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Chief Justice Marshall, Justice Holmes, and the Discourse of Constitutional Adjudication

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CHIEF JUSTICE MARSHALL, JUSTICE HOLMES, AND THE DISCOURSE OF CONSTITUTIONAL ADJUDICATION

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I. INTRODUCTION

This essay is precipitated by the presence of a potentially new stage of public discourse about Justices of the United States Supreme Court. The appearance of this stage is suggested by the recent nominations of Robert Bork and Anthony Kennedy, and, in particular, one feature of their confirmation proceedings. The feature to which I refer is the collapse, in both nominations, of an established justification for presidential choices of given nominees. Established since Franklin Roosevelt's initial nominations, that justification can be stated, in lay terms, as follows. The President can name whomever he[1] wants, so long as the nominee is professionally qualified; the ideological politics of the nominee are irrelevant. After all, the justification suggests, the President himself holds partisan ideological views, why can't the nominee? I will call this justification "presidential prerogative."

An implicit corollary to the presidential prerogative justification also exists. Although the President may name ideological partisans, the nominee must disclaim his or her partisanship in the confirmation process. This corollary was in evidence in the nomination hearings of William Rehnquist and Antonin Scalia to be Associate Justices. Both men, at the time of their nominations, were known political "conservatives" and were known to be acceptable to the Presidents who nominated them in part because of those views. Nevertheless, the nominees stated repeatedly that their ideological inclinations and their partisan affiliations would be irrelevant in

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1. "She" would be misleading as applied to Presidents from Roosevelt through Reagan.

their interpretations of the Constitution.[2] Rehnquist and Scalia were by no means unique in these disclaimers: Thurgood Marshall made them as well in his confirmation hearings.[3]

The established justification of presidential prerogative was advanced in Bork's nomination proceedings as well. Bork, too, eventually offered a version of the nominee disclaimer corollary.[4] Yet, in Bork's confirmation proceedings, the justification collapsed. Bork abandoned the corollary and stated forthrightly his substantive views. Moreover, in Kennedy's confirmation proceedings, the presidential prerogative justification was stated in very muted terms. Kennedy did not so much disclaim his ideological orientations as intimate that his orientations were politically "moderate," that is, much less right of center than those of Bork.[5]

I am not, at this point in the essay, addressing the question of whether the apparent collapse of the prerogative justification, and the attendant diminution of the significance of the nominee disclaimer corollary, mark a laudable development in the history of the process of nominating Supreme Court Justices. I am merely assuming that the Bork and Kennedy nominations may have marked the beginning of a new stage in the discourse of commentary about the proper role for Justices of the Supreme Court, and am seeking to explore the origins of that stage.

In that exploration I turn first to history, and seek to examine the discourse of commentary about the proper role for Supreme Court Justices over time. I find, in the history of that discourse, two idealized postures for Supreme Court Justices in constitutional adjudication. These postures, I will argue, have established the boundaries of discourse; they represent the polar opposites of an

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2. *Nomination of Judge Antonin Scalia to be Assoc. Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 37-38, 43-44, 59, 84 (1986); *Nomination of Justice William Hubbs Rehnquist, of Arizona, to be Assoc. Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 155, 175, 204 (1971).

3. *Nomination of Thurgood Marshall of New York, to be an Assoc. Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 50, 93, 158-61 (1967).

4. *See A War of Words: Nominee Denies Kennedy's Charges*, N.Y. Times, Sept. 19, 1987, at A10, col. 5.

5. *See Judge Kennedy Says Rights Are Not Always Spelled Out*, N.Y. Times, Dec. 15, 1987, at B16, col. 1.

ongoing debate about the proper role of the Court in constitutional adjudication. The two postures are the Marshallian posture, identified with Chief Justice Marshall, and the Holmesian posture, identified with Justice Holmes. I will explore the origins and evolution of the postures and their dialectical interaction over time. I will ultimately return to the Bork and Kennedy nominations with that exploration in mind, and at that point my comments will have an explicitly normative dimension.

At this juncture, a preliminary comment on what I mean by "Marshallian" and "Holmesian" postures for Supreme Court Justices seems in order. The postures are being employed as ideal types: I am not suggesting that they represent precise characterizations of the jurisprudential views of Chief Justice Marshall and Justice Holmes in every constitutional case they respectively decided. An example may clarify the distinction I have in mind. I will characterize the Holmesian posture as incorporating an attitude toward the sources of rights in American jurisprudence (either natural or constitutional) that rejects a conception of rights as having any meaningful content apart from positivistic legislation. In constitutional adjudication, rights are based, for a Holmesian, on enacted legislation or on the text of the Constitution, not on anything prior to or independent of those entities.

