efforts to apply Kansas law to the entire class that had no connection to Kansas, save for the fact that a few class members resided there.¹⁶⁷ In language that overrode Silberman's fears, while adopting her substantive concerns about misuse of jurisdiction to alter rights, the Court observed that states "may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law."¹⁶⁸ It further emphasized that the issues are "entirely distinct" and that the "large number of transactions" does not alter the calculus on permissible choices of law.¹⁶⁹ Of course, no one, even with the highest magnitude crystal ball, could have predicted how important that ruling would be when the Court was faced with an attempt to certify a nationwide class of present and future asbestos victims a decade later in *Amchem Products v. Windsor*.¹⁷⁰

Second, the validity of the ruling of the New York Court of Appeals in *Seider v. Roth*¹⁷¹ was called into question by *Shaffer*, but Silberman predicted, based on a post-*Shaffer* decision of the Second Circuit authored by Judge Henry Friendly,¹⁷² that *Seider* would survive.¹⁷³ It sounded like a good bet, but not if one read *Shaffer* as a fairness case rather than one about only one kind of property.

With more than twenty years hindsight, the concern that *Shaffer* would make it harder to obtain personal jurisdiction seems overblown. Legislatures, courts, and lawyers have responded, as they long

¹⁶³ See Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. Rev. 33, 99 (1978).

¹⁶⁴ See *id.* at 82-83.

¹⁶⁵ 472 U.S. 797 (1985).

¹⁶⁶ See *id.* at 814.

¹⁶⁷ See *id.* at 821-22.

¹⁶⁸ *Id.* at 821.

¹⁶⁹ *Id.*

¹⁷⁰ 521 U.S. 591 (1997).

¹⁷¹ 216 N.E.2d 312 (N.Y. 1966).

¹⁷² *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir. 1978).

¹⁷³ See Silberman, *supra* note 163, at 100.

have in our common law tradition, to changed circumstances (and decisions) by finding new ways to accomplish old ends. After all, most of us still think that it is constitutional for states to make officers and directors of companies incorporated there subject to suits over their corporate duties in that forum, even if they cannot use the fiction of stock ownership to accomplish that end. And if *Shaffer* created new barriers to obtaining jurisdiction, one would have thought that nationwide classes never would have been possible, but we know that is not the case.

To be sure, an era of teaching personal jurisdiction ended when *Shaffer* was decided, but no one should confuse the plight of civil procedure teachers with real changes in the law, affecting real people in real lawsuits. However it may have seemed at the time, *Shaffer* has not produced the sea change that some predicted, although it has made its share of waves along the way.

HENRY P. MONAGHAN, OUR PERFECT CONSTITUTION,
56 N.Y.U. L. REV. 353 (1981)

*Christopher L. Eisgruber**

Henry Monaghan's "Our Perfect Constitution" appeared during a period of deepening debate about how to justify judicial review. Provoked by John Hart Ely's "process-perfecting" theory of judicial review, some theorists elaborated ambitious justifications for judicial protection of rights not specifically mentioned in the Constitution. Monaghan criticized these projects with such rhetorical force that his article achieved iconic status. Nowadays, to say "Our Perfect Constitution" is to evoke the idea that some constitutional theory is concerned too much with political ideals and not enough with dirty details of text, history, and precedent.

Monaghan's article accused scholars of treating the Constitution as though it were "perfect in one central respect: [P]roperly construed, the constitution guarantees against the political order most equality and autonomy values which the commentators think a twentieth century Western liberal democratic government ought to guarantee to its citizens."¹⁷⁴ Monaghan rejected that view: "The ideology contained in the constitution is significantly less embracing in scope

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¹⁷⁴ Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 358 (1981) (emphasis omitted).

than the ideology of the American way of life at the end of the twentieth century.”¹⁷⁵

The article’s success is partly attributable to Monaghan’s powerful elaboration of originalist premises. Perhaps more important, though, is the article’s tone of “lawyerly tough-mindedness.” Monaghan chastised starry-eyed theorists who confused hard law with soft intuitions about social justice. The article has come to epitomize what one might call the “No Pain, No Claim” approach to constitutional theory, which supposes that if a constitutional theory produces no unjust results (and so causes “no pain”), then the theory is utopian—and hence has “no claim” to be faithful to the actual Constitution.

