LAW AND COURTS

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In this Issue

From the Editor

On April 28, 1995, C. Herman Pritchett passed away at the age of 88. To honor this great scholar and teacher, John Brigham asked some of Professor Pritchett's faculty and student colleagues for their reflections. The result is a fitting tribute to a man who touched the lives of so many. It appears on pages 16-18.

Also in this issue of **Law and Courts** is a fascinating symposium on social facts and constitutional interpretation. Edited by Ronald Kahn, the symposium contains contributions from H.N. Hirsch, William Haltom, Susan Burgess, Howard Gillman, and Michael McCann. Readers wishing to continue the conversation will be able to do so at the Roundtable on Social Facts, Constitutional Theory, and the Rights of Subordinated Groups, to be held at the 1995 APSA meetings.

In his popular column, Harold Spaeth continues his discussion of the differences between the expanded version of the U.S. Supreme Court Judicial Database and the existing one. In particular, he takes up the occasional differences between the report vote (RVOTE), as compiled by his co-principal investigator, Jan Palmer, and the Spaeth specification (VOTE). Harold also raises significant research questions that the expanded Database will enable analysts to address.

Finally, this issue of **Law and Courts** contains information regarding important Section business (see pages. 20-21). Michael McCann, chair of the Nominations Committee, announces this year's nominees; and Edward Schwartz, co-organizer of the Short Course, provides a preliminary schedule of the program.

The Year in Review

The next issue of **Law and Courts** (Winter 1995) will contain the "Year in Review"—including lists of journal articles, grants, and books of interest to members of the Section.

Of course, we would like the lists to be as comprehensive and accurate as possible. So, if you have written or edited a book in 1994 or 1995—a book that has not been previously listed in **Law and Courts**—please fax (314/935-5856) or e-mail (EPSTEIN@WUECON.WUSTL.EDU) the following information: author(s) or editor(s), year of publication, title, place of publication, publisher. The deadline for submissions is November 1, 1995.

In the Winter 1994 edition of **Law and Courts,** we published Nancy Crowe's CQ Press award-winning paper. Because reader response was uniformly positive, we will continue the tradition, with the Winter 1995 issue containing a contribution from this year's winner.

A New Editor

My term as editor of **Law and Courts** ends in January 1996 . At the Section's business meeting—to be held on Friday, September 1, 1995 at 5:30 pm during the APSA meetings—the Chair will announce procedures for the new editor search.

In the meantime, please don't hesitate to contact me if you have any questions about the job. I would be happy to provide information about the general responsibilities of the editor and about the specifics of producing the newsletter.

Instructions to Contributors

General Information

Law and Courts publishes articles, notes, news items, announcements, commentaries, and features of interest to members of the Law and Courts Section of the APSA. **Law and Courts** is published three times a year in Winter, Spring, and Summer issues. Deadlines for submission of materials are: November 1 (Winter), March 1 (Spring), and July 1 (Summer). Contributions to **Law and Courts** should be sent to:

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Articles, Notes, and Commentary

Brief articles and notes describing matters of interest to the field will be published subject to review by the editor. Authors are encouraged to share research findings, teaching innovations, or commentary on developments in the field, which would interest members of the Section.

Footnote and reference style should follow that of the *American Political Science Review.* Please submit two copies of the manuscript. If possible, also enclose a diskette containing the contents of the submission. In a cover letter, provide a description of the disk's format (for example, DOS, MAC) and of the word processing package used (for example, WORD, Wordperfect).

Symposia

Collections of related articles or notes are encouraged. Please contact the editor if you have ideas for symposia or if you are interested in editing a collection of common articles. Symposia submissions should follow the guidelines for other manuscripts

Announcements

Announcements and section news will be included in **Law and Courts**, as well as information regarding upcoming conferences. Organizers of panels are encouraged to inform the editor so that papers and participants may be reported. Developments in the field such as fellowships, grants, and awards will be announced if there is sufficient time for submission of materials to the granting or awarding body. Finally, authors of judicial books should inform **Law and Courts** of their manuscript's publication.

Data and Analysis Information

Law and Courts wishes to keep the Section informed about the availability of datasets of interest to the field. Special analysis and data problems or queries of interest to the field will also be published. Send suggestions or information to the editor.

Social Facts, Constitutional Theory, and Doctrinal Change

Editor's Note: At the 1995 Western Political Science Association Annual Meeting Ronald Kahn chaired a roundtable on Social Facts and Constitutional Interpretation. Ron edited a symposium for this issue of **Law and Courts**, containing the remarks of the panelists. Those who wish to continue this conversation can do so at the Roundtable on Social Facts, Constitutional Theory and the Rights of Subordinated Groups at the 1995 APSA Meetings in Chicago.

Social Facts

H. N. Hirsch, *University of California-San Diego*

Recently, I published a book in which I claimed that social facts were an essential ingredient in constitutional decision-making (Hirsch, 1992).

The dilemma of constitutional theorizing, it seemed to me, was to find a way of remaining faithful to *something* in the constitution—some meaning, some value or values—without losing our ability to apply the constitution to contemporary controversies.

Deconstructionist theories of the constitution—the idea that the constitution is a text, like a piece of fiction, that can mean anything—seemed to me to go too far.

The Fourteenth Amendment is not like Hamlet—the Fourteenth Amendment was written and ratified by real people, with real political and ideological purposes, purposes we can discover with a reasonable degree of historical certainty. One actor's Hamlet can't be compared to some original Hamlet-clause, but today's Supreme Court decision about affirmative action or voting rights *can* be looked at in light of the overriding goals of the Fourteenth Amendment.

