Although perhaps best known to the nation at large for execution of the "Saturday Night Massacre," Robert Bork is heralded in constitutionalist circles as the very model of the modern intentionalist jurist. When we speak of the need for a proper understanding of the judicial role, we would be hard pressed to explain why our ideal vision is not in fact of Judge Bork in action. Indeed, the consistency of his approach to judicial duties demonstrates the devotion with which Robert Bork, the judge, has followed the teachings of Robert Bork, the academic proselytizer of judicial restraint.

"Judicial restraint," Bork explains in one of his opinions, "is shorthand for the philosophy that courts ought not invade the domain the Constitution marks out for democratic rather than judicial governance." This credo is the hallmark of Bork's jurisprudence. Just as Bork's 1971 Indiana Law Journal article responds to Justice Peckham's Lochner question ("are we all . . . at the mercy of legislative majorities?") by observing that "[t]he correct answer, where the Constitution does not speak, must be 'yes'," Bork's opinions from the bench are equally emphatic that "[w]hen the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process . . . come before us not as suspect because majoritarian but as conclusively valid for that very reason." Dronenberg.

Bork, then, recognizes and abides by the constraints that law imposes upon judges. He is no conservative mirror-image of Justice Warren, endeavoring to implement right-minded public policy through judicial fiat; he is not an activist judge of the sort encouraged by Richard Epstein. To Bork, for example, substantive due process, whether as applied in Griswold or as in Lochner, "is and always has been an improper doctrine." Indiana Law Journal. As he recently reiterated in his San Diego Law School address, he is unalterably opposed to the notion that some "general spirit of libertarianism pervades the original intention underlying the fourteenth amendment so that courts may review virtually all regulations of human behavior."

Bork's brand of judicial restraint, however, is more textured than simple opposition to unfettered judicial power; he is decidedly unawed by misguided precedent, and his constitutional analysis does not always end, although it always begins, with the actual words of the charter. On or off the bench, Bork's criticisms of the Supreme Court are sharp, and indicate a willingness, if given the opportunity, to help revisit and correct improper Court doctrine. (As he has written, his philosophy "does not even remotely suggest that a court may not offer criticism of concepts employed by a superior court.") He is insistent, for example, that the Supreme Court's "right to privacy" opinions are incoherent and "[do] not provide any
guidance for reasoning about future claims laid under that right." Dronenberg. His writings and speeches, as well as his court opinions, have vigorously attacked the Griswold line of "reasoning"; typical was the newly-appointed Judge's 1982 Yale Federalist Society address castigating the high court for legislating (and nationalizing) morality on the basis of certain Justices' "middle-class values." Indeed, his prodding of the Supreme Court has extended well beyond the "privacy" area, as witness, for example, Loveday and Quincy Broadcasting (where Bork urges expanded protections for broadcast political speech and questions the Court's [incorrect] scarcity rationale for differentiating between the print and broadcast media in First Amendment matters).

Bork's opinions in the First Amendment area not only illustrate his willingness to question Court doctrine, but provide additional insight into his approach to constitutional analysis. In his Ollman concurrence, for example, Bork demonstrates what he has meant by his repeated statements that the "penumbras, formed by emanations" language of Griswold is in and of itself unexceptional and unexceptionable. Bork's position in Ollman follows from his dicta in McBride that "problems posed by contemporary libel law," if not "carefully handled," will "threaten journalistic independence." Changing times, in Bork's view, demand a changed response to protect the constant "values" implicit in the First Amendment; he sees a proliferation of libel suits threatening the values of political expression that emanate from the free press clause, and is therefore willing to see doctrine evolve to constrain libel suits in ways that the Framers would not necessarily have thought the First Amendment to demand.

In Ollman, Bork puts into practice the theory of his San Diego speech that:

all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a premise. That premise states a core value that the framers intended to protect. The intentionalist judge must then provide the minor premise in order to protect the constitutional freedom in circumstances the framers could not foresee.