It is curious that this ascetic stance so appeals to American lawyers. Nobody doubts that the Constitution is imperfect—indeed, it contains some specific and obnoxious provisions, such as the one that prohibits foreign-born citizens from becoming President. But when reading the Constitution’s abstract, flexible language, isn’t it sensible to construe that language so as to make the imperfect Constitution as good as possible? In fact, whether they admit it or not, virtually all judges and scholars do just that. Monaghan’s article was no exception. Monaghan favored a constitution that left most judgments of political morality to the legislature, and his article interpreted the American Constitution to produce, as nearly as possible, his perfect constitution.

RONALD DWORKIN, THE FORUM OF PRINCIPLE,
56 N.Y.U. L. REV. 469 (1981)

This article, like that of Professor Monaghan, was presented as a paper at a *Law Review* symposium in March 1981 on the subject of constitutional adjudication and democratic theory.¹⁷⁶ As Ronald Dworkin remarked, “an extraordinary amount of talent” has tried to reconcile the institution of judicial review with majoritarian democracy,¹⁷⁷ but the results have been unevenly successful. While John Hart Ely, whose classic *Democracy and Distrust* had just been published,¹⁷⁸ argued that the judiciary should not make substantive policy decisions, Dworkin asserted that there is no apolitical way to decide constitutional cases.¹⁷⁹

¹⁷⁵ Id. at 396.

¹⁷⁶ Symposium, Constitutional Adjudication and Democratic Theory, 56 N.Y.U. L. Rev. 259 (1981).

¹⁷⁷ Ronald Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469, 516 (1981).

¹⁷⁸ John Hart Ely, *Democracy and Distrust* (1980).

¹⁷⁹ See Dworkin, *supra* note 177, at 470.

The bulk of Dworkin's argument consisted of dismissing the two main principles advanced to avoid substantive judicial decisionmaking: original intent and procedural due process. The process of determining the "intent of the Framers" on any particular question, Dworkin argued, is dependent on a host of substantive assumptions. Who exactly counts as a "Framer"?¹⁸⁰ If a Framer's substantive policy preference and his personal belief about the meaning of some constitutional provision conflict, which counts as the original "intent"?¹⁸¹ Most importantly, is the original intent to be identified with the Framers' concrete historical understanding of terms like "due process" or "cruel and unusual punishment," or with their more abstract understanding of such terms whose concrete meanings vary over time?¹⁸² This last question in particular, according to Dworkin, cannot be answered by reference to original intent;¹⁸³ the original intent cannot be determined without making value-laden choices about what kinds of intentions count.

The limitation of judicial review to matters of process and procedure rather than substance, as proposed by Ely,¹⁸⁴ is also ultimately impossible to carry out fully. Ely himself, Dworkin argues, is unwilling to hold that invidious racial discrimination can be made acceptable by a majoritarian, democratic decision, and Ely accepts Justice Stone's *Carolene Products*¹⁸⁵ formulation of the Court's role in protecting minority rights as well as policing democratic procedures.¹⁸⁶ But, Dworkin says, this concern for minority rights is "procedural" only if the theory itself establishes which rights the Court is to enforce.¹⁸⁷

Rather than embrace "the flights from substance through the routes of intention and process,"¹⁸⁸ Dworkin holds that the Court cannot avoid the substantive questions of deciding which rights the Constitution protects.¹⁸⁹ In the end, what distinguishes judicial review from pure legislation in Dworkin's view is that the Court must make its decisions on principle rather than on particular conceptions of the

¹⁸⁰ See *id.* at 482-83.

¹⁸¹ See *id.* at 483-85.

¹⁸² See *id.* at 488-93.

¹⁸³ See *id.* at 497 ("[T]he question of which of their intentions should count cannot itself be referred to their intentions.").