Yet in *Pennsylvania Coal Co. v. Mahon*[6] Holmes did not seem to hold such an attitude toward rights. The case tested the constitutionality of a state legislature's restriction on "vested" property rights. At issue were the rights of subsurface mine owners to maintain mineral rights in their land once they had conveyed the surface of that land to other private parties, expressly retaining their subsurface rights. The mine owners argued that a Pennsylvania statute[7] that forbade them from reasserting their subsurface rights was unconstitutional in several respects.[8] They asserted that it violated the fourteenth amendment's due process clause,[9] the fifth amendment's takings clause[10] as incorporated in the fourteenth

6. 260 U.S. 393 (1922).
7. The statute at issue was the Kohler Act. *See id.*
8. *Id.* at 412.
9. U.S. CONST. amend. XIV, § 1.
10. U.S. CONST. amend. V.

amendment,[11] and the contracts clause,[12] which precludes states from "impairing the Obligation of Contracts."

Holmes, for the Court, held the statute unconstitutional. He argued that "the statute is admitted to destroy previously existing rights of property and contract,"[13] that "the implied limitation [of the police power of the state in eminent domain cases] must have its limits, or the contract and due process clauses are gone,"[14] and that "[t]he general rule . . . is . . . that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[15] Although Holmes may have treated all of the vested property and contract rights he protected in *Mahon* as derived from some positivistic source, a more reasonable reading of his opinion is that it is not entirely consistent with a "Holmesian" posture toward the sources of rights. That posture, therefore, is not the equivalent of Holmes' actual stance in every case he decided, although it represents a fair extrapolation of his stance in the great majority of his decisions.

II. The Origins and Evolution of the Marshallian and Holmesian Postures

As employed in this essay, the Marshallian and Holmesian postures represent contrasting attitudes toward four fundamental jurisprudential issues: 1) the sources of individual rights in American jurisprudence, 2) the relationship between individual rights and the state, 3) the Constitution's role in that relationship, and 4) the respective roles of legislatures and the United States Supreme Court in that relationship. My characterization of the postures assumes not only that their respective attitudes toward these four issues are in diametrical opposition, but also that the issues themselves have remained, over time, at the core of discourse about the role of Supreme Court Justices in constitutional adjudication.

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11. In Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897), the Supreme Court held that the fifth amendment's "just compensation" requirement for constitutional takings was applicable to state eminent domain statutes, of which the Kohler Act was one. *See id.* at 241.

12. U.S. Const. art. I, § 10, cl. 1.

13. 260 U.S. at 413.

14. *Id.*

15. *Id.* at 415.

A Marshallian posture treats individual rights as natural and inalienable, existing prior to the formation of the state. Marshallians characterize the state as functioning not only to secure and preserve pre-existing rights, but also to ensure that pre-existing rights are exercised and protected through positive law. For a Marshallian, the Constitution is the paramount positive source of law in America. It is designed to preserve, promote, and defend the proper relationship between individual rights and the state and is presumptively supreme over all other positive sources of law. But the Constitution is not the exclusive source of individual rights; other extratextual natural rights retain their intelligibility and significance. Finally, for a Marshallian, the positive enactments of state or federal legislatures, when they restrict individual rights, are suspect because legislatures are potentially demagogic and corrupt. In sum, for Marshallians, the proper role of the Supreme Court in constitutional adjudication is to maintain the supremacy of the Constitution and to protect individual rights, whether they are pre-existing natural rights or "vested" rights derived from pre-existing positive law.[16]

In contrast, a Holmesian posture treats rights as solely the product of positive laws enacted by the state. Natural and inalienable rights do not exist, either in the sense of being philosophically intelligible or in the sense of being practically significant. Being the creation of the state, rights are subordinate to its dictates, which are themselves the result of majoritarian preferences. Individual rights, whatever their nature or content, must yield to the majority. The recourse of disappointed individuals whose rights are being restricted is to facilitate revolution so that they become members of a new majority. Although the Constitution is a paramount source of law, because it is a positive enactment, it has a very limited substantive meaning when it restricts majoritarian preferences. The constitutional text, for Holmesians, restricts legislative activity only when a "clear mandate" exists in the words of the text; needless to say, the text does not implicitly incorporate natu-