Bork begins with the "core value" of the First Amendment and urges creation of new rules to protect that preexisting right. "Penumbras" are thus deemed useful by Bork insofar as they can be traced to specific constitutional clauses from which they emanate; these radiations cannot, however, properly be used to form some more general principle from which new constitutional rights not linked to specific text may be derived (Bork having disavowed this earlier theory in his 1971 piece). Nonetheless, this Ollman approach is unsettling to some conservatives.
Bork's willingness to vindicate rights grounded in the Constitution does not alter his general suspicion of judicial action. His jurisdictional opinions, for example, consistently attempt to narrow the scope of federal court involvement. Bork's approach here is presented perhaps most dramatically in his dissent from Barnes, where he details an array of arguments against congressional standing. He identifies the entire concept as a violation of separation of powers principles and of the case or controversy requirement, fabricated without any constitutional warrant: "it is absolutely inconceivable that Framers who intended the federal courts to arbitrate directly disputes between the President and Congress should have failed to mention that function or to have mentioned judicial review at all." In other areas as well, Bork makes clear his sensitivity to justiciability issues. (He is not willing to distort constitutional intent to reach these aims, however; in Silverman, for example, he refuses to invoke the greatly appealing but constitutionally dubious notion of Burford-type abstention for matters involving important but not unsettled issues of state law.)

The alternative to judicial power is to leave authority with the people and their elected representatives; in particular, Bork favors a strong executive (see, e.g., Persinger) in the context of a limited national government possessing only enumerated powers (see, e.g., Franz). He is generally inclined to grant administrative agencies broad discretion over matters within their ambit (perhaps especially when a deregulatory agenda is at issue), although he will entertain textually based constitutional claims against regulators (as in Jersey Central, a takings clause case against FERC). Some have discerned a pro-prosecution bias in his criminal law rulings, and he is not enthusiastic about any non-deterrent aspects of the exclusionary rule. He is unwilling for the courts to extend statutory civil rights laws to conduct not addressed by the legislature. Again, his reaction to claims of new found constitutional "rights" is illustrated by his view of Griswold and by his Dronenberg opinion (upholding military regulations against homosexual conduct): "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court."

In short, Robert Bork is an extraordinarily articulate advocate of an intentionalist philosophy that he himself has greatly helped to define and popularize. In both his areas of professorial concentration, antitrust and constitutional law, he has been in the vanguard of the conservative legal renaissance. His powerful abilities as a writer, his always evident analytical skills, and his diverse professional experience (Kirkland & Ellis partner, Yale professor, Solicitor General, judge) all contribute to his intellectual influence. Bork is 59 years of age.
This discussion of Robert Bork's work is designed to respond to the search's criteria and is therefore divided into three general headings. The first is a brief discussion of Bork's professional and intellectual qualifications. Next, constituting the bulk of the memo, is a treatment of his jurisprudence as developed in his opinions on the D.C. Circuit. The memo concludes with some thoughts on his broader political and social philosophy.

Because of the unique character of Bork's writing, commentary can convey only so much. In order to let Bork speak for himself, I suggest that anyone who does not read all his cases look at Barnes, (IV.A.1) Dronenberg, (IV.D.2) Hanoch tel Oren, (VII.3) Nathan (III.D.5) and Franz (IV.D.2). Those, together with the last chapter of The Antitrust Paradox and the Indiana Law Journal article on neutral principles and the First Amendment, should give some indication of the character of his thought and work.

I. Qualifications

Bork's resume -- private trial lawyer, law professor, Solicitor General -- speaks for itself. More important for these purposes is his influence on legal thinking. As an academic, Bork concentrated on two fields: antitrust and constitutional law. In both of them, he was a leading spokesman for the conservative reaction against the excesses of the courts and the Warren Court in particular.

Fifteen years ago the Administration's merger reform proposal would have been thought radical. Today, it is very close to the consensus among serious students of antitrust law and policy. This is a measure of the success of the Chicago School, the "new learning" in antitrust, which has succeeded in reducing dramatically the courts' intrusions into the marketplace.

The Antitrust Paradox is, along with Posner's hornbook, the favorite guide to Chicago-style thinking. Bork, however, is not primarily a law-and-economics theorist in the manner of Posner; on the contrary, he has expressed the view that Posner overdoes economic analysis. Bork's primary contribution to the new learning is legal, not economic: his seminal article on the legislative history and intent of the Sherman Act argued that the antitrust laws are a ban on price-fixing and restrictive horizontal practices, designed to maximize consumer welfare. This legal conclusion is the necessary predicate for the judicial adoption of the new learning. Without it, courts simply would be replacing Congress's bad law with their good law.