¹⁸⁴ See *id.* at 502 ("Ely insists that the proper role of the Supreme Court is to police the processes of democracy, not to review the substantive decisions made through those processes.").

¹⁸⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁸⁶ See Dworkin, *supra* note 177, at 512.

¹⁸⁷ See *id.*

¹⁸⁸ *Id.* at 499.

¹⁸⁹ See *id.* at 516.

general welfare.¹⁹⁰ Judicial review acts as a constraint on the political process by ensuring that the political debate includes arguments about principle.¹⁹¹ Of course, Dworkin's distinction between principle and mere politics is as difficult to make in practice as is the distinction between intention and interpretation, or the distinction between procedure and substance.¹⁹² Nonetheless, Dworkin insists, the existence of "an institution that calls some issues from the battleground of power politics to the forum of principle" supports a hope that "the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice."¹⁹³

GARY GOODPASTER, THE TRIAL FOR LIFE: EFFECTIVE ASSISTANCE
OF COUNSEL IN DEATH PENALTY CASES,
58 N.Y.U. L. REV. 299 (1983)

*Martin Guggenheim**

When the Supreme Court reinstated the death penalty as a permissible sanction in 1976, it radically rewrote both the procedural and the substantive rules of death penalty law.¹⁹⁴ By creating a constitutionally significant distinction between the adjudicatory and penalty phases, and by requiring particular findings of fact as preconditions to invoking the death penalty, the Court transformed the landscape for criminal litigation.

Gary Goodpaster's 1983 article, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,"¹⁹⁵ was one of the first in the field to grasp the significance of these changes. The article is particularly noteworthy because it goes well beyond the traditional law review piece that synthesizes and analyzes doctrine. Goodpaster was chiefly concerned with the impact on practitioners that the new death penalty jurisprudence had wrought. For new teachers or scholars pondering what kind of scholarship to produce, Goodpaster's work serves as an exemplar of scholarship-in-action.

The article successfully accomplished four things. First, it examined and blended a highly complex set of recent Supreme Court

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 517.

¹⁹² See, e.g., H.L.A. Hart, *The Concept of Law* 203-05 (2d ed. 1994).

¹⁹³ Dworkin, *supra* note 177, at 518.

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¹⁹⁴ See *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁹⁵ 58 N.Y.U. L. Rev. 299 (1983).

cases. Second, it advanced the law by demonstrating how the important differences between the sentencing phase in ordinary criminal cases and that in capital cases should yield new obligations for defense counsel in capital cases. Third, it provided an important blueprint for judges when called upon to examine claims of ineffective assistance of counsel in death cases. Finally, it instructed lawyers representing defendants in death cases how to represent their clients effectively in the sentencing phase of the proceeding. It is no mean feat to write an accomplished article that addresses scholars, judges, and lawyers. Goodpaster admirably achieved this.

The quality of the article that I consider the most challenging and successful is the exploration of the role of counsel. Goodpaster delved deeply into the role and suggested a framework for integrating a strategic plan for the guilt and sentencing phase, investigating and preparing for the sentencing phase, and presenting evidence in the sentencing phase. Goodpaster's article long has served as a guidepost for lawyers committed to the highest professional standards of practice.

Goodpaster also insisted that faithful adherence to Supreme Court principles designed to ensure that death be imposed only upon truly deserving persons should mean that courts must examine rigorously defense counsel's efforts and void death sentences when counsel failed to take steps that would expectably reduce the risk of a death sentence being imposed. If an article's success were measured by the degree to which its recommendations have been implemented (either in terms of being adopted by courts or faithfully followed by practitioners), then Goodpaster's work hardly could be considered an unmitigated success. Only one year after its publication, the Supreme Court decided *Strickland v. Washington*,¹⁹⁶ which held that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation."¹⁹⁷ In the wake of *Strickland*, defendants have been sentenced to death without offending the Constitution even though their lawyers slept during their trial.¹⁹⁸

On the other hand, Goodpaster's views were partially vindicated in the most recent Supreme Court Term in *Williams v. Taylor*,¹⁹⁹ which held that defendants are denied their constitutionally guaranteed right to effective assistance of counsel when their attorneys fail to

¹⁹⁶ 466 U.S. 668 (1984).