16. For support for the generalizations advanced in this paragraph, see R. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 59-63, 69-79, 195-223, 227-68 (1968); G.E. WHITE, *The Marshall Court and Cultural Change, 1815-35*, in 3-4 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 512-35, 541-52, 563-80, 595-656 (1988).

ral extratextual rights. Finally, Holmesians believe that Supreme Court Justices should give great weight to the positive enactments of legislatures in interpreting the Constitution, even when the positive law restricts individual rights, because legislatures are the primary institutional embodiment of the majority's will.[17]

As a shorthand summary, one could characterize the opposition between the postures as a familiar precept of constitutional commentary: the "countermajoritarian difficulty" that Alexander Bickel once claimed followed from "the essential reality that judicial review [as practiced by the Supreme Court in constitutional cases] is a deviant institution in the American democracy."[18] Marshall's Constitution is a countermajoritarian document, and the Supreme Court is a countermajoritarian force. Holmes's Constitution is one in which the Court constantly must consider the fact that the Court is not a democratic institution and that the attendant "countermajoritarian difficulty" exists.

I now turn to a brief and necessarily sketchy overview of the origins and interaction of the two postures in American constitutional history. The Marshallian posture was originally a product of a premodern jurisprudence, one in which a certain set of substantive values—protection of property, the importance of civic responsibility, a hierarchical ordering of status relationships—were taken for granted by elites as permanent features of society. Those values formed the basis of all of the assumptions I have associated with Marshallians.[19] By contrast, the Holmesian posture originated in modernism; it began with the premise that any deep societal consensus on substantive values was necessarily impermanent and

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17. For support for the generalizations advanced in this paragraph, see H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE (1984); Gordon, *Holmes'* Common Law *as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 723-27, 734-36, 742-44 (1982); Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 225-26, 249-55 (1964); White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633, 652, 655-58, 663-71 (1982); White, *Looking at Holmes in the Mirror*, 4 LAW & HIST. REV. 439, 447-48, 451-55, 464-65 (1986). *See also* R. FAULKNER, *supra* note 16, at 227-68, for an effort to compare Marshall's and Holmes's jurisprudence.

18. A. BICKEL, THE LEAST DANGEROUS BRANCH 18 (2d ed. 1986). Bickel may have coined the phrase, but he by no means exhausted the concept. For an extensive summary of the considerable literature on the "countermajoritarian difficulty," see P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 889-901 (2d ed. 1983), and sources cited therein.

19. *See* G.E. WHITE, *supra* note 16, at 595-656, and sources cited therein.

problematic. As modernists, Holmesians posit that humans cannot affirm reflexively the universality and permanence of substantive values. According to Holmes, all that one can affirm is that some values for which many individuals in a culture might die exist. For Holmesians, the primacy of values is determined not by their inherent rightness but by their affirmation by majorities. In other words, the best test of the truth of an idea is its power in the marketplace of ideas.[20]

The above analysis might suggest that, because we are now all modernists, the Holmesian view has prevailed. Furthermore, although some commentators seem bent on resurrecting a conception of property rights as absolute, inalienable, and permanent[21] and others wax enthusiastic about the virtues of republicanism,[22] the discourse of contemporary commentary remains seemingly embounded by modernist eschatology.[23] Yet at the very time that the Holmesian posture, which Holmes first articulated impressively in *Lochner v. New York*,[24] became orthodoxy in the early 1930s,[25] a

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20. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See* H.L. POHLMAN, *supra* note 17, at 13-15, 81, 96-97, 141-43; M.G. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 59-75, 103-06 (2d ed. 1957); *Special Issue: Modernist Culture in America*, 39 AM. Q. 1 (1987); White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51, 65-67, 75-77 (1971).

21. *See, e.g.*, B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

22. *See* Michelman, *The Supreme Court, 1985 Term-Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

23. *See generally* Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982). See also the exchange between Owen M. Fiss and Paul Brest in Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982), and Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982).

24. 198 U.S. 45 (1905) (Holmes, J., dissenting). The adverb "impressively" is precipitated by Holmes's earlier opinion in Otis v. Parker, 187 U.S. 606 (1903), which contained the following passage:

> While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions . . . .

Id. at 608-09.

