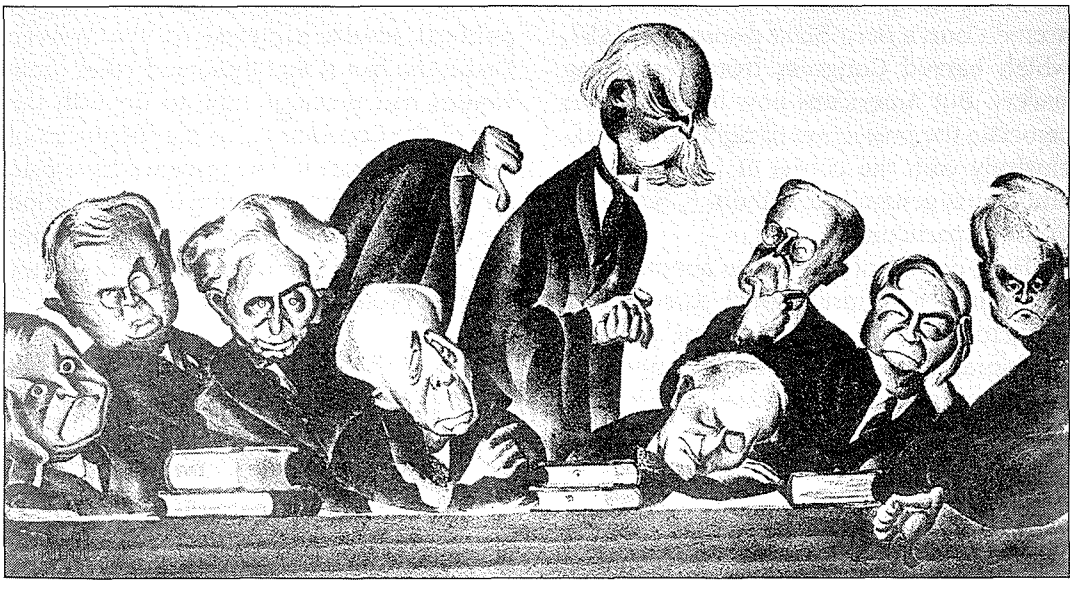
RIGHTS WITHOUT ROOTS

by Gary L. McDowell

We are living in the midst of America's second great age of rights—or perhaps its first age of rights rhetoric. Scarcely a question now comes before the American public without some fundamental issue of rights being invoked. There is said to be a right to life and a right to die, and a right governing virtually everything that might occur between the exercise of these two prerogatives. There are said to be women's rights, gay rights, and handicapped rights, a right to work and a right to smoke, to name only a few. To a degree that must astonish even Western Europeans, concern about rights animates many contemporary American public debates—over judicial nominations, congressional legislation, federal grants to "artists," even performances by pop music stars.

There is a sense in which all of this is quite natural. Our nation was founded on the idea that all men are created equal, that they are endowed by their Creator with certain inalienable rights, and that governments are instituted among men to secure the rights nature gives. From the beginning, Americans have believed that if their country was about anything, it was about personal freedom and the rights that helped secure it. During the 20th century, the American devotion to rights was redoubled by the contest with fascism—which erupted into war during the sesquicenten-



The Nine Old Men of the U.S. Supreme Court used spurious economic "rights" to obstruct the New Deal, then dropped them. Can today's "rights" be as easily forgotten?

nial of the Bill of Rights—and then with communism. What more clearly distinguished free societies from totalitarian ones than individual rights? And, finally, there was the civil rights movement of the 1960s, which strengthened Americans' resolve to practice what we have always preached.

Today, the rhetoric of rights occupies center stage in American politics. As a result, there have been subtle changes in the way we think about rights. The very idea of rights has been cheapened by the widespread use of rights rhetoric to morally inflate what are, in reality, only policy preferences—over everything from abortion to affirmative action. And the transformation of ordinary political questions into non-negotiable questions of right has diminished our public life, turning the give-and-take of normal debate into all-or-nothing clashes.