¹⁹⁷ *Id.* at 689.

¹⁹⁸ See Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835, 1843 n.53 (1994).

¹⁹⁹ 120 S. Ct. 1495 (2000).

investigate and present substantial mitigating evidence during the sentencing phase of a capital murder trial. This is very good news for those committed to ensuring that the complete story of a capital defendant's life be presented to the jury considering whether he or she should live or die.

DAVID L. SHAPIRO, JURISDICTION AND DISCRETION
60 N.Y.U. L. REV. 543 (1985)

*Barry Friedman**

Sometimes it is enough to state the obvious, especially in the face of a dogged refusal on the part of others to see it. And sometimes the obvious can be stated with such clarity and good sense that people come to accept it for what it is. Such is the case with David Shapiro's "Jurisdiction and Discretion," only fifteen years old and already a classic.

The critics of judicial discretion have been fierce, their rhetoric strident. Abstention doctrines were attacked, justiciability doctrine ridiculed. The argument against discretion rested in the seemingly narcotic simplicity of "separation of powers":²⁰⁰ Congress was charged with creating the jurisdiction, the courts with exercising it consistent with Congress' commands. The great Marshall himself had said: "'We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution.'"²⁰¹

In the heat of this debate appeared the calm, thoughtful reason of David Shapiro. Shapiro surveyed the field in meticulous detail and overwhelmed his reader with the obvious: Discretion exists everywhere! Surely one cannot be serious in arguing that so many well-established doctrines must give way.

From example Shapiro turned to justification, distinguishing between the appropriate exercise of "principled discretion,"²⁰² and ad hoc discretion, of which we must beware. According to Shapiro, "principled discretion" is guided by factors such as "equitable discretion,"²⁰³ "federalism and comity,"²⁰⁴ "separation of powers,"²⁰⁵ and

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²⁰⁰ David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 544 (1985) (citing Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71 (1984)).

²⁰¹ Id. at 543 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

²⁰² Id. at 578.

²⁰³ Id. at 579.

²⁰⁴ Id. at 580.

"judicial administration."²⁰⁶ These are indeed the appropriate criteria, although no one looking for meaningful constraint on judicial power can hope to find it in these four vast oceans of discretion.

Nonetheless, Shapiro clearly was correct that functionally this is a discretion courts cannot escape seriously. The grants of jurisdiction by Congress are simply too broad, the factors suggesting that courts not exercise jurisdiction too particularistic, and the expertise at weighing those factors much too judicial in nature to deny this power to courts. Power it is, but in the end Shapiro's moderate tone and logic persuade us: The exercise of discretion is inevitable and appropriate.

Shapiro's article has been cited approvingly six times by the Supreme Court, by the vast majority of circuit courts, and in over one hundred fifty law review articles. Many others have toiled in the same fields as Shapiro with far less acknowledgment. In the end it is Shapiro's good common sense, his talent for forcing us to see the obvious, and the inescapability of his argument that caused courts and colleagues alike to award this article a place in the pantheon.

WILLIAM J. BRENNAN, JR., *THE BILL OF RIGHTS AND THE STATES: THE REVIVAL OF STATE CONSTITUTIONS AS GUARDIANS OF INDIVIDUAL RIGHTS*, 61 N.Y.U. L. REV. 535 (1986)

*Helen Hershkoff**

A decade before the end of his life, Justice Brennan looked back at the Court's civil liberties decisions and at the work that remained to achieve "equal justice for all members of our society."²⁰⁷ "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights," delivered in 1986 as the nineteenth James Madison Lecture on Constitutional Law at the New York University School of Law, summarizes Justice Brennan's thinking on the role of courts and constitutions—both federal and state—in protecting individual liberty against government abuse and concentrated power.