Thus there may indeed be some uncertainty about what the constitution means, and there certainly is no formula that can always be applied to come up with a single right answer—there may indeed be a range of interpretive possibilities—but this does not mean that the constitution can mean anything.

It also seemed to me that there was a pretty clear answer to the question, "what is the overriding value the constitution is meant to protect"—and that value, it seemed to me, and it still seems to me, is the protection of liberty.

Now, if you go back and look at the political theory out of which the constitution is written—if you look at Montesquieu and the common law and Locke (and whether or not the founders read the *Second Treatise*, they certainly read Blackstone, and Blackstone is in many ways pure distilled Locke)—the understanding of liberty embedded in the American constitution can be summed up in four propositions:

l. Liberty was protected when citizens were protected from arbitrary government action.
2. Liberty was to be the rule, its restriction, the exception.
3. The liberty of an individual could be restricted only for agreed, limited purposes: to protect another individual, or the public, from harm.
4. The purpose of government, and of the constitution, was to protect man's natural rights, including unenumerated rights. The most important of these rights were personal security and property, broadly understood.

Under these propositions, social facts are relevant in two ways: first, and most importantly, in deciding what is, and is not, arbitrary; and second, in determining what general agreements exist in society about the restriction of liberty.

What kinds of social facts am I talking about?

In the book I discuss first the existence, or lack, of a societal consensus about a given moral issue. For example: If there were really a consensus in this society that aborting a fetus was murder, that would determine the results in *Roe v. Wade*; as it is, the absence of such a consensus becomes, to me, determinative.

Another kind of social fact is the existence of widespread prejudice against a given minority, which, of course, becomes crucial in deciding what is a suspect class; science or social science may well supply facts crucial to a case; or the existence of diversity—such as sexual diversity in *Bowers v. Hardwick*—

may well be relevant; and, finally, we must sometimes look carefully at what actually happens between the parties in question—all of these kinds of social facts may be crucial in deciding what is and is not arbitrary, and thus what is or is not a deprivation of liberty.

To take some recent examples from First Amendment jurisprudence: What do many recent cases turn on? They turn on questions like these: What is a "traditional public forum"? Is an airport a traditional public forum? What is an objectively hostile or abusive environment? What are fighting words? That is, what epithets or slurs can we reasonably assume will cause a breach of the peace when uttered face-to-face? Does a public employee's speech have the potential to disrupt the workplace? Is a law restricting abortion protesters from a 36-foot zone around the entrance to a clinic necessary to preserve access to the clinic by its patients, or is such a law the result of a desire to suppress an unpopular political opinion?

Answers to all of these questions cannot be found in the text of the constitution, and yet all of them must be answered to decide the relevant cases. A judge can only decide these cases by bringing to them some piece of knowledge or evidence about the real world. Once you have an answer to these questions, you can then proceed to decide the case, remembering that the constitution's basic commitment is to maximum liberty, including liberty of speech.

Now, of course, I realize that by claiming that social facts exist and are "knowable," I am taking a position in a complex methodological debate; I also realize that facts can be contradictory and murky. And I realize that one's values can exert a powerful influence on the choice of one's "facts." But these problems, which some of the other participants in this roundtable outline so well, do not cause me to abandon my theory. In many legal cases, *there is simply no alternative* but to seek the facts as well as we can. "Social facts" are not an infallible constitutional touchstone, but they are often an essential, and unavoidable, ingredient of principled constitutional decision-making.

Facts of Political Life

William Haltom, *University of Puget Sound*

Professor Harry Hirsch's call for attention to "social facts" and judicial notice of "social reality" tantalizes us with the possibility of rigorously empirical, even scientific interpretations of the Constitution. We should not be taken in, however. Most stabs at constitutional empiricism overstate our ability to bolster our interpretations with facts and understate our ingenuity at fending off unwelcome evidence. If, as I maintain below, "social facts" de-legitimize constitutional interpretations far better and far more often than they legitimize interpretations, then such "facts" will remain far more useful for political rhetoric and ideological critique than for constitutional interpretation.

Reliance on "social facts" tempts us because interpreters, like the rest of us, are entitled to their own opinions but not their own facts. Interpreters impeach themselves if their arguments assume away common beliefs about how things are and how things work. Constitutional interpreters infuriate us — rightly so — when they use formalistic argot or "ingenious verbal criticism" to obscure beliefs and opinions that are so widely believed that they may be labeled "facts."

To be justified and credible, then, interpreters must address objections that have been raised or might be raised, including objections to the material validity of premises. That necessity exposes an asymmetry: "social facts" serve critics better than creators. Since constructions of "social reality" need achieve only limited currency before constitutional interpreters may be expected to anticipate and to answer critics who might brandish such constructions, critics have many sets of "facts" to forward. Critics of interpretations, then, need only marshal doubts plausible enough that the criticisms cannot be dismissed out of hand. In contrast, creators who would build on "social facts" must assert premises that critics may not easily contest or problematize lest creators' "facts" be transformed by criticisms into mere opinions, ideology, or idiosyncrasy.