Virtually any article about the fundamental questions of constitutional interpretation and the power of the courts will begin its citations of interpretative, judicial-conservative, writings with Bork's Indiana Law Journal article. The Article is
not a finished piece of theory by any means, but a preliminary study, one that mixes well-established thinking about the counter-majoritarian difficulty with speculation about the possible sources of values. Bork has elaborated his views somewhat in numerous popular articles and speeches since then, but the basic theme has never changed: to stray from the law is to move from popular government to a tyranny of the robe.

Part of the reason Bork has been influential is the lucidity of his writing. When he wants to, Bork can be magisterial. Take for example the conclusion of the Paradox:
Because it deals directly and explicitly with the functioning of markets, antitrust has a unique symbolic and educative influence over public attitudes toward free markets and capitalism. That lends the discussion of this law an added degree of importance. The regime of capitalism brings with it not merely unexampled economic performance and a social and cultural atmosphere that stresses the worth of the individual, but, because of the bourgeois class it creates, trains, and raises to power, the possibility of stable, liberal, and democratic government. Antitrust goes to the heart of capitalist ideology, and since the law's fate will have much to do with the fate of that ideology, one may be forgiven for thinking that the outcome of the debate is of more than legal interest.

Everything Bork writes, however, is not this solemn. Earlier in that book, he characterized the "rising tide of competition," referred to by all advocates of strict merger regulation, as "the standard, Mark I all-weather antitrust hobgoblin."

As a judge, Bork sometimes tends to paint with a broad brush, as will be noted in the discussion below of his controversial Oilman (IV.B.2) concurrence concerning the First Amendment and libel law. His constitutional work generally is rooted in but explicitly not limited to text, drawing heavily on structure and history; Charles Black's Structure and Relationship in Constitutional Law profoundly influenced Bork's methods of reasoning, although not the substance of his views. Bork still exhibits the primary virtue of any judge: being careful about the law. His opinion in York v. MSPB (III.B.1), which is of no conceivable interest to anyone but York, patiently comes to grips with the procedural details of the Civil Service Reform Act; Judge MacKinnon's dissent in that case exhibits a contrasting, result-oriented impatience with the details of statutory and regulatory interpretation.

II. Legal Principles

The dominating themes of Bork's work on the D.C. Circuit are attention to the law -- as attested by his unusual willingness to reheat panel decisions in order to come to the right answer -- and a profound suspicion of the courts' ability to do anything but interpret the relevant authorities.
A. Interpretavism and Judicial Role

Bork exemplifies judicial conservatism in its classic form: he is both an interpretivist and an advocate of judicial restraint. The two are not exactly the same thing, and for Bork the latter acts as a gloss on the former. Bork's primary argument for interpretivism is from the fact that the premises of our national government are those of popular rule. For him, this has two complementary consequences. First, since the Constitution and the laws represent the choice of majoritarian or super-majoritarian processes, they are the privileged bases of decision. Second, since judicial preferences are not democratically sanctioned, they are unacceptable bases of decision. Thus, Bork is not simply an interpretivist. His primary principle is to analyze the law -- cases and statutes and the Constitution -- but he does so in light of a second-order principle of suspicion of judicial power. While Bork is certainly willing to overrule agencies in the name of the law and laws in the name of explicit constitutional text (such as the First Amendment), his bias appears to be against judicial action.

A nice formulation of this distrust of judicial power is found in his concurring opinion in Williams v. Barry, (IV.C.2) a procedural due process challenge to the decision of the Mayor of the District of Columbia to close shelters for the homeless. The majority intimated in dictum that under certain circumstances such decisions by the Mayor, which admittedly were purely political and not controlled by substantive law, might have to be made pursuant to minimal procedures. Bork blasted this fleas with the big gun: after citing the passage in Marbury which explains that mandamus does not lie for political acts of the President, he says:

Given our legal tradition, the suggestion that there may be judicial imposition of procedures on, and review of, plainly political decisions is revolutionary. It ought to be recognized as such, lest judges grow accustomed to the suggestion that they may control any process and begin to assume powers that clearly are not theirs.

It is typical of Bork that he combined the purely interpretive point -- that there were no limits on the Mayor's discretion in that case -- with the judicial-restraint point, that in any event courts should not seek to provide such limits.