The 1986 Madison Lecture forms a piece with writings that Justice Brennan began in 1961 with the delivery of the second James Madison Lecture, "The Bill of Rights and the States,"²⁰⁸ and carried forward in 1977 with his Meiklejohn Lecture at the Harvard Law

²⁰⁵ Id. at 585.

²⁰⁶ Id. at 587.

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²⁰⁷ William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 546 (1986).

²⁰⁸ William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. Rev. 761 (1961).

School, "State Constitutions and the Protection of Individual Rights."²⁰⁹ In 1961, the Court had only just "opened a door"²¹⁰ through the Fourteenth Amendment's Due Process Clause for "application of the Bill of Rights to the states."²¹¹ Justice Brennan argued in favor of such extension, cautioning that an "[e]xcessive emphasis upon states' rights" should not lead to a "watered-down, subjective version" of the Bill of Rights in cases challenging state action.²¹²

By 1977, Justice Brennan no longer prevailed as the majority voice on the Court, and in his lecture that year he issued the now famous invitation that state courts "step into the breach" and use their state constitutions to safeguard rights that the Court no longer would protect because of concerns for federalism.²¹³ Justice Brennan warned, however, that state courts could not relieve federal courts of their independent duty: "Federalism is not served when the federal half of that protection is crippled."²¹⁴

Justice Brennan returned to these twin themes in his 1986 Madison Lecture, offering a vision of federalism that "'provides a double source of protection for the rights of our citizens.'"²¹⁵ Taking stock of the state of civil liberties, Justice Brennan noted with considerable satisfaction that the Court since had extended "almost all of the restraints in the Bill of Rights" to the states; he hailed these decisions as the most important accomplishment of the Warren era.²¹⁶ But Justice Brennan warned against complacency. Despite the obvious inequities that riddle our nation, the Court was "involved in a new curtailment of the Fourteenth Amendment's scope," subordinating rights "to the ever-increasing demands of governmental authority."²¹⁷ Counterbalancing the Court's contraction of rights and liberties, however, were state courts resuming their role as "coequal guardians of civil rights and liberties";²¹⁸ in the intervening decade, state courts had issued more than 250 published decisions affording greater protection to individual liberty than "the constitutional minimums set by the United States Supreme Court."²¹⁹

²⁰⁹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

²¹⁰ Brennan, *supra* note 208, at 769.

²¹¹ *Id.* at 761.

²¹² *Id.* at 777.

²¹³ Brennan, *supra* note 209, at 503.

²¹⁴ *Id.*

²¹⁵ Brennan, *supra* note 207, at 552 (quoting Brennan, *supra* note 208, at 503).

²¹⁶ See *id.* at 536.

²¹⁷ *Id.* at 546.

²¹⁸ *Id.* at 548.

²¹⁹ *Id.*

I watched the Justice's 1986 lecture on videotape, part of an overflow audience in Greenberg Lounge that I joined hurrying in from my legal aid office. By 1986, the Court had relented in its push to end segregation,²²⁰ to protect the indigent,²²¹ and to guarantee privacy.²²² Yet I remember the sense of optimistic possibility that I drew from Justice Brennan's voice that evening. In the years since, the Court has retreated further from the constitutional ideal that Justice Brennan defined. The 1986 Madison Lecture, however, urges us to resist pessimism, encouraging instead a renewed commitment to securing "[j]ustice, equal and practical, for the poor, for the members of minority groups, for the criminally accused, . . . for all, in short, who do not partake of the abundance of American life."²²³

ELIZABETH M. SCHNEIDER, *THE DIALECTIC OF RIGHTS AND POLITICS: PERSPECTIVES FROM THE WOMEN'S MOVEMENT*,
61 N.Y.U. L. REV. 589 (1986)

*Sylvia A. Law**

This path-breaking article is a classic work on the complex relations between legal rights and socio-political change. It is an immense and important work.

Published in 1986, Schneider's article responded to the critical legal studies critique of liberal legal rights as inherently individualistic, indeterminate, and destructive of both community and popular political movements and to the assertions of some feminists that liberal claims of legal rights are formal, hierarchical, and premised on patriarchal concepts of law and politics.