In the process, we have become increasingly confused about what rights are and how they are best preserved. Earlier generations thought rights were to be protected by the constitutional system as a whole. Abraham Lincoln, after all, went to the White House declaiming against the Supreme Court's *Dred Scott* decision of 1857, which barred Congress from restricting slavery. But Americans now have come to associate the protection of rights almost exclusively with the courts of law—the federal courts generally and the U.S. Supreme Court in particular.

How did all of this come about? What intellectual and institutional forces combined to create this state of affairs, in which fundamental rights are looked upon as rootless things to be fashioned and re-fashioned at judicial will?

A major cause was the prominence of the Supreme Court under the leadership of Chief Justice Earl Warren between 1953 and 1969. Under Warren, the Supreme Court began teaching a generation of lawyers and law professors what Judge J. Skelly Wright called the "language of idealism." The lesson was simple: There need be "no theoretical gulf between law and morality." By the time Earl Warren handed over the reins of judicial power to Warren Burger in 1969, he had used the language of rights to transform American society in accordance with his own vision of a just political order. He had undertaken to end segregation beginning with the desegregation of public schools in *Brown* v. *Board of Education* (1954 and 1955); to restructure state criminal justice systems by announcing in *Gideon* v. *Wainwright* (1963) that the Constitution demanded that indigents be afforded legal counsel and in *Miranda* v. *Arizona* (1966) that the police had to inform suspects of their "rights"; and to enforce "one man, one vote" as the rule for apportionment of state legislatures, in *Reynolds* v. *Sims* (1964).

However much one may agree with the political results achieved by the Warren Court, the fact is that these and other innovations had precious little to do with the text of the Constitution or the intentions of those who wrote it. The price we have paid for such departures is a loss of appreciation for rights properly understood: what they are, where they come from, and how they are best protected.

Of all the Warren Court's significant rights cases, none can compare in importance to *Griswold* v. *Connecticut* (1965). In *Griswold*, the Court

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made the startling announcement that there was a realm of unwritten rights and that the job of the Court was to divine and decree these rights.

The *Griswold* case involved a challenge to a Connecticut law that prohibited the use of contraceptives, even by married couples. Few would argue with Justice Potter Stewart's judgment that the law was "uncommonly silly," but many, including Stewart and Justice Hugo Black, did argue with the Court's presumption that silliness was enough to render it unconstitutional. But writing for the majority, Justice William O. Douglas did just that, creating as he did so a "right to privacy" out of the First, Third, Fourth, Fifth, and Ninth amendments. Douglas said that he discerned "penumbras, formed by emanations from these guarantees" that looked to him like "zones of privacy." In short, while nowhere mentioned in the Constitution, there was indeed an unenumerated general "right to privacy."

The lines and limits of this new right? That was simple; the only limit would be the judicial imagination.

"Rights anxiety" might be the title of this cartoon. Critics say that the news media wrap themselves in a First Amendment flag, and invoke a "right to know" not mentioned in the Constitution.

To old-time liberals such as Hugo Black, *Griswold* was as intolerable as what the Court had done long before in such economic liberties cases as *Lochner* v. *New York* (1905). It was, he said in a spirited dissent, nothing more than the old natural rights arguments come back clad in the raiment of due process of law. What had made that approach illegitimate at the turn of the century was precisely what made it illegitimate now. Such constitutional interpretation—if, indeed, interpretation be the right word—would turn the Court into a continuing constitutional convention with the power to transform the Constitution. That, said Black, was antithetical to the very idea of the rule of law. (In 1973, in fact, the Court would discover within the right to privacy a new right to abortion in *Roe* v. *Wade*—or at least a right that existed during the first trimester of pregnancy. But in 1985, the Court would refuse to stretch the "right" to include consensual homosexual sodomy.)

It would be wrong to hold the Warren Court solely responsible for the recent revolution in rights. In many ways, Warren and his colleagues merely took advantage of ambiguities in law and the public understanding of rights that had been growing for a long while. Some of the revolution's seeds were planted long ago in a most unlikely place, that most infamous of Supreme Court cases, *Dred Scott* v. *Sandford* (1857). While most notable for denying Congress the power to restrict slavery in the territories (and thus for helping to push the nation closer to civil war), *Dred Scott* also marks the first suggestion of what

would become the legal doctrine of Substantive Due Process. This doctrine asserted that the constitutional guarantee of due process of law did not only require the just administration of legal *procedures*; it also allowed the courts to scrutinize the *substance* of laws for infringements of, say, the right to own private property—in the case of *Dred Scott*, slaves. Thus, the Court ruled that the Constitution barred Congress from tampering with the noxious institution of slavery.