25. Examples of the establishment of the Holmesian perspective as orthodoxy in the early 1930s abound. *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND 253 (1930) (describing

deep chasm began to emerge in modernist thought. Over the next fifty years that chasm has persisted and widened, despite impressive efforts to straddle it or to pretend it did not exist. The chasm has had a dramatic evolution in constitutional law. It began with a crack in the surface of Holmesian orthodoxy: the free speech cases in the late 1920s and 30s.[26] It widened as modernism became linked to totalitarianism in the late 1930s and during the Second World War,[27] and the recognition of its existence precipitated the emergence of new versions of the Holmesian perspective in the 1950s.[28] The chasm deepened and widened more during the dominant years of the Warren Court,[29] and it has served as the starting point for a variety of recent efforts to resolve the "countermajoritarian difficulty."[30]

Holmes as "the completely adult jurist"); F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT (1938); Llewellyn, *Holmes*, 35 COLUM. L. REV. 485 (1935).

26. See the "preferred position" cases, United States v. Carolene Products Co., 304 U.S. 144 (1938); Near v. Minnesota, 283 U.S. 697 (1931); Whitney v. California, 274 U.S. 357 (1927).

27. The attacks on Holmes and the revival of "natural law" in the 1940s are now a familiar part of constitutional literature. *See* E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 167-68 (1973); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 583-84, 715-16 (1978); White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 282-84 (1973); White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51, 65-68 (1971).

28. See the exchange between Mark DeWolfe Howe and Henry Hart in Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951); Hart, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951). *See* L. FULLER, THE ANATOMY OF LAW (1968); *see also* White, *The Evolution of Reasoned Elaboration*, *supra* note 27; *see generally* Ackerman, Book Review, 103 DAEDALUS 199 (Winter 1974) (noting the connections between the 1930s Holmesians and the "Legal Process School").

29. See the exchange between Henry Hart, Thurman Arnold, and Erwin Griswold, in Hart, *The Supreme Court, 1958 Term-Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960); Griswold, *The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960). See also the exchange precipitated by Herbert Wechsler's article, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Finally, see the affirmative defense of the Warren Court's neo-Marshallian perspective in Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970), and CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

30. The efforts begin with A. BICKEL, *supra* note 18, at 16-23, and extend through Black, *supra* note 29, to L. TRIBE, *supra* note 27. *See also* P. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982); J.H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITI-

The cause of the chasm, of course, was a renewed consciousness of the potential primacy of substantive rights, even in a modernist age. But needless to say, the content of the rights elevated to prominence after the 1930s differed from the content of the rights elevated by Marshall's contemporaries. Moreover, the rights consciousness of twentieth-century jurisprudence differs from that of Marshall's time in its assumption that contemporary American culture is a far more diverse and heterogeneous configuration than that in which Marshallian jurisprudence was formulated.[31]

A few cases illustrate the history sketched above. First are the "vested rights" decisions of the Marshall Court themselves: decisions such as *Fletcher v. Peck*,[32] *Dartmouth College v. Woodward*,[33] and *Ogden v. Saunders*.[34] Few contemporary commentators spend time with those cases, but they are rich illustrations of the assumptions of Marshallian jurisprudence.[35] Almost all of the Marshallian assumptions are still present as late as 1905 in the majority opinion in *Lochner v. New York*,[36] although the substantive rights being cited have shifted from "property" to "contract," and

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CAL PROCESS (1980); R.M. DWORKIN, LAW'S EMPIRE (1986); J.H. ELY, DEMOCRACY AND DISTRUST (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).

31. Cross-cultural comparisons are of course treacherous, and some additional clarification of this statement seems necessary. To compare factors such as "diversity" and "heterogeneity" in any absolute fashion across time is very difficult, although social historians routinely attempt to do so. Marshall's world may have in fact been far less demographically and ideologically "diverse" than ours, but "diversity" is itself an ideological label that seems capable of being used only in a relative sense. It seems clear, however, that modernist commentators *perceive* contemporary American culture to be more demographically and ideologically diverse than America of the late eighteenth and early nineteenth centuries. I have argued, in G.E. WHITE, *supra* note 16, that Marshall and his contemporaries also perceived their culture as rapidly diversifying and changing, and that such a perception can be observed in the jurisprudential orientation of the Marshall Court. Indeed, the most identifiable feature of Marshall Court jurisprudence, I have argued, was the affirmation of a substantive value consensus in the face of and as a response to perceived change. In short, despite the overwhelming differences between premoderns and moderns, our current debates in the area of constitutional commentary are more reminiscent of those of Marshall and his contemporaries than we might first suspect.

32. 10 U.S. (6 Cranch) 87 (1810).

33. 17 U.S. (4 Wheat.) 518 (1819).

34. 25 U.S. (12 Wheat.) 213 (1827).