Schneider appreciates the power of these critiques. She brilliantly captures and explains the dialectical dimension of legal rights. Legal rights often promise more than they deliver, and the struggle to achieve them can debilitate political, community, and individual mobilization and expression.²²⁴ At the same time, she argues the importance of claims of rights and affirms that "the assertion of or 'experience' of rights can express political vision, affirm a group's humanity, contribute to an individual's development as a whole person,

²²⁰ See *Milliken v. Bradley*, 418 U.S. 717 (1974).

²²¹ See *Harris v. McRae*, 448 U.S. 297 (1980).

²²² See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²²³ Brennan, *supra* note 207, at 553 (quoting William J. Brennan, Jr., *Landmarks of Legal Liberty*, in *The Fourteenth Amendment* 1, 10 (Bernard Schwartz ed. 1970)).

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²²⁴ See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. Rev. 589, 593-96 (1986).

and assist in the collective political development of a social or political movement.”²²⁵ She analyzes the way in which rights claims emerge from social movements and how the assertion of legal rights can sharpen and clarify the political struggle. The article systematically sustains a deep appreciation of the critique of rights and an affirmation of the power of rights as both legal claims and a form of consciousness. It is profoundly dialectical in substance and in structure, keeping two conflicting and wise ideas in sharp focus.

Schneider argues that this deep conflict cannot be resolved abstractly, but requires engagement with particular cases. Many scholars of law and political science extol the integration of theory and practice, i.e., “praxis.” Schneider does it. The article analyzes the dialectical dimensions of legal rights in the context of concrete problems confronting women and their advocates in a nuanced way. Schneider assesses the legal struggle of women’s rights and closely examines how assertions of rights concerning constitutional equality, reproductive choice, sexual harassment, and woman-abuse reflect these dialectical dimensions.

She concludes:

The women’s movement’s experience with rights shows how rights emerge from political struggle. The legal formulation of the rights grew out of and reflected feminist experience and vision and culminated in a political demand for power. The articulation of feminist theory in practice in turn heightened feminist consciousness of theoretical dilemmas and at the same time advanced feminist theoretical development. This experience, reflecting the dynamic interrelationship of theory and practice, mirrored the experience of the women’s movement in general.²²⁶

This analysis of the women’s rights movement, shaped by an understanding of praxis, reveals a conception of both the process through which rights are formulated as well as the content of the rights themselves. The process has been called “regenerative” as rights were developed in the “middle,” not the “end,” of political dialogue. Rights were the product of consciousness-raising and often were articulated by both political activists and lawyers translating and explaining their own experience. Further, rights asserted in the context of the women’s movement enabled women to develop an individual and collective identity as women and to understand the connection between individual and community. The articulation of rights, then, has been a means of projecting, reflecting, and building upon a bur-

²²⁵ Id. at 590.

²²⁶ Id. at 648-49.

geoning sense of community developing within the women's movement.

This important article has been influential in legal scholarship on feminist theory, rights jurisprudence, and the interrelationship between law and social change. In a 1996 study of the most-cited law review articles, Schneider's is the only *New York University Law Review* article listed.²²⁷ Schneider, Professor of Law at Brooklyn Law School and a 1973 N.Y.U. law graduate, is one of only two N.Y.U. alumni/ae on this list.²²⁸

Professor Schneider has continued her project to integrate the claim of the importance of legal rights with a recognition of the power of the critique of rights, through the praxis prism of feminist legal work on domestic violence. Yale University Press has recently published her book, *Battered Women and Feminist Lawmaking*, which analyzes the accomplishments of the last thirty years of feminist legal advocacy on domestic violence. In this book, she explores how claims of rights for battered women have emerged from feminist activism and assesses the possibilities and limitations of feminist legal advocacy to improve battered women's lives and transform law and culture.²²⁹ The book has been nominated for a Pulitzer Prize and the National Book Award.