Of course, the Constitution said no such thing. This was merely what a majority of the Court under Chief Justice Roger B. Taney thought reasonable. As Alexander Hamilton had put it long before, the "words 'due process' have a precise technical import, and are applicable only to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature." Yet that is precisely what the Court's Substantive Due Process doctrine allows. It posits as a general rule that any law that strikes the Court as being unfair, unjust, or against the rules of reason is unconstitutional.

The Fourteenth Amendment, ratified after the Civil War, contains the same Due Process Clause as the Fifth Amendment. Now, both the states under the Fourteenth Amendment and the nation under the Fifth Amendment were bound to guarantee that no citizen would be deprived of "life, liberty, or property without due process of law." These terms "life, liberty, or property" were not natural law abstractions; they had a very definite common law meaning. Life referred to the death penalty; liberty to incarceration; and property to fines. Nothing more than that.

No matter. The belief that due process empowered the courts to review the substance of legislation lay dormant for nearly half a century after *Dred Scott*. Then, toward the end of the century, it was transformed into a full-blown doctrine when the justices bridled at new laws that Congress and the state legislatures began passing to mitigate the ills of rapid industrialization. One after another, laws restricting child labor, mandating safe and sanitary conditions in the workplace, and establishing minimum wages, among others, were overturned by the Court.

The business community, the Court said in a series of rulings, had certain rights protected by the Constitution. While these were not spelled out in the text, they were included in the "liberty" provision of the Due Process clauses of both the Fifth and the Fourteenth Amendments. This provision, the Court declared, included a "liberty of contract." Certain "unreasonable" governmental regulations, the Court asserted, violated the freedom of private property implicit in the already implicit "liberty of contract."

This notion of *laissez faire* constitutionalism reached its clearest expression in *Lochner* v. *New York* (1905), in which the Court struck down a New York State health and safety law regulating the hours bakers could work, declaring that the law violated the fundamental "liberty of contract" between employers and employees. For the next 22 years, the Court stuck more or less steadily to this extra-textual path in constitutional law. It was, as one wry observer put it, "prone to take a decidedly astringent view of all governmental powers except its own."

The beginning of the end came in 1937 in *West Coast Hotel* v. *Parrish*, wherein the Court, as part of its general retreat from confrontation with President Franklin D. Roosevelt and his New Deal policies, finally upheld a state wage law. That year and the next proved to be very important in the history of the rights revolution. Not only was the move away

from Substantive Due Process in economic matters begun, but two other cases were handed down that foreshadowed the next wave of judicial innovation.

The first of these portents was *Palko* v. *Connecticut* (1937), which addressed the question of whether the Due Process Clause of the Fourteenth Amendment "incorporated" the Bill of Rights—that is, whether it required the states to abide by the Bill of Rights.

"Incorporation" may be a worthy goal, but there is nothing in the Fourteenth Amendment to suggest that it was the intention of the authors. Like the Framers of the Bill of Rights, they were quite prepared to contemplate a situation in which primary responsibility for these matters was left in the hands of the states. To arbitrarily "incorporate" provisions from the Bill of Rights reduces those rights to judicial fiat.

But *Palko* was not the first "incorporation" case.* The real heart of the *Palko* decision lies in the idea, advanced by Justice Benjamin Cardozo in the majority opinion, that there is "an honor roll of superior rights." The Court deemed these rights "superior" insofar as they were distinguished from those without which "justice . . . would not perish." Only those rights "implicit in the concept of ordered liberty [and] so rooted in the traditions and conscience of our people as to be ranked fundamental" were to be considered superior. In particular, Cardozo believed that strictly procedural rights (such as protection against being placed twice in jeopardy of one's life) were of a lower order than such rights as "freedom of thought and speech." These were the "matrix, the indispensable condition, of nearly every other form of freedom."