35. *Fletcher*, for example, exhibits simultaneously an assumed primacy and priority for private property rights, hostility toward legislatures, an extratextual theory of constitutional interpretation, and an implicit conception of the judiciary as a countermajoritarian force.

36. 198 U.S. 45 (1905).

the explicit reliance on extratextual sources has been abandoned.[37] In *Lochner*, substantive rights against the state are taken for granted. The state is assumed to be in existence to protect, not to restrict, those rights, legislatures are viewed with suspicion, the judiciary is conceived as a bulwark in defense of private rights, and the Constitution remains resolutely countermajoritarian. The *Lochner* majority opinion is both the culmination and a caricature of the original Marshallian posture.

The sense in which *Lochner* is a caricature is captured vividly in Holmes's dissent. He disclaims any substantive opposition to the majority's position; he is embracing neither paternalism nor laissez faire.[38] But his characterization of the Constitution as "made for people of fundamentally differing views,"[39] is itself substantive: his Constitution is majoritarian and pluralist. The *Lochner* majority opinion is made out to be a caricature because its elevation of "liberty of contract" as a primary substantive value is jarringly out of sync with modernism. Liberty of contract is merely a "dogma";[40] dogmas have no place in the sophisticated intellectual universe of the early twentieth century. With Holmes's challenge to *Lochner*, the (now ludicrously inappropriate) strictures of premodernism become clearly exposed.

The Holmesian posture next gathers momentum, becomes orthodoxy, and begins to crack, as previously discussed. The next significant case in the history is *Brown v. Board of Education*.[41] In *Brown*, as recent history has demonstrated, the Holmesian posture invites judicial abdication. Congress has not acted with respect to the question of racial segregation and the segregationist states have acted, the latter action based on majoritarian preferences emanating from a particularistic sociology. Although one can argue that segregation, like slavery, is inconsistent with the values of lib-

37. Compare *Fletcher*'s reliance on "general principles which are common to our free institutions," 10 U.S. at 139, with *Lochner*'s reliance on "liberty of contract as well as of person," 198 U.S. at 61. The distinction has not been regarded as insignificant, but it can be seen as one without a difference.

38. 198 U.S. at 75 (Holmes, J., dissenting) ("a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*").

39. *Id.* at 76.

40. *Id.* at 75.

41. 347 U.S. 483 (1954).

erty and equality and is deeply racist, it is also a majoritarian practice. Absent the overwhelming constitutional mandate, "separate but equal" facilities satisfy the requirements of the equal protection clause and the Supreme Court should defer to legislative majorities.

It may seem incredible to us that this Holmesian argument was taken seriously at the time *Brown* was decided. Yet it was. The crucial problem for the Court in *Brown* was not, as commentators have sometimes suggested,[42] the enforcement of the *Brown* decree; the crucial problem was justifying the Court's intervention to change equal protection jurisprudence in segregation cases in the face of both southern preferences and congressional inaction. That was the problem identified both within the Court, prominently by Jackson and Frankfurter,[43] and by commentators.[44] In response, the Court in *Brown* said, in effect, that when certain rights are implicated, the Constitution insists on more than judicial deference to majority preferences. When those preferences themselves amount to the denial of substantive rights against the state, specifically, in the case of segregation, rights to equal educational opportunities regardless of race or skin color, the Constitution mandates that such rights be protected. *Brown* represents, therefore, the clear emergence of what can be called a neo-Marshallian posture.[45]

The next significant case in the history is the revival of the *Lochner* majority's position in *Griswold v. Connecticut*.[46] Justice Douglas announced in *Griswold* that "[o]vertones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation."[47] The "invitation" to which he referred was an argument that the Warren Court should do for privacy

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42. *See, e.g.*, G. GUNTHER, CONSTITUTIONAL LAW 712-14 (11th ed. 1985).

43. *See* R. KLUGER, SIMPLE JUSTICE 576-77, 596-610 (1976).

44. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

45. One could attempt to argue that *Brown* is not inconsistent with a Holmesian posture because that posture permits judicial reversal of a majoritarian legislative preference in the "clear constitutional mandate" situation. Yet no one regarded *Brown* as a "clear constitutional mandate" at the time it was decided. Indeed, one of the difficulties with *Brown* was that the Court had interpreted the equal protection clause to *permit* segregation in the public schools.

46. 381 U.S. 479 (1965).