This asymmetry advantages Professor Hirsch when he scores recent interpretations by the Rehnquist Court. Hirsch so deftly criticizes decisions in *A Theory of Liberty* from his liberal or progressive stance that we might forget that he might have marshaled "facts" derived from many other ideological, partisan, or cultural standpoints as well. Dr. Hirsch, as critic, wielded one set of "facts." The Rehnquist Court, as creators, must parry not only Hirsch's set of "facts" but all such sets.

All such "facts" or conceptions of "social reality" are contestable constructions, of course. Among the "facts" on which Professor Hirsch, I presume, would prefer interpreters not rely are President Reagan's high-living welfare-queens, Rush Limbaugh's femi-nazis, and Speaker Gingrich's empowering orphanages. Indeed, he would probably decry my citing such examples as facts at all. However, some of the "knowledge" that Hirsch finds dispositive — whether two lovers, homosexual or heterosexual, constitute a "family," for example — strikes me as controversial. Indeed, it seems to me that, much as I wish that it were different, many more Americans regard the inapplicability of "family" to homosexual lovers as a certainty than agree with Professor Hirsch. I agree with Dr. Hirsch's conceptions of the world and disagree with Mr. Reagan, Mr. Limbaugh, and Mr. Gingrich. However, that agreement does not make the conceptions factual or actual. Indeed, controversies make such agreements and such conceptions political and ideological.

To overcome controversy and to make our perspectives seem factual, Drs. Hirsch and Haltom must privilege our views and denigrate contrary views. We privilege the perceptions and cognitions of people who agree with us by endowing our side with expertise or other forms of authority. Absent the imprimatur of some recognized experts or authorities, proffered facts are mere traditions, superstitions, or errors. If controversial views are approved by "the right sort," they are facts even if

the vast majority of our fellow citizens regard them as damnable lies.

Please permit me to reiterate the political facts of life: "social reality" is constructed by elites who advance one set of views as unquestionably correct and devalue competing or contrasting views as unquestionably incorrect. Absent the privileging of one perspective and the invalidation of all other perspectives, no elite may succeed in labeling its views as "facts," "reality," or "knowledge."

To privilege any knowledge-creating class or stratum is a strategy tried but not true. The strategy has been tried since Plato discovered — *mirabile dictu*! — that the secret to good government was to put the state in the hands of an elite just like himself. The strategy has not proved true, however, because the elevation of one elite at the expense of other elites is — immediately or eventually — recognized as Real Politick rather than realism.

I do not doubt that Professor Hirsch would prefer constitutional interpreters to begin from "facts" commonly assumed in academia rather than those usually dear to the Rehnquist Court. However, I cannot imagine whom among admirers of the Rehnquist Court Professor Hirsch expects to fool with the old switcheroo.

In sum, we must not overstate our ability to make our views factual and other views baseless. Interpreters can and often do mobilize "facts" in the weakest sense of the term. I concede, for example, that ideological "facts" are readily available to critics who would demonstrate that interpreters have dismissed a view of reality without due care and, thus, that even tendentious views asserted as facts furnish critics with grievances. However, I do not concede that "facts," defined in any rigorous way, are usually dispositive for constitutional interpretation. To ensconce a "social reality" in constitutional law requires a far more rigorous vetting process than Dr. Hirsch or any other constitutional theorist has yet articulated. Indeed, any notion of "social facts" beyond rhetorical flourish must terrify anyone who has even glanced at epistemology, the sociology of knowledge, or philosophy of science.

Even if we agreed to overlook the politics of "social facts," the history of constitutional interpretation abounds with examples of virtually indisputable facts that judges easily circumvent. For brevity, I shall cite but one example. The research that showed the Court in *McCleskey v. Kemp* that capital punishment is, in the aggregate, applied in a racist manner was about as imposing empirically, methodologically, and statistically as any "facts" that might be adduced in court. These compelling data did not even faze the justices in the majority. They noted that such aggregate information was of limited utility in specific cases but generously allowed that, were racism to be shown in a particular instance, they would be ever vigilant.

Thus, even if "social facts" were easier to create and to defend than I believe they are, they would be hard to force upon constitutional interpreters. The *Lochner* Court ignored social facts that Professor Hirsch believes would have dictated a different decision by resorting to an economic definition of the bargaining situation that, it seems to me, many contemporary interpreters would accept. The same Court proved much more receptive to Hirsch's "facts" in *Muller v. Oregon* when those facts were allied with even more widely acknowledged "facts" such as the inferiority of women.

These considerations compel me to conclude that, welcome as it might be if constitutional interpretation responded to "facts," no renascence of sociological jurisprudence is likely to solve many interpretive problems. If we insist on defining "facts" rigorously, we find relevant "facts" difficult to create and to preserve and, hence, rare. If we relax our concept of "facts" to include the widespread but contestable beliefs and assumptions that Dr. Hirsch cites in his book, we should expect to find that most issues and cases will elicit a wealth of reasonably equal and fairly opposite "facts." Such lax facts will favor critics of interpretations but will little assist creators of interpretations. Hard or lax, facts that threaten an interpretation will signal the interpreter that it is time to shift ground.

A landmark that Dr. Hirsch cites for its reliance on social science, *Brown v. Board of Education*, ironically shows how tendentious such facts can be and how political their acceptance and rejection will always be. Chief Justice Warren cited sociological "facts" about as persuasive [Gunnar Myrdal excepted] as the racist anthropology adduced by defenders of anti-miscegenation statutes in *Loving v. Virginia*. Perhaps Warren instead should have called segregation a "badge of slavery" and thereby elevated constitutional argot to the status of a "fact?"