JAMES A. HENDERSON, JR. & AARON D. TWERSKI, DOCTRINAL
COLLAPSE IN PRODUCTS LIABILITY: THE EMPTY SHELL OF
FAILURE TO WARN, 65 N.Y.U. L. REV. 265 (1990)

JAMES A. HENDERSON, JR. & AARON D. TWERSKI, CLOSING THE
AMERICAN PRODUCTS LIABILITY FRONTIER: THE REJECTION OF
LIABILITY WITHOUT DEFECT, 66 N.Y.U. L. REV. 1263 (1991)

*Mark Geistfeld**

In their role as Reporters for the largely successful Restatement (Third) of Torts: Products Liability,²³⁰ James Henderson, Jr. and Aaron Twerski have exerted substantial, enduring influence on products liability doctrine. This influence was foreshadowed by a series of articles they wrote prior to their appointment as Reporters. These articles, including the two published here, established the general approach they would take in formulating the Restatement (Third). The

²²⁷ See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 Chi.-Kent L. Rev. 751, 775 (1996).

²²⁸ See *id.* at 764.

²²⁹ See Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* 8-9 (2000).

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²³⁰ Restatement (Third) of Torts: Products Liability (1997).

articles also influenced the American Law Institute's decision to abandon the controversial, two-volume Reporters' Study on *Enterprise Responsibility for Personal Injury*,²³¹ in favor of the more traditional approach of the Restatement (Third).

Henderson and Twerski's article on product warnings, a fine piece of doctrinal scholarship, significantly influenced the Restatement (Third). It established the doctrinal basis for and importance of incorporating cost considerations (space constraints, reading time, and recall ability) into the liability standard.²³² The article also argued that the presumption of causation should be rejected,²³³ a problematic proposal implicitly adopted by the Restatement (Third) despite the inadequacy of doctrinal support.²³⁴ The other article provides debatable rationales for negligence or defect-based liability standards, though the analysis usefully suggests that litigation costs in a regime of generalized strict liability will be higher than commonly thought.²³⁵

These two articles, combined with their other scholarship, helped make Henderson and Twerski leading candidates for reporters of a products liability restatement. Whether the American Law Institute would undertake a restatement was unclear, however. The law of products liability has developed rapidly since publication of the Restatement (Second) of Torts,²³⁶ becoming one of the most politically contentious areas of tort law. Any attempt to restate a rapidly evolving area of the law being scrutinized by legislators carries an obvious set of risks. Rather than initiating a new restatement, in the mid-1980s the American Law Institute commissioned a wide-ranging study of various forms of enterprise liability, including products liability. The study is a notable scholarly achievement, though it was never adopted by the American Law Institute due to its controversial reform proposals and departure from the traditional restatement format. In 1993, the American Law Institute embarked on the Restatement (Third). Its decision undoubtedly was influenced by the scholarship of Henderson and Twerski in this period, which exhibited the potential benefits of restating this important area of law.

²³¹ American Law Inst., Reporters' Study: *Enterprise Responsibility for Personal Injury* (1991).

²³² See James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 296-303 (1990).

²³³ See *id.* at 278-85.

²³⁴ See Restatement (Third) of Torts: Products Liability § 2(c) & cmts. i-1.

²³⁵ See James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263, 1279-86 (1991).

²³⁶ Restatement (Second) of Torts (1965).

RICHARD L. REVEZS, REHABILITATING INTERSTATE COMPETITION:
RETHINKING THE "RACE-TO-THE-BOTTOM" RATIONALE
FOR FEDERAL ENVIRONMENTAL REGULATION,
67 N.Y.U. L. REV. 1210 (1992)

*Richard B. Stewart**

"Rehabilitating Interstate Competition" is one of those rare articles that has transformed the intellectual landscape of a major public policy issue. Prior to its publication, the prevailing wisdom held that nationally uniform federal environmental standards were necessary in order to prevent a "race to the bottom" that would occur if regulation were left to the states, which would compete in regulatory laxity in order to attract industry and, in the process, would all adopt inadequate levels of regulatory protection. This widely shared view was a cornerstone of the political and policy arguments for the sweeping federal environmental regulatory programs adopted by Congress. A variant of the same argument has provided the major justification for uniform environmental legislation by the European Community.