47. *Id.* at 481-82 (citation omitted).

what the *Lochner* Court did for liberty of contract; namely, constitutionalize an extratextual right against the state. Douglas "declined," but actually accepted. Although Douglas throughout his career denied this interpretation of his *Griswold* opinion, *Griswold* elevated to constitutional stature a "liberty" of privacy, grounded in the fourteenth amendment's due process clause.[48] Read in that fashion, *Griswold* represents an advance from *Brown*. *Griswold* was not merely a reaffirmation of the primacy of substantive rights over majoritarianism; it also employed an openly extratextual interpretive methodology. In *Brown*, the Court's reading of the equal protection clause had been doctrinally novel, but the Court was not faced with the absence of any constitutional text pertaining to equality of racial opportunity. In *Griswold* no text protecting "privacy" existed; only text protecting "liberties" existed and Holmesian canons of interpretation suggested that substantive readings of the "liberties" text by judges was anti-majoritarian. *Griswold* was, in short, a case in which the "right" given protection was derived extratextually, from cultural attitudes which took for granted that married persons could make their own procreative decisions, and a case in which the Court merely affirmed what "everyone" already believed. It was a Marshallian opinion in a modernist setting.

The last stage in the history brings us back to the Bork and Kennedy nominations. This stage marks the establishment of the neo-Marshallian posture as a genuine alternative to the Holmesian posture, the appearance of "hard cases"[49] for each of the two postures, and commentary seeking to reconcile the postures. *Roe v. Wade*[50] has been a classic "hard case" for neo-Marshallians. It raises the problem of basing a jurisprudence on the primacy of substantive rights when "rights" in constitutional adjudication

48. In Roe v. Wade, 410 U.S. 113 (1973), a majority of the Court acknowledged that the rights of privacy protected in *Griswold* and its progeny, such as Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972), were liberties protected by the due process clause. *Id.* at 152. In a concurring opinion in *Doe v. Bolton*, a companion case to *Roe v. Wade*, Justice Douglas continued to maintain that *Griswold* had "nothing to do with substantive due process." 410 U.S. 179, 212 n.4 (1973) (Douglas, J., concurring).

49. By "hard cases" I mean cases conceived as such by the prevailing jurisprudential discourse of the time, not cases that are inherently difficult.

50. 410 U.S. 113 (1973).

may be historically contingent, philosophically problematic, and in perceived conflict with other rights.

Conversely, a classic "hard case" for unreconstructed Holmesians is *Bowers v. Hardwick*.[51] That decision seeks to distinguish between a deeply embedded but not yet explicitly protected right—the right for adults to engage in private consensual intimate affection—and the "nonright" of adult homosexuals to engage in private consensual sex. The decision affirms a majoritarian preference, namely that the state should prohibit private consensual homosexual activity because it is immoral or repulsive. In *Bowers*, the Holmesian posture thus confronts the dilemma that the whims of majorities with respect to our sexual preferences affect either "all of us" or just homosexuals. If the latter view is preferable, the decision affirms that majorities can repress private consensual intimate conduct simply on the basis of their preferences. This affirmation leads Holmesians back to the problem of the close relationship between majoritarianism and totalitarianism.

In response to "hard cases" such as *Roe* or *Bowers*, constitutional commentators have produced a new outpouring of literature in the late 1970s and 80s. I have previously alluded to some of the prominent examples of that literature,[52] but there are numerous others. As early as the late 1960s,[53] commentators had exhibited an awareness that the unreconstructed Holmesian and its neo-Holmesian versions, such as process theory, were being severely confronted by the Warren Court's neo-Marshallian tendencies. By the mid-1970s, efforts to recreate and elevate the stature of substantive rights had appeared.[54] As noted, the flood of commentary in

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51. 478 U.S. 186 (1986).

52. *See supra* note 30.

53. *See* Black, *supra* note 29.

54. A prominent effort was Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975), in which the terms "interpretivism" and "noninterpretivism" first appeared. Despite my admiration for Professor Grey's work, I continue to believe that the rapid acceptance of his terminology has led to an obfuscation of the language of constitutional commentary. As Grey employs the terms, "interpretivists" are those whose chief characteristic is that they disclaim the possibility of extratextual sources for constitutional interpretation; "noninterpretivists" by contrast admit such a possibility. But because both the "interpretivist" and "noninterpretivist" postures are theories of constitutional interpretation, both groups are "interpreters." I believe that the close connection between the words "interpreter" and "interpretivist" has led to significant confusion, especially in the classroom. Although it is too late to abandon these terms, Grey could have avoided any confu-

the late 1970s and 80s has stressed the renewal of substantive rights in constitutional law, has opposed that renewal and offered up unreconstructed and neo-Holmesian perspectives, and has sought to reconcile the two positions.