Social Facts and Mainstream Constitutional Theory

Susan R. Burgess, *University of Wisconsin-Milwaukee*

I. *The Central Problem.* Mainstream constitutional theory, as produced by Robert Bork, Ronald Dworkin, John Hart Ely, and Michael Perry and others, defines its central problem as follows. Judicial review, as practiced by electorally unaccountable judges, is difficult, if not impossible to reconcile with liberal democracy because there is no widely accepted standard or uncontroversial constitutional grounding upon which judges might base their decisions. As Ely puts it: "The central function is at the same time the central problem of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they`d like" (Ely 1980, 4). Given this account, both restraintist and activist forms of judicial review appear to be difficult, if not impossible to justify on liberal grounds. However, since judicial activism appears to entail a much broader practice of judicial review, mainstream constitutional theory's rendering of its "central problem" places a much greater burden on judicial activism and its defenders.

Nearly 15 years ago Paul Brest labelled this characterization of the central problem of constitutional theory "the fundamental rights controversy" which he said was "not susceptible to resolution within its own terms." According to Brest, the controversy would not be resolved "until despair or hope impels

us to explore alternatives to the world we currently inhabit" (Brest 1981, 1105). The impasse that Ely, Brest and others noted long ago still serves as the focal point of mainstream literature in constitutional theory. Scholars continue to search for an acceptable grounding for judicial review, advancing new forms of judicial restraint and activism as the latest contender to resolve the crisis. Yet the impasse persists.

Applying the insights of social fact theory to the literature of mainstream constitutional theory could help locate the alternatives for which Brest appeared to be hoping. While other roundtable participants may apply social fact theory directly to case law, in this essay I intend to focus mainly on the literature of constitutional theory, as I believe scholars have more control over, and hence more responsibility for, the representation of reality contained in its theorizing.

II. *Social Fact Theory.* Social fact theory promises to deliver mainstream constitutional theory from its current impasse by recasting the central problem of the literature, and providing a framework for theorizing the lived experience of subordinated groups that might be used as a basis for activist judicial review.

Social fact theory is based on the idea that knowledge, or fact, is socially produced (Ronai, 1994). Communities represent lived experiences or social practices that provide the basis for shared views of fact and reality, as well as distinct forms of social life. Facts and reality are embedded in social life and as such are perspectival. Although no one form of social life can represent reality in entirety, each may accurately represent the real world, as viewed from a specific, socially grounded perspective.

Social fact theory can help us to become more critical about how mainstream constitutional theorists, as a community of scholars, produce a body of knowledge. What representation of reality and fact do we find in the mainstream literature? What shared practices or lived experiences might form the basis for this production? What alternative forms of social life, reality and fact might be excluded or marginalized in the literature? How might this affect the knowledge that mainstream constitutional theory produces? Social fact theory compels us to explore these kinds of questions.

III. *The Central Problem is Problematic*. Mainstream constitutional theory's characterization of the central problem of the literature is problematic because it compels mainstream scholarship to conceal the social and political basis of its theorizing. Rather than directly discussing the social practice or experience that forms the basis for the community's discussion of constitutional theory, the mainstream literature has adopted a disconnected and uncritical stance towards its representation of reality. This apparent disconnection from experience could rest upon the fact that, in the mainstream community, scholarship which appears detached from politics is often characterized as impartial, objective, and therefore authoritative in the literature.

Mainstream constitutional theory remains largely unaware or uninterested in alternative social facts that could provide the basis for some much needed critical perspective; focus on the central problem serves to shield mainstream scholarship from alternative representations that scholars might find, for example, in feminist legal theory, critical race theory and queer theory.

As a queer woman who comes from a urban working class background, it is a well established fact, in the social worlds that I walk in, that multiple forms of social life and multiple representations of reality exist, and that mainstream representation will often be quite oblivious to this fact. When alternative representations do break through and gain recognition, the mainstream literature is often quite critical on the grounds that such work is political, subjective and partial, and hence unauthoritative. This criticism stems from the literature's quest for an objective, or at least broadly accepted, standard of interpretation upon which to ground judicial review, which in turn stems from the its definition of the central problem of constitutional theory. However, dismissing research because of its political character is problematic because any discussion of justice will be preeminently political; the latter fact, as well as the fact that attempting to *avoid* a discussion of justice is a political decision, has been well accepted by the community of scholars in Western political thought, at least since Socrates was compelled to discuss justice in *The Republic*. Yet rather than considering that its views might be at least as political or partial as the alternative views which it criticizes, the mainstream represents its characterizations as Reality or Fact.

In addition, mainstream constitutional theorists have paid little, if any, attention to the political consequences of casting the "central problem" as a tension between democracy and objectivity on the one hand, and fostering an oppressive environment for subordinated groups on the other hand. Whether intentionally or not, mainstream constitutional theory has made it more difficult for subordinated groups to seek effective relief from oppression through the courts; mainstream constitutional theory has made activist judicial review that addresses oppression appear to be almost inescapably problematic, on the grounds that it is subjective and partisan and hence Illegitimate, rather than objective and principled.

IV. *Conclusions.* Distanced from other forms of social life, and disconnected from the social and political basis of the knowledge it produces, it is not surprising that, by its own account, the mainstream literature has been languishing at the same impasse for almost a generation. Indeed, the current characterization of the central problem often seems as intractable as the dilemma it presents.