In statutory contexts, Bork rejects readings that would give judges more discretion. In a powerful separate opinion in Hancoch tel Oren (VIII.3), for example, he confronted the Alien Tort Claims Statute, which by its terms permits aliens to sue in our courts for torts in violation of the law of nations. In Hancoch, plaintiffs, victims of a terrorist bombing in Israel, sued the PLO and Libya in U.S. court. On the basis of a comprehensive analysis of the language, historical context, and underlying policy considerations of that venerable but seldom-used law, Bork adopted a limited view of the statute's reach, in contrast to that taken by the Second Circuit in its influential and
widely-praised Filartega opinion. His line in Hanoch was rooted explicitly in the notion that to give the statute the broadest interpretation its language might bear would invite judicial policymaking that easily could interfere with the conduct of the nation's foreign affairs.

B. Constitutional Law

1. Jurisdictional doctrines

Bork maintains that the jurisdiction of the federal courts is sharply limited by the Constitution and statutes. His best known opinions on this subject involve congressional standing, and argue that standing doctrine should include separation-of-powers considerations. The underlying thinking seems to be this: something that looks like a lawsuit is not one if it demands that the court enter into the sphere of decision belonging to another branch of government. This means that certain "political" complaints do not, as a constitutional matter, amount to injury-in-fact of the sort required by Article III. This view is not universal among conservative judges: Malcolm Wilkey, for example, generally was willing to adjudicate anything that had a plaintiff and a defendant.

Bork argues that, since anything can be made to look like a lawsuit, only jurisdictional limitations will keep the courts from controlling the entire constitutional system. In order to prevent this, he has entered into an admittedly difficult field. His first congressional standing opinion, a concurrence in VanderJagt v. O'Neill (IV.A.2), discusses the importance and difficulty of the jurisdictional doctrines:

All the doctrines that cluster about Article III -- not only standing but mootness, ripeness, political question and the like -- relate in part, and in different but overlapping ways, to an idea which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

The jurisdictional doctrines are the very heart of judicial restraint.

In VanderJagt, Bork was willing to accept what he characterized as his court's fairly narrow congressional standing rule. After the Supreme Court's decision clearly importing separation-of-powers considerations in standing in Wright v. Allen, Bork revisited congressional standing in an extensive and powerfully reasoned dissent that may be his best work to date, an opinion which has been characterized as a proof by construction of the possibility of interpretive judging. That case, Barnes v. Kline (IV.A.1), involved a congressman's challenge to a presidential pocket veto. Once again, Bork's underlying claim, for which he relied on John Marshall among others, was that if the courts can adjudicate anything that takes the form of a lawsuit they will run the government. In dissenting from the majority's holding
against the Executive on the merits, Bork rejected congressional standing root and branch:

With a constitutional insouciance impressive to behold, various panels of this court, without the approval of the full court, have announced that we have jurisdiction to entertain lawsuits about governmental powers brought by congressmen against Congress or by congressmen against the President. This jurisdiction floats in midair. Any foundations it may once have been thought to possess have long since been swept away by the Supreme Court. More than that, the jurisdiction asserted is flatly inconsistent with the judicial function designed by the Framers of the Constitution.

Bork's argument drew heavily on constitutional structure and history as well as the uniform practice of the government since the framing. The Supreme Court currently is considering our argument in Barnes that congressional standing be eliminated.

Bork's wariness of jurisdictional excess extends beyond politically controversial cases involving congressional standing. In von Aulock (IV.A.4), for example, he found a jurisdictional difficulty that this Department, representing the EEOC, had missed. At issue was an EEOC Interpretative Bulletin which, plaintiffs alleged, enabled their employers to discriminate against them. Bork, sua sponte, found that plaintiffs' problem arose from the statute, not from the EEOC's views, so that the redressability and traceability requirements of standing were not satisfied. Similarly, in Weisberg (V.6) Bork made himself the special friend and advocate of the exclusive jurisdiction of the Federal Circuit under the Federal Courts Improvements Act and the Tucker Act — a jurisdiction that often ousts that of his own court. This doctrine is part of the Department's defense in Hohri, the Japanese exclusion-order damages case in the D.C. Circuit.

2. Separation of powers

The congressional standing cases are, of course, also separation of powers cases. Barnes in particular represents an attempt by a Member of Congress to recruit the judiciary in his attack on the Executive. For that reason, one can speculate that Barnes must have seemed especially easy for Bork, who has long championed a strong executive in the President's wars with the other branches.