Cardozo thus established two novel ideas. First, not all of the rights spelled out in the Bill of Rights are equal. (Thus, incorporation could be done on a case-by-case basis.) Second, the distinctions between "fundamental" rights and lesser rights are to be drawn by the Court, based on what the justices (or at least a majority of them at any given time) think is reasonable. These two ideas would propel the Court into the next period of Substantive Due Process, a period of judicial activism that continues to this day. A new doctrine was born: Rights depend only upon the Court.

The second major case of that era, *United States* v. *Carolene Products* (1937), was handed down about four months after

*That distinction belongs to *Gitlow* v. *New York* (1925), in which the Court ruled, without so much as an argument, that at least portions of the Bill of Rights affect the states. And between *Gitlow* and *Palko*, a few other provisions of the Bill of Rights found their way into the crevices of the Fourteenth Amendment. But in no case did the Court offer a sustained defense of what it was doing. That was left for *Palko*.

RANKING RIGHTS

Two centuries ago George Mason asserted that citizens must "give up some of their natural rights that . . . they might secure the rest." In 1989, People for the American Way put this 18th-century proposition to a 20th-century test. In an opinion survey, it asked a sample of young adults aged 15–24 which of their fundamental rights they would be willing to give up in order to keep all the others. Below, the question and responses:

If you had to trade off just one of these rights or freedoms in order to keep all the others, which one would you be the most willing to give up?

Freedom of the press	27%
Right to protest	17%
Right to own private property	15%
Freedom of religion	11%
Right to choose own career	11%
Right to vote	8%
Freedom of speech	2%
Refuse to give up any rights	5%
Not sure	4%
	100%

Palko. Its significance lies less in the Court's formal opinion than in a single famous footnote. In footnote four of the majority opinion, Justice Harlan Fiske Stone noted that there was a need for "more searching judicial inquiry" into whether prejudice against "discrete and insular minorities" might raise special constitutional concerns. Together, the new doctrines announced in *Palko* and *Carolene Products* eventually would take the Court down many strange paths. By focusing on the claims of minorities (not just racial minorities, but those defined by ethnicity, gender, and even political ideology and religious belief) and by focusing on rights not always explicitly mentioned in the Constitution, the Court would encourage the belief that majority rule is somehow inherently illegitimate, that the collective sense of the community ought to be easily trumped by a well-tuned minority claim of rights. The Court thus contributed in no small way to the atomization of American society. Substantive Due Process was alive and well; only now it focused on personal liberties rather than property rights.

The Court did not immediately put the new doctrines into practice. Between the demise of the old liberty-of-contract variety of Substantive Due Process in the mid-1930s and the explosion of the new era of Substantive Due Process in the mid-1950s, the Court largely went about its incremental business, stretching a past holding here and adjusting an old doctrine there. Under the stewardship of Chief Justices Charles Evans Hughes (1930–41), Harlan Fiske Stone (1941–46), and Fred M. Vinson (1946–53) there was no inkling of the revolution that was to come. Yet each in his own way presided over a Court that was, however slightly, clearing the way for the Warren Revolution.

Between 1937 and 1947, for example, the Court effected a virtual constitutional revolution in the way federal regulation was considered. The power of Congress to regulate commerce, once radically restricted by the Court, was suddenly endowed with a life beyond anything the Framers of the Constitution could have dreamed. So expansive was the power, the Court held in *Wickard* v. *Filburn* (1942) that a farmer could be prohibited from growing certain crops for his own family's consumption.

The Court also moved ahead on the bit-by-bit "incorporation" of the Bill of Rights. In 1937, in *De Jonge* v. *Oregon*, it invalidated the conviction of a communist under an Oregon statute outlawing criminal syndicalism. In 1943, it struck down as unconstitutional a West Virginia flag salute statute in *West Virginia State Board of Education* v. *Barnette*. Four years later the Court erected its famous "wall of separation" between church and state in *Everson* v. *Board of Education*. And in 1948 Justice Hugo Black, in a famous opinion in *Adamson* v. *California*, urged his brethren to dispense altogether with the ad hoc approach to incorporating the Bill of Rights and to decree the entire catalogue of the first eight amendments absorbed.