The view of the world that is represented in mainstream constitutional theory may not be the world that many of us walk in, even those of us who continue to contribute to the mainstream literature. Yet the mainstream representation of reality is the stick against which the worth of our research is measured. We need to make room in the literature for the representation of various social facts as well as the varied practices and forms of social life from which they are drawn -- even if, or perhaps especially if, they make little or no sense within the mainstream framework.

What would it mean for mainstream scholarship to acknowledge alternative social facts and forms of social life—not just at the margins, but at the center of constitutional theorizing? The representation of multiple forms of social life would allow scholars with relatively homogenous lived experience "to `practice' an area of the social world that is typically silenced" (Ronai, 1994). Such practice might serve to clarify the inevitable connection between social and political life and constitutional theory, recast the central problem of the literature, and provide an alternative basis for "activist" judicial review.

Sociological Jurisprudence Revisited, or Why Facts Can't Serve as Foundations for Constitutional Theory

Howard Gillman, *University of Southern California*

It is one thing to say that appropriate references to helpful facts are a useful feature of almost all arguments, and quite another to claim that the general injunction "pay attention to social facts" will provide a predictable shape or direction to constitutional interpretation, or that such an injunction will make constitutional interpretation more sensitive to the plight of oppressed or marginalized groups and classes. Facts cannot provide this kind of shape or direction because facts—rather than being little chunks of reality to which we have unmediated access and to which we owe allegiance — only become conspicuous and relevant within particular, contestable theoretical frameworks. The interesting question to consider, then, is not how facts can be used to anchor interpretation, but rather how different political perspectives generate different versions of the indisputable facts.

Those who think that there is something general and predictable to be gained by emphasizing the importance of social facts for constitutional interpretation share with early advocates of sociological jurisprudence a desperate modernist faith that social science information might replace formalism as a foundation for defensible judicial decisionmaking. This shift from a faith in formalism to a faith in social science was signalled by the infamous Brandeis brief, which was notable for the fact that it pleaded its case in favor of maximum hours laws for women by emphasizing, not case law and precedent, but sociological studies that purportedly showed how such laws contribute to the health of the community. Like reform-minded critics of the turn-of-the-century Court, contemporary scholars such as Hirsch believe that these sorts of facts might provide a cure for what is considered to be an excessive commitment to "legal formalism" which results in the justices being "divorced from social reality" [204—bracketed page preferences are to Hirsch (1992)]. He thinks, for example, that if the Court better understood the reality of child abuse it would not have decided (as it did in *DeShaney v. Winnebago County* [1989]) that a county department of social services had no constitutional obligation to rescue a child from an abusive father, or if the Court understood the reality "about the nature of homosexuality" it would not have decided (as it did in *Bowers*) that sexual intimacy between gays and lesbians did not deserve the same level of constitutional protection as nonprocreative sexual intimacy in a heterosexual relationship. Hirsch acknowledges that no "single `correct' solution" to constitutional puzzles flows from the recognition of a particular set of facts [104], but he does believe that attention to the facts will make one a liberal constitutionalist, like himself, apparently because one can only be a conservative constitutionalist if one is shielded from the facts by an indefensible commitment to legal formalism.

What we have here, then, is a theory of constitutional interpretation crafted out of one of our most common experiences—the experience of thinking that the people with whom we disagree on important political issues are completely out of touch with reality. This is the attitude that I have most of the time when I read the opinions that Hirsch criticizes and so I am sympathetic to the reaction. The problem, of course, is that everybody thinks that people who disagree with them aren't paying enough attention to the right facts or are not making the correct inferences from the agreed-upon facts. Hirsch thinks that the solution to this problem is for his opponents to look more carefully at the real facts. But unless one thinks that the identity and significance of these real facts are perspicuous irrespective of one's conceptual framework, this preferred solution is really just a stubborn restatement of the problem.

Hirsch understands that "by claiming that social facts exist and that they are `knowable' he is "taking a position in a complex epistemological debate" [3]. I don't have time to focus on these epistemological issues, and so instead I'd like to say some things about constitutional interpretation that might illustrate some of the ways in which facts are dependent upon theory in a way that would prevent them from being as determinative as Hirsch believes them to be.

First, and most obviously, the relevant facts of a case are never self-evident. As Lief Carter has noted in his terrific discussions of "fact freedom" (Carter 1988, chapter 2), when judges construct and defend particular analogies they inevitably emphasize some features of a case rather than others, and there are no meta-facts that govern this process of selection and comparison. For example, in *DeShaney*, Rehnquist chose to emphasize the fact that the child who was being abused was not directly in the state's custody; this allowed him to distinguish the case from the circumstance where the state has an affirmative obligation to provide medical care to its prisoners. In his dissent, Brennan emphasized how county workers continued to return the child to his abusive father and thus established a condition whereby the victim was a captive of his abuser—which was a point that enabled him to argue that the government's obligation in this case was similar to its obligation when caring for prisoners. Like Hirsch, I prefer Brennan's rendering, but not because I think a clear-eyed view of the facts requires the analogy to prisoners to be made rather than evaded. The appropriateness of the analogy has nothing to do with the facts alone and everything to do with an unformalizable web of ideas and convictions about a host of contestable issues.