Two other opinions are especially important here. In the first panel opinion in Persinger (VIII.1), Bork went to considerable lengths to find presidential power sufficient to support the U.S./Iran executive agreement which terminated the hostage crisis and, along with it, plaintiffs' tort actions. (Persinger was a Marine hostage who sued Iran.) Bork's position on the broad scope of the executive power is controversial, within and without the conservative camp, but he adheres to it consistently.
The other signal opinion is his concurrence in Nathan v. Smith (III.D.5), where plaintiffs sought to compel the Attorney General to conduct a preliminary investigation under the Ethics in Government Act, an investigation that might have led to the appointment of an independent counsel. In finding that the Ethics in Government Act created no private right of action to ground the court's jurisdiction, Bork emphasized the unique nature of prosecutorial functions and the constitutional sensitivity of the issue. Any statute giving a private individual the opportunity to control the Attorney General's prosecutorial decisions, Bork thought, would raise serious constitutional issues.

In addition, his separate opinions in two CIA FOIA cases, Sims (III.A.1) and McGehee (III.A.2), suggest a feeling that application of FOIA to intelligence agencies represents an attempt by Congress to interfere dangerously with the conduct of the executive in the vital field of national security. Sims was particularly troubling, since it involved an attempt to obtain through FOIA names of individuals who had cooperated with the CIA's MKULTRA project and who therefore were intelligence sources. Bork's dissent in Sims, which was somewhat constrained by his court's earlier holding in the case, was largely adopted by the Supreme Court when it reversed the original Sims decision. Finally, Bork's Abourezk (VIII.4) dissent argued in favor of a broad executive power to exclude dangerous aliens from the country.

3. Federalism

Given the chance, Bork produced a very interesting opinion involving the relationship between the states and the national government. In Franz (IV.D.2), a father sought relief against the Marshals Service in order to see his children, who were being hidden by the Witness Protection Program. Franz brought substantive and procedural due process challenges which Edwards, for the majority, dealt with at length. Bork pointed out that the constitutional issues were not properly reached until Franz's rights, both to visitation and to relief against any third party (including possibly the United States) interfering with visitation, had been determined by a lower court, probably a Pennsylvania court.

Franz is interesting not only because it takes seriously the substantive state law of child custody, but also because it entertains the notion that alterations of such law may be beyond the enumerated powers of Congress. Citing Uscopy, Bork argued that Edwards erred in cavalierly asserting that any state law rights Franz might have had were preempted by the Witness Protection Act. Rather, according to Bork, that Act should be read so as to avoid that question, which would raise grave constitutional issues as to Congress's power over domestic relations. Bork's criticism of Edwards' substantive due process "fundamental
right" of family association is well taken, and his discussion of the context, conduct and content of the hearing that Edwards requires is a fine send-up of judicial process-worship.

4. Individual rights

For Bork, there is a clear dividing line in the jurisprudence of constitutional rights: the line between rights contained in the Constitution and rights the courts have made up. He is solicitous of the former -- sometimes more so than conservatives would prefer -- and contemptuous of the latter.

It is clear that Bork is a strong friend of the First Amendment's protection of the news media. His treatment of the common law of libel in McBride (IV.B.1) and of the legislative history of the Communications Act in Loveday (I.A.8) are strongly and explicitly linked to a profound skepticism concerning any regulation of the means of communication. Loveday, which involves the FCC's authority to require that the sponsorship of political commercials be identified, is especially interesting because it shows Bork reaching out to discuss First Amendment protections for the electronic media, a point on which he has been outspoken. Given the chance, Bork in Quincy Broadcasting joined in rejecting the scarcity rationale and in striking down the FCC's must-carry rules on constitutional grounds.

This advocacy of the press has gotten Bork into considerable trouble with conservatives over his Ollman (IV.B.2) concurrence, in which he endorses limited First Amendment-based restrictions on libel actions involving political statements of the sort incapable of proof or disproof at trial, an application arguably at variance with the original understanding. There are two crucial steps in Ollman: first, the characterization of the First Amendment as seeking some particular (very high) level of freedom to express political opinion, and second the claim that the proliferation of libel suits threatens that outcome. The characterization of a constitutional right as effecting an outcome rather than a rule is, of course, highly controversial. The second step is likewise questionable, but reasoning of that sort is inevitable if one is to be anything but the most literal-minded sort of originalist. The Ollman opinion represents a real but probably errant attempt to apply the clearly expressed values of the Framers to the contemporary world.