III. The Current State of Discourse

At this point we are in a position to revisit the jurisprudential climate in which the Bork and Kennedy nominations occurred. The history just reviewed suggests that the discourse of commentary up to the time of those nominations was an implicit dialogue between Holmesians and Marshallians about the relationship between rights, the legislature, the Constitution, and the Court. In the terms of this essay, the following questions have been at the core of the debate: Is the Court to be a protector of rights based on those substantive value judgments that while articulated by the Justices, are deeply shared in the culture at large? Or is the Court to concede implicitly that Justices are not capable, indeed that no moderns are capable, of making a determination of which values count more than others, of which values are universal, and of which values are always to be given substantive priority?

In his confirmation hearings, Bork attempted to portray himself as something of a Holmesian. He believed in judicial "self-restraint," in following the "original intent" of the framers, and in majoritarian democracy.[55] He would not be guided by his substantive views as a Justice; he would be guided by the text of the Constitution, the original intent of its framers, and the principle of deference to majorities. Bork's self-portrait was simply not accepted as credible; it was labeled a "confirmation conversion." Bork's opponents argued that he was not only an ideologue, but that his ideological views were substantively "wrong": for example, he had been on the "wrong" side of both of the central neo-Mar-

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sion had he used the terms "textual" and extratextual" because the necessity for constitutional interpreters to be bound by a finite constitutional text is at the heart of the dispute between the two postures. Of course, "extratextual" may sound pejorative, which is perhaps why Grey did not use it. It only sounds pejorative, however, if one is frozen in a jurisprudential perspective that insists that the "text" control constitutional interpretation. Grey's views suggest that he is hardly "frozen" in that sense.

55. *See Bork Statement: "Philosophy of Role of Judge,"* N.Y. Times, Sept. 16, 1987, at A28, col. 1.

shallian decisions of the recent past, *Brown* and *Griswold*. Bork, his critics claimed, had come to accept *Brown*, but his previously expressed views on civil rights issues suggested that his was a belated and perhaps a convenient acceptance. He had never accepted *Griswold*: he believed that privacy was not protected by the Constitution.

Above all else, the substantive "extremism" of Bork's views was the cause of the defeat of his nomination. National politics undoubtedly played a part; the Senate that confirmed Scalia as Associate Justice and Rehnquist as Chief Justice had a different composition from the Democrat-controlled Senate that failed to confirm Bork. Yet that Senate confirmed Kennedy. Despite his impressive professional qualifications and the absence of any ethical improprieties in his career, Bork's substantive views ultimately provided the material for his defeat.

How could a person with Bork's professional credentials, who advanced Holmesian and neo-Holmesian arguments that were for the most part jurisprudential orthodoxies[56] and who was nominated in a confirmation culture in which presidential prerogative was still given great weight, fail to be confirmed? In the terms of this essay, Bork's failure principally resulted from the fact that those who passed on his confirmation believed that he was not truly a Holmesian, but rather a neo-Marshallian masquerading as a Holmesian, and found that his version of neo-Marshallianism was substantively disqualifying for a Supreme Court Justice.

Saying that one disagrees with a nominee's substantive views, and, for that matter, that one disagrees with the substantive views of the nominating president, is quite a different statement than saying that a nominee's views are so substantively wrongheaded as to disqualify him or her for the Court. Yet the latter statement is what a majority of the Senate said about Bork. The stark emergence of the orientation that a nominee's substantive views are de-

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56. The interpretive canon of "original intent" may not qualify for the label "orthodoxy." Although the adherence to the constitutional text has been an established canon of constitutional interpretation since Marshall, *see* G.E. WHITE, *supra* note 16, at 111-56, adherence to the original intent of the framers, especially in some of its less apt contemporary versions, appears to endorse a position so limiting to modern judges as to amount to a radically new and incoherent theory of interpretation. For a sensible historical discussion, see Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

cisive in his or her eligibility, even those of a nominee with Bork's professional qualifications, marks a new stage in the discourse of commentary on the place of Supreme Court Justices in American culture. In the Bork hearings the criterion of substantive ideology was not merely *juxtaposed* against other traditional criteria such as the presidential prerogative, the nominee disclaimer corollary and the nominee's professional qualifications, substantive ideology *overwhelmed* those criteria.