Yet none of these rulings was part of an overarching judicial vision. They came from different directions at different times and for different reasons. What Earl Warren was able to supply after he arrived on the Court in 1953 was precisely that unifying vision—not only of rights but of judicial power generally.

As one of his biographers put it, Warren felt he had a "mission to do justice," and he combined "an ethical gloss on the Constitution with an activist theory of judicial review." His was a calling, in Warren's view, that did not demand that he carry along much "theoretical baggage." His feelings and a commitment to do good were all that

he needed.

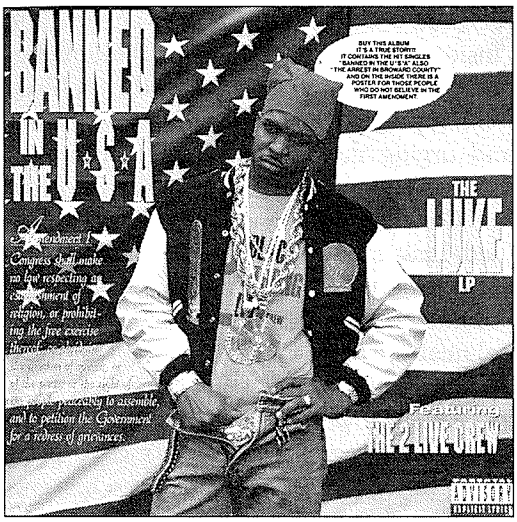
But an activist theory of judging without much "theoretical baggage" is a vacuum waiting to be filled, and the legal academy wasted no time in rushing to Warren's ideological rescue. As Judge J. Skelly Wright pointed out, Warren and his Court had nothing short of a "revolutionary influence" on an entire generation of law students, a generation that has long since passed into the law professoriate and the judiciary itself. That generation did carry a lot of "baggage," including Warren's dedication to act on those "ideals to which America is theoretically and rhetorically dedicated."

Indeed, the real revolution in rights during the last 40 years has occurred in the way constitutional theory is taught in the nation's law schools. Students are now trained to practice a muscular kind of "political jurisprudence," with the ultimate aim of persuading the courts to adopt new theories of rights in the name of doing justice. According to Robert H. Bork, many of today's constitutional theorists "continue to speak of 'constitutional law,' but it is clear that they view the Constitution less as a legal document with a meaning to be ascertained than as a general warrant for judges to implement the policies the professors favor." As the dean of the Stanford Law School, Paul Brest, once confessed, the writings of these thinkers are not so much political theory as "advocacy scholarship . . . designed to persuade the Court to adopt our various notions of the public good."

The theoretical keystone of this new judicial activism was finally laid in place in 1977 by Ronald Dworkin, in a book appropriately titled *Taking Rights Seriously*. Dworkin, an American lawyer who had become the University Professor of Jurisprudence at Oxford, aimed to "define and defend" a new liberal theory of law. That required a concerted effort to achieve the "fusion of constitutional law and moral theory." At a minimum, that fusion required freeing judges from the shackles of history and urging them to exercise their moral imaginations in ways that the Framers of the Constitution never could have imagined. Law, in Dworkin's view, had to be an arena where "political morality" could be put into effect. But where was that vision of political morality to come from? Not from the people, Dworkin argues, but from judges: "The program of judicial activism holds that courts . . . should work out principles of legality, equality, and the rest, revise those principles from time to time in the light of fresh moral insight, and judge the acts of Congress, the states, and the president accordingly." Such a system "involves risks of tyranny," Dworkin concedes, but to his way of thinking that is simply a price worth paying.

While the years since the publication of *Taking Rights Seriously* have seen the emergence of an army of constitutional moralists—Philip Bobbitt of the University of Texas, Michael Perry of Northwestern, and Laurence Tribe of Harvard, to name but three—none departs very significantly from Dworkin's original vision. They all tend to share certain assumptions. First, they believe that the idea of rights is not static but dynamic. Thus, as Tribe argues, it is the Court's job to exploit the Constitution's alleged "necessarily evolutionary design" in order to encourage the "living development of constitutional justice."