Ollman annoyed quite a few readers of National Review; Dronenberg (IV.D.1), which upheld military regulations on homosexuality against a constitutional right-of-privacy challenge, infuriated patrons of the New York Review of Books. Dronenberg, denounced by Ronald Dworkin as lawless, was an adventurous opinion. In order to determine the reach of the right of privacy protected by Roe and its relatives, Bork conducted a systematic analysis of the cases on which the Roe court rested its decision. He found no intelligible principle capable of supporting protection of homosexual conduct. Given the Supreme Court's position -- the
Court cannot and does not admit that it made Roe up -- the
opinion was fairly radical, although its forthrightness in
criticizing the Supreme Court drew a laudatory response from
Judge Ginsburg in a statement explaining her refusal to vote to
rehear the case en banc. The issue of treatment of homosexual
conduct under Roe has generated a split in the circuits and is
currently before the Supreme Court.

C. Administrative Law

The heart of Bork's administrative law jurisprudence might
be said to be openmindedness. He needs to be convinced that an
agency decision is genuinely wrong on the law before he will
reverse, but he can be persuaded. An example of willingness to
listen to agencies, and unwillingness to consult his own prefer-
ences, is the New York City Broadcasting (I.A.3) case, where Bork
simply refused to challenge an FCC determination as to the
content of the public interest in the granting of exemptions to
its AM broadcasting rules. One indicator of the change that has
come over his court is Bork's concurring statement in Office of
Communications of the United Church of Christ (I.A.1), which
largely upheld the FCC's deregulation of broadcasting. In the
old days, the pro-regulatory sentiments expressed by Judge Wright
with which Bork refused to associate himself probably would have
become holding rather than mere dictum. A companion case written
by Bork, Black Citizens for a Fair Media (I.A.6), likewise
captures the change, and Bork's tendency. In Black Citizens,
Judge Wright dissented violently from Bork's opinion upholding a
fairly extreme deregulation of radio relicensing.

As a general matter, Bork is an attentive statutory analyst,
although his focus tends to be more on purpose and structure than
on text. For example, his opinion in Middle South (I.B.1), which
disputes with Judge Ginsburg over the meaning of the word "such,"
is a reasonable interpretation of the statute in its full context,
not a mere parsing. Another characteristic performance is in
Bellotti v. NRC (II.B.2), which upheld (over a Wright dissent) an
NRC refusal to hold a hearing. Although the language of the
statute could be read in petitioners' favor, Bork reasoned from
the absurd and destructive results to another, quite reasonable,
construction of the extent of the agency's power.

Bork's deference certainly has limits. His opinions in two
FERC procedure cases, New York State ERDA (II.A.1) and Internation-
Paper (II.A.2), show impatience with unreasonable agency excuses.
More important is his dissenting opinion in Planned Parenthood
(II.B.3), the "squeal rule" case, in which Bork rejected the
reading of HHS's authority advocated by this Department. Unlike
the majority, Bork did not think this put an end to the case.
Rather, he suggested that the Secretary might have had some other
basis for her action, a basis that could be found if the reg-
ulations were remanded per Chenery.
Bork's most important administrative decision may turn out to be the opinion on rehearing in *Jersey Central Power* (I.B.3), where he held a utility entitled to a hearing on its claim that the rate FERC had set was so low as to be unreasonable under the Federal Power Act and an unconstitutional taking of property under the Just Compensation Clause of the Fifth Amendment (the Supreme Court has found the statutory and constitutional standards to be the same). *Jersey Central* shows Bork willing both to reverse an agency and to entertain textually based constitutional claims directed against regulatory statutes. While Bork's view is plainly correct under governing Supreme Court precedent (a Douglas opinion in *Hope Natural Gas*), Judge Mikva in dissent accused him of Lochnerizing, which enabled Bork to make this memorable response: "The dissent must represent the first record- ed instance of anyone confusing the philosophy of Justice Rufus W. Peckham and that of Justice William O. Douglas with respect to economic regulation."