More generally, it is also useful to remember that sociological jurisprudence itself became influential, not because of the rigor of its science, but because contemporaneous constitutional doctrine emphasized that state interferences with liberty would only be upheld if there was a demonstrable relationship between the regulation and public health, safety, and morality. When the Court was convinced there was a demonstrable relationship (as in the case of maximum hours laws for coal miners or women who worked in factories) the laws were upheld; when the Court was not convinced (as in the case of maximum hours laws for bakery workers or prohibitions against yellow-dog contracts) the interferences were struck down as arbitrary. But these investigations were not simple matters of getting the facts straight. The Court had defined general welfare as something distinct from the welfare of particular classes, and so for many of the justices the key fact against which to be on guard was the legislature's attempt to use (for example) public health

arguments to disguise illegitimate class politics (see Gillman, 1993). This is what some of the justices thought had been done in previous cases such as *Slaughterhouse* and *Powell v. Pennsylvania* (involving legislation designed to protect the dairy industry from competition from oleomargarine), and given the fact that class legislation was on the rise at the turn of the century it should come as no surprise that many justices felt that the reality of their situation required them to carefully scrutinize legislative declarations about the public benefits associated with particular regulations.

Hirsch wants us to believe that *Lochner* was a bad decision "because the majority stubbornly refused to take seriously the social and scientific facts supporting New York's exercise of its police powers.... The `stench' of *Lochner* is created by a Supreme Court that refused to see the world as it is" [85]. But this misses what is so interesting about the Lochner era, which is how the justices interpreted their world through the lenses of an inherited jurisprudence that was premised on the assumption that there was a factual difference between the general welfare and the welfare of favored classes. The real lesson to be learned from this early period is not the difference between formalism and reality, and how reality can be a cure to formalism, but how reality in these cases was constructed within the dominant conceptual apparatus of constitutional law. In fact, during this period, reality in the form of sociological jurisprudence was not a cure to the Court's formalism. It reinforced the traditional categories by playing into the Court's assumption that legislative interferences with liberty or property rights were legitimate only when there was a demonstrable connection between the regulation and traditional understandings of public health, safety, and morality. The real challenge to the Court's formalism came from Holmes and his disciples. But Hirsch has no patience for Holmes, because Holmes was disdainful of the idea that judges should scrutinize legislative determinations of social facts.

It should also be pointed out that before we can even discuss how social facts and contemporary experiences might be relevant for constitutional interpretation we need to develop and defend an argument about why it is appropriate for constitutional meaning to adapt to changing circumstances and experiences. However, this notion of a living Constitution was itself a turn-of-the-century innovation, a creative rejection of the framers' belief that because the Constitution represented the command of a sovereign its meaning was fixed and would remain so until the sovereign amended the document (see Gillman, 1995). If one does not accept the legitimacy of that innovation then changes in social facts or experiences become largely irrelevant to the question of constitutional meaning. This, in fact, was the view of the conservatives during the early twentieth century, who thought that it was obvious that if one assumed that the Constitution could mean different things at different times then that meant that the Constitution meant nothing at all but was instead infinitely adaptable to the conveniences of succeeding generations. So, not only are particular social facts interpreted through jurisprudential constructs, but the more general (and preliminary) question of whether social facts are relevant to the enterprise of constitutional interpretation itself requires theoretical justification. And we should keep in mind that the theoretical justifications that might be offered for why courts should pay attention to social facts can have a number of different implications for the nature of judicial politics. Just recall that the original advocates of sociological jurisprudence were interested in getting courts to reduce their power by deferring more to legislatures on the assumption that legislatures were in a better position to know the facts than courts, whereas Hirsch's project is to get courts to strike down legislation on the assumption that courts are in a better position to know the facts than legislatures, at least when it comes to issues relating to important freedoms or discrimination.

It should be clear, then, that professing a general commitment to social reality has no influence whatsoever on the shape or direction of constitutional interpretation. However, there is always a chance that references to particular social facts may have an influence over the resolution of particular disputes, depending on the assumptions embedded in prevailing constitutional discourse. This latter point means that, when we engage in polemical discussions of constitutional politics, it is always appropriate for us to claim that the facts are on our side and that our opponents are out of touch. When Hirsch reviews O'Connor's opinion in *Croson* he accuses her of ignoring the 'simplest facts' about racism and then he emphasizes the facts he considers most relevant while ignoring the so-called facts beloved by conservatives (such as the fact of the stigmatization that attaches to beneficiaries of affirmative action, or the fact of white resentment and the exacerbation of racial tensions, or the fact of the experiences of so-called model minorities, some of whom are now allegedly being disadvantaged by affirmative action). When Hirsch rejects the feminist critique of pornography as a justification for censorship he emphasizes the fact that a book is just a book and a film is just a film, and he dismisses the claim that it is a social fact that pornography is intimately connected to the maintenance of patriarchy [104]. Setting aside the substance of Hirsch's construction of social reality, it seems to me that he is engaging in a perfectly respectable form of argumentation—by characterizing his position as based on indisputable facts he is paying a compliment to his preferred angle of vision; he is also propping up his perspective by constructing for it a (mythical) ontological foundation. When most of us marshal facts and evidence in support of our positions, we are doing something unexceptional—even inevitable. My problem is not with fact-talk per se but rather with the attempt to transform this argumentative tactic into a constitutional epistemology.

We have, then, a claim to consider: "The soundness of legal interpretations and other legal propositions is best gauged, therefore, by an examination of their consequences in a world of fact. That is a central contention of this book." This could be Hirsch's liberalism; but it is Posner's pragmatist neoconservativism (Posner 1990, 467), and the quote shows how little political payoff there is to be gained by drawing people's attention to facts in general rather than to particular facts—favored facts. While I am in solidarity with Hirsch's politics, it seems to me that Posner has the more defensible position on epistemology, which is that it doesn't exist, except as an inflated characterization of our mortal (and mutable) convictions.