Second, they assume that the idea of rights is not rooted in the consent of the governed or in any "archaic" notion of popular sovereignty. As Bobbitt argues, "constitutional decisionmaking has . . . an expressive function . . . and if we accept the expressive function of the Court, then it must sometimes be in advance of and even in contrast to, the largely inchoate notions



Another First Amendment flap: 2 Live Crew hoped for a hit after its first record ran afoul of Florida authorities. It was a commercial flop.

of the people generally."

The third assumption that unites Dworkin and his allies is the dismissal of the written Constitution as binding law. The idea that the intentions of those who wrote and ratified the Constitution can be known, they hold, is naive. And even if these intentions could be discerned, to think them binding on us at this late date is more than naive. It is ludicrous. Another of the activists, Craig Ducat of Northern Illinois University, bluntly declares that the Framers "are dead, and, in the contemporary world, their views are neither relevant nor morally binding." To seek the original meaning of the text, says still another theorist, is to do nothing more than to encourage "judicial autopsies on the Framers' minds."

What unites these shared assumptions into a vision of law is a simple belief that it is legitimate for judges to "define and enforce fundamental human rights without substantial guidance from constitutional text and history." Such a view obviously presupposes judges who are, as Michael Perry puts it, "committed to the notion of moral evolution and are themselves open to the possibility of moral growth." In the name of taking rights seriously, these three fundamental assumptions ultimately lead, as political scientist Walter Berns has noted, to "treat[ing] the Constitution frivolously."

To many of those who founded the American republic, rights were important enough to require a bill of rights to shackle the new national government, just as the state governments were restricted. To keep the government in its place, it was necessary to get the rules in writing, to give concrete expression to those things we call rights. Such rights, or constitutional "fences" as John Locke called them, were to come from the collective judgment of the people, not from the moral imaginations of judges. The Framers recognized that it was not only the Constitution but the very idea of constitutionalism and the rule of law that was at stake. As Justice Benjamin Curtis wrote more than a century ago in his dissent in the infamous *Dred Scott* case, "When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."

The idea that there are unenumerated rights waiting to be discovered and decreed by the judiciary is an idea at odds with the premises of constitutional government. Rights divorced from the idea of written protections in the form of a constitution are not "rights" in any meaningful sense. They may be the moral predilections of a judge, or of people who come to bar to press their claims, but they are not rights in the historic sense. Nor are they rights in the sense

that they are permanent "fences" against the pretensions of governmental power. Judicial power is still governmental power, and rights that depend upon governmental power for their definition are not rights at all but only privileges.

Therein lies the lesson for our time. The Warren Court is gone; the Burger Court is no more; and now the so-called Reagan Court under Chief Justice William Rehnquist will have its say about the rights of Americans. There is every reason to believe, of course, that the newly constituted Court will be less than friendly to some of the liberal claims of rights likely to arrive on its docket. Neither a significant limitation of capital punishment nor expansions of abortion rights, the separation of church and state, or affirmative-action policies that embrace racial preferences seem likely.

Since the Warren Court shed virtually all pretense of judicial restraint, the way is now clear for the Reagan Court to do virtually whatever it wishes—and some of what it does do will no doubt horrify the constitutional thinkers who have been so eager to trust in the moral imaginations of judges. There is, for example, a distinct possibility that the Court will revive the economic liberties doctrine of the 19th century, albeit in new dress. There is no reason a creative judge could not stretch *Griswold*'s unenumerated right to privacy to include a right to private property. Rent control, environmental regulations, and other allegedly socially benevolent laws may very well be roughly treated by a Court that includes many justices who are at least as libertarian in their economic beliefs as they are conservative in their politics. And there are important libertarian theorists in the law schools—notably, Richard Epstein of the University of Chicago and Bernard Siegan of the University of San Diego—who have helped lay the theoretical foundations for just such a drastic change of course should the Court choose to build upon them.

Whether the Court strikes out on that path or not, the status of rights in America is certain to remain confused. That is the inevitable result of our contemporary jurisprudence of rights. The rights of Americans will continue to have less to do with what "We the People" have marked off as beyond the reach of government than with what a majority of the Supreme Court may think or feel at any given moment. That is a sad state indeed for our country to be in as it celebrates the bicentennial of its Bill of Rights.