Richard Revesz squarely challenged this centralizing rationale, arguing that the assumption that states shortsightedly would adopt policies that would reduce their citizens' welfare is implausible and inconsistent with the most relevant economic models of state regulatory competition, which conclude that such competition is likely to enhance, not reduce, societal welfare. Revesz contended that allowing each state to balance its citizens' varying preferences for environmental quality against their desired level of industrial and commercial production would promote overall well-being. Further, he argued, if state competition is indeed destructive, the argument for federal uniformity must be extended to all policy fields, including state taxation and welfare programs.

Revesz's article has sparked a searching reexamination of the justification for centralized environmental regulation. Federal environmental regulation, of course, has not disappeared. There are other potential justifications for centralized regulation, including transboundary pollution spillovers or systemic political failings at the state (but not the federal or international) level. The situation is still more complicated if people in one state care about environmental conditions in another state or if environmental quality is viewed as a national or global good rather than a local good. These considerations,

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which Revesz has analyzed powerfully in subsequent articles,²³⁷ may justify some centralized regulation, but, if so, such regulation will be quite different in scope and type than that implied by race-to-the-bottom logic. Revesz indeed has awakened us from our dogmatic slumber.

ANDREW KOPPELMAN, WHY DISCRIMINATION AGAINST LESBIANS
AND GAY MEN IS SEX DISCRIMINATION,
69 N.Y.U. L. REV. 197 (1994)

*David A.J. Richards**

Andrew Koppelman's article was remarkable in the legal literature for both its interdisciplinary methodology and its analytical re-fashioning of emerging constitutional arguments for the recognition of the rights of gays and lesbians. These arguments had been propounded only in terms of either the right to privacy or suspect classification analysis. Koppelman's argument ostensibly was a form of suspect classification analysis, but, in fact its analytical power derived from the way in which it reconceived both this mode of analysis and that of the right of privacy on common grounds.

The analytical contribution of the article was its interpretation of the analogy between the acknowledged constitutional wrong of anti-miscegenation laws and the not yet acknowledged wrong of laws forbidding same-sex intimate relations. On Koppelman's analysis, the wrong of forbidding intimate relations between partners of different races exemplifies the constitutional evil of state-supported racism on the same forbidden basis as the wrong of forbidding same-sex intimate relations exemplifies the constitutional evil of state-supported sexism. The startling originality of the article was to offer an analytically rigorous account of how two acknowledged forms of constitutionally forbidden prejudices—racism and sexism—reasonably could be understood as implicating constitutional grounds for both arguments of privacy and of suspect classification on behalf of gays and lesbians.

To make his analytic case, Koppelman developed an innovative interdisciplinary methodology that combined interpretive history, political philosophy, and law. Its most important contribution was its critical normative and interpretive use of the history of gender stereotypes. In particular, the article noted the confluence of modern stigmatization of gay/lesbian identity with the development of a

²³⁷ See, e.g., Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2341 (1996).

* Edwin D. Webb Professor of Law, New York University. A.B., 1966, Harvard University; Ph.D., 1970, Oxford University; J.D., 1971, Harvard University.

contradictory theory and practice of gender roles, an ideology of ostensible equality and a practice of gender inequality mandated by incommensurable gender spheres. Discrimination against gays and lesbians is today wrong under the same principle, gender equality, by which we now constitutionally condemn much of the historical practices of gender inequality. Constitutional arguments for the rights of gays and lesbians thus should be understood as the yet unfinished work of the struggle for gender equality, claims of justice owed all persons (women and men, heterosexual and homosexual) on grounds of principle.²³⁸

²³⁸ For further historical and normative support for this form of argument, see David A.J. Richards, *Identity and the Case for Gay Rights: Race, Gender, Religion as Analogies* (1999); David A.J. Richards, *Women, Gays, and the Constitution: The Grounds for Feminism and Gay Rights in Culture and Law* (1998).