And so let us continue to emphasize those versions of the facts that are most sympathetic to the plight of disadvantaged and oppressed groups and classes, but let us not assume that our favored facts will have the power over others that they have over us. Moreover, because of this we should also not lose sight of some of the other constituent elements of a persuasive argument. In fact, I think it's fair to say that what makes Hirsch's specific discussions so compelling is not his dispassionate recitation of undisputed facts; it's his use of conventional rhetori

cal techniques, such as the construction of dramatic narratives that should evoke empathy from anyone who possesses an ounce of human decency. While this is not his agenda, Hirsch's work can be appropriated so that it lends support to the case made by some contemporary philosophers about how competing conceptions of justice and liberty might be better interrogated through melodrama than methodology (see Nussbaum 1986, Rorty 1991). His review of the *DeShaney* case is powerful mostly because it reads more like Charles Dickens than James Q. Wilson. This is the best reason to think that there is less to the authority of sociological jurisprudence than meets the eye, and more to what counts as a defensible act of constitutional interpretation than an infatuation with facts.

As A Matter of ("Social") Fact

Michael McCann, *University of Washington*

At the outset, let me note that I find much to admire in Professor Hirsch's book. In particular, both his defense of a liberty-oriented jurisprudence and his challenge to communitarians strike me as timely and important. Whatever I have to say about Hirsch's case regarding "social facts" thus should not obscure my respect for his larger theoretical and normative enterprise. Moreover, it is relevant to note that I agreed to participate in this colloquium at a very late date, just hours before the panel. My initial comments on the panel, which I develop here, thus were formulated after, and somewhat in response to, the comments of others.

I begin with Hirsch's basic argument about social facts. His general claim seems to be that, because constitutional principles are vague, justices must engage in a constant process of reconstructing constitutional meaning "in the light of two kinds of `data': general beliefs about what the public welfare requires, on the one hand, and social `facts' on the other" (91). Hirsch thus tends to urge a rather dynamic, social constructionist view of constitutional law making. This in itself is reasonable and, for me, promising. However, his distinction between "general belief" and "facts" is too simple. Hirsch's reliance on this distinction often implies that "facts" are somehow more real, trustworthy, or incontestable than mere beliefs or opinions, and that the former have meaning and strategic power independent of the latter. This is problematic because facts themselves are social constructions (micro-constructions, we might say) of events and relations in the world that become significant and salient only in terms of more general (macro-constructions) interpretive frames. As Professor Gillman argues, facts themselves provide no solid, indisputable foundation or self-evident capacity to determine how people — and here I suppose I would include Supreme Court justices — make sense of things.

I do find that many of the "facts" — regarding diverse patterns of sexual relationships, the costs of hierarchical economic relationships, patterns of racial and other forms of invidious discrimination — identified by Hirsch to be significant, and they might prove to be potentially important resources for challenging an increasingly conservative judiciary. But I also recognize that such facts are significant to "us" because they confirm our general normative predispositions and analytical perspectives; they "fit" our view of social reality. That these facts fit less well the interpretive and normative frames of our opponents (including most justices) does not mean that the former necessarily are likely to humble the latter. New facts sometimes can pose an awkward dilemma for particular policy arguments or normative positions, especially when the facts betray expectations or assumptions specified by advocates of those positions. Yet, more often, "inconvenient" facts are simply ignored, discounted, countered by other facts, or interpreted differently by our adversaries. Again, the key point is that facts have no meaning apart from the interpretive frames themselves — the beliefs, values, knowledges — in which they are understood; facts thus cannot resolve interpretive disagreements. And this puts a different spin on how we assess Hirsch's tome: his achievement is not that he maps out in new ways the causal relationship between changing social facts and constitutional interpretation, but that he advances a powerful conceptual argument regarding how constitutional principles ought to be constructed. He marshals particular types of facts to support that perspective, but such facts are just one contestable strategic resource he deploys to advance his argument. And while compelling to many of us, these facts provide no more "ultimate" interpretive certainty or moral foundation than the older "formalist" claims for the objectivity or neutrality of self evident legal principles that Hirsch rightly assails.

My comments thus far do not stray far from what several others on the panel have argued. But I offer two further points of a more independent nature. I advance them because they are unacknowledged or muted in the debate that has developed among Hirsch and his readers. The first is to emphasize that legal interpretation and fact generation is rather more interactive and, dare I say, dialectical than Hirsch and others on the panel have specified. This is so in several senses. Most generally, just as "new" facts (micro-constructions) can be used to challenge (macro) the interpretive frames of officials, so do interpretive frameworks articulated by authorities both encourage and discourage the generation, or construction, of new facts. Professor Haltom may be right that facts often better serve "critics" than "creators," but it seems to me that facts most often are mobilized to serve already authoritative rather than "new" interpretive frames in both public and personal life. This is to say that prevailing ways of seeing and understanding tend to prefigure most fact formation — privileging identification or construction of certain salient facts while obscuring or deterring alternative fact recognition. Social theorists often make just this point in noting that our legal traditions (and cultural norms generally) are most powerful where they are not contested, in the silences of questions not asked, of values not articulated, and of facts not credited.

More specifically, the panel discussion strikes me as misleading in emphasizing that courts primarily just respond to changing facts, or more accurately to changing constructions of fact, in the social world. I would stress as well that the interpretive frames articulated by courts — and other authoritative institutions — importantly shape how and which facts are constructed by disputing parties in society. One of the most important but subtle aspects of judicial power is the communication of signals about which facts matter, to what degree, and under which

conditions for parties interacting — whether in cooperation or conflict — in particular social settings. In short, far from merely responding to changing social facts, courts significantly define or "create" the terms in which how citizens find (or do not find) meaning in facts. The facts that judges confront most often thus usually are already constructed in terms anticipating what the courts might accept as legally sensible or meaningful.

Let me offer an illustration. My example involves statutory interpretation of the 1964 Civil Rights Act rather than constitutional interpretation, but the previous legacy is closely tied to the fate of constitutional equal protection which other panelists have astutely canvassed. The initial orientation of federal courts in the 1950s-60s addressed the manifestations of palpable intentional race discrimination (segregation) in the South, and later throughout the nation. In the late 1960s, however, some progressive activists came to understand that a focus on intentional discrimination stopped short of dealing with many deeply rooted patterns of continuing institutional bias for which no specific contemporary agent was the architect or explicit advocate. The documented social scientific data (facts) and the conceptual frameworks for understanding these systemic aspects of bias were underdeveloped at the time, but the High Court granted legitimacy to them by formulating the disparate impact standard in the 1971 *Griggs v. Duke Power Co.* ruling. This standard offered the possibility of demonstrating invidious discrimination where an institution engaged in practices that were not overtly or self-consciously discriminatory but nevertheless produced discriminatory results — for example, in job hiring, promotion, and compensation.

What is significant for my argument here is that this ruling sent signals to "liberal" policy analysts and activists around the nation; the next decade witnessed scores of studies demonstrating both the "facts" of widespread "unintentional," institutional discrimination and new "causal stories" to make sense of these facts. In short, the court invited or generated, rather than merely responded to, the creation of new facts and interpretive frameworks from a growing intellectual cottage industry. This in turn gave rise to waves of litigation and social advocacy on behalf of new legal claims, including for affirmative action in hiring/promotion and wage equity as well as charges of racial bias in death penalty administration. But just as this fact-generating enterprise began to escalate among liberal policy analysts and activists, of course, the courts themselves reversed their orientation. As conservatives flooded the judiciary in the 1980s, once "invited facts" and welcomed causal stories about systemic discrimination were rejected and discarded to the dustbin of judicial irrelevance. The facts of bias were more amply demonstrated than ever before, and still seem highly significant to many of us, but federal appellate courts rewrote both statutory and constitutional law in ways that deprived them of legal "sense." All in all, courts were anything but reactive in the social construction of facts and assessments of their significance during this era. *McCleskey v. Kemp* represents just one dramatic example of how profoundly significant is the courts' power to define what facts matter, and which facts are worth constructing over time, in public life.

My final point follows from the previous ones. While I find Hirsch's analysis of social facts to be underdeveloped, I admire his willingness to engage in the rhetorical strategy of "fact claiming" to support his analytical argument. When Hirsch invokes facts, he is engaging in the practice of making an evidentiary claim to authorize his particular opinion. He is offering a particular interpretation, to be sure, but his position is not merely a self-referential statement of preference. His effort instead constitutes a public engagement over matters of collective "right" supported by evidence and routine methods of verification that others can investigate, embrace, or challenge — but wholly ignore potentially at a cost of conceding authority to Hirsch's view. We all invoke facts — often embellished as claims to capture what "really" is going on — in order to fortify our views and to trump others in just this way. Moreover, we social scientists traditionally have staked their our very claim as teachers and experts to developing more rigorous standards of argument, analysis, and evidentiary verification in such matters of public debate about social welfare.

My view is that this fairly routine practice is important, in part because it is accepted, and in part because it offers one of the better rhetorical routines we have for distinguishing among stronger and weaker arguments, not to mention challenging simple idiocy, ignorance, and unacceptable bias. While facts alone rarely are sufficient to undercut the power of particular normative or analytical positions, interpretive perspectives which make no bid to account for factual evidence usually are, and should be, treated as suspect. The significant implication of this point is to underline that we interpretive legal scholars who find unconvincing many of the methodological claims by our positivist colleagues should be mindful of the need to develop rigorous alternative methodologies for mobilizing facts that we find important. In short, our ability to advance interesting, compelling interpretive frames of legal analysis depends in part on our success in offering ample, well documented evidence and "facts" of some type in support of those arguments. That Hirsch's argument at least calls attention to the important discursive practice of fact construction in political as well as academic life thus strikes me as valuable contribution.

Social Facts and the Reconceptualization of Constitutional Theory

Ronald Kahn, *Oberlin College*

I. *Social Facts Writ Small and Writ Large.* Social fact theory argues that in order to define what the Constitution means with regard to interpreting fundamental rights principles in the 14th Amendment due process and equal protection clauses the Supreme Court must take into account "social facts," which are facts about social, economic, and political reality. Harry Hirsch's *A Theory of Liberty: The Constitution and Minorities* (1992) is the best developed argument to date on how to incorporate social facts into constitutional theory and practice. One can also see "social facts" at work in the scholarship of political scientists John Brigham, Susan Burgess, Howard Gillman, and Michael McCann, and legalists