**D. Criminal Law**

Two of Bork's criminal law opinions are worth noting. *Mount* (VI.1) involved the application of a version of the exclusionary rule developed under the so-called supervisory power, according to which foreign evidence collection methods that "shock the conscience" of the court should result in suppression, even though exclusion would have no deterrent effect on foreign law enforcement. Rejecting the rule in other circuits, Bork's concurrence suggested that the supervisory version of the exclusionary rule is, in the face of congressionally-adopted Rules of Evidence, unacceptable judicial legislation. He also questioned the propriety of any non-deterrent exclusionary rule: "Where no deterrence of unconstitutional police behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience even more than admitting the evidence."

If any generalization is possible on this limited a basis, it is that Bork may have a pro-prosecution bias. His opinion on remand in *Singleton* (VI.2 & 3) characterizes as obviously correct a rule which in fact is very difficult, that due process and sufficiency-of-the-evidence standards are the same. Bork's position is sufficiently shaky on the law that a majority of the judges in the en banc vote questioned it, although they did not think the case merited full consideration.

**E. Civil Rights**

Bork has made a few noteworthy contributions to anti-discrimination law. He dissented from denial of en banc reconsideration in two cases now before the Supreme Court: *Paralyzed Veterans* (VII.1), which asks whether the funding strings of the Rehabilitation Act are program-specific (as in *Grove City*), and *Vinson* (VII.2), in which the D.C. Circuit found an employer vicariously liable for sexual harassment as a result of a liaison
that may have been voluntary. Paralyzed Veterans, in which handicapped groups are seeking to apply the Rehabilitation Act's anti-discrimination provisions to airlines, is particularly controversial, given that it involves the Grove City issue: airports receive funds, but airlines themselves do not. In his Vinson dissent, Bork challenged a developing consensus among the other circuits that applies Title VII to sex harassment claims.

Bork's reluctance to accept yet another judge-made extension of the doctrine of sexual harassment under Title VII led to the six-judge concurrence in denial of rehearing en banc in King v. Palmer (VII.3). Judge Edwards' opinion for the panel had implied that Title VII gives relief to an employee who is passed over for promotion in favor of a co-worker with whom the employer was having an affair. Bork's concurrence pointed out that this part of Edwards' decision was dictum.

III. Political Philosophy

On the surface questions of the day, Bork is easy to describe. He believes that the nation is overgoverned and overlawyered. As to the latter, his discussion of summary judgment in dissent in Catrett (V.4) and of tort law in Wilson (IX.1) are similar to the line the Department has taken in its litigation reduction and tort reform proposals. Of course, it should not be at all surprising that Bork sounds so many of the standard conservative themes. Judicial restraint, for example, is a standard conservative theme in part because Robert Bork has been espousing it for the last twenty years. Our underlying model of a conservative jurist has been profoundly influence by Bork's work.

But Bork's deeper political convictions -- the wellsprings of his obvious conservatism -- are more obscure. Ten years ago, he readily would have been classified as part of the libertarian wing of Classical Liberalism, as represented by the Chicago School. Thus, it is clear that when in the conclusion of the Paradox Bork identifies four trends in antitrust, he is identifying four tendencies of contemporary politics of which he disapproves:

The trends observable in antitrust, I have suggested, are four: (1) a movement away from political decision by democratic processes toward political choice by courts; (2) a movement away from the ideal of free markets toward the ideal of regulated markets; (3) a tendency to be concerned with group welfare rather than general welfare; and (4) a movement away from the ideal of liberty and reward according to merit toward an ideal of equality of outcome and reward according to status. Common to all of these movements is an anticapitalist and authoritarian ethos.

The reader can tell what the author thinks of the authoritarian ethos.
Since then, however, Bork has moved in the direction of communitarianism and traditionalism. He has spoken in praise of Thomas More and his reverence for established authority. His speeches attacking the "privatization of morality" are even more instructive. That anyone would object to keeping or making morality a private concern would shock a Classical Liberal, and in my view it would have shocked the author of The Antitrust Paradox. Nevertheless, the author of that book and of that phrase are the same.

For most purposes, though, these differences are unimportant. The conservative movement is a coalition of traditionalists and radicals, individualists and communitarians. All are enemies of the regulatory redistributionist state and of the legal doctrines that have made the Constitution and the courts its tools. That Bork is not readily classified as between these two camps reinforces his status as an archetypal judicial conservative.