This brings me to Kennedy's successful confirmation. One might be tempted to say that Kennedy was confirmed, and Bork was not, because Kennedy successfully invoked the nominee disclaimer corollary, thereby implicitly convincing those passing on his nomination that his stance as a Justice would be that of a Holmesian. Yet that interpretation would be a misreading of the two confirmation proceedings. Kennedy and Bork both used the same orthodox language of "self-restraint" and fidelity to the Constitution,[57] but Kennedy's prior record was principally scrutinized with respect to the substantive political implications of his positions. He was ultimately deemed a "moderate"—a person with a conservative but not ultraright ideology, the sort of individual that Reagan might be expected to look favorably on but whose views were not "extreme." He was acceptable to the Senate because of the content of his ideology. The two confirmation episodes thus can be viewed as conveying the same message that the substance of a nominee's views overwhelms anything else about his or her candidacy.

IV. Conclusion

The Bork and Kennedy hearings thus suggest that substantive, rights-oriented jurisprudence is not merely competing with, but encroaching upon the jurisprudence of majoritarian deference; the dialogue between Holmesians and Marshallians may no longer be in equipoise. The most fascinating aspect of this potential development is that in the face of a renewed emphasis on the substantive ideology of Supreme Court Justices, the orthodox language employed to characterize the jurisprudential stances of those Justices has apparently retained its vitality. In short, nominees and their

57. *See Bork Statement*, *supra* note 55; *The Questions Begin: 'Who Is Anthony Kennedy?,'* N.Y. Times, Dec. 15, 1987, at B16, col. 3.

critics continue to treat judicial "self-restraint," the catchword of Holmesian jurisprudence, as if it were a significant check on the substantive inclinations of the nominees, while at the same time treating substantive ideology as the decisive criterion in the selection of Justices.

This paradoxical situation has resulted, in my view, from a failure to distinguish two quite different features of the Holmesian posture, with its homage to judicial "self-restraint." One feature is the idea that judges can suppress their substantive views simply by deferring to "neutral" authoritative legal sources, such as the Constitution, statutes, or precedent. Thus Holmes, in deciding the *Lochner* case, suppresses his own views on labor relations because the Constitution does not embody any economic theory, whether paternalism or laissez faire.[58] The other feature is the related but distinguishable idea that judges can suppress their substantive views by recognizing the overriding substantive commitment of the Constitution, and American culture generally, to democracy and pluralism, and by further recognizing that the only way to preserve pluralism is by accepting the primacy of institutions—primarily the legislature—that can incorporate multiple ideological perspectives.

The first feature of Holmesianism is nonsensical, and has been exposed so thoroughly as to no longer merit serious attention. Judges cannot avoid substantive choices simply by following authoritative legal sources because those sources are not themselves substantively neutral.[59] Unfortunately, the first feature and the second have been run together, to the detriment of the second. The second feature remains a significant jurisprudential message today if pluralism, the contemporary version of majoritarianism, is regarded as a significant cultural value. The strength of the second message, combined with some unreflective adherence to the first, accounts for the continued vitality of language subscribing to the canons of judicial self-restraint.

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58. Lochner v. New York, 198 U.S. 45, 76 (Holmes, J., dissenting).

59. Critics of Wechsler's *Toward Neutral Principles of Constitutional Law*, *supra* note 44, recognized this immediately. *See* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

Yet even the second feature seems problematic. What if the institutional embodiments of pluralism do not preserve it? What if the legislative process functions to exclude views, rather than to include them? What if in deferring to majoritarian instructions judges are making substanative choices, namely the choice to sustain the ideology of the majority? What if, in the end, the chief restraint on judges is the content of their own substantive values, so that constitutional adjudication imposes on judges an implicit burden to convince others that the values they are affirming in a given case are the values that the rest of the culture cares deeply about? If such questions are real rather than rhetorical, then the obligation of constitutional commentators would seem to be to evaluate the Court's decisions from an unabashedly neo-Marshallian posture because substantive ideology is all that counts in those decisions.

The primacy of substantive ideology in constitutional adjudication suggests that a good deal of allegedly sophisticated modernist constitutional discourse is just rhetoric. It is rhetoric to the extent that it fails to realize that whatever institutional or doctrinal devices one enacts to prevent substantive values from being paramount in constitutional adjudication, substantive values will shape the devices being enacted. The Bork and Kennedy nominations may have led to the beginning of a recognition of the overarching significance of ideology in constitutional adjudication, a recognition that is by no means threatening, either to the Court or to the rest of us. We have in a sense come full circle. We are back to Marshall, but not, of course, with Marshall. Holmes is still with us as well, and perhaps we may come to understand a little better how he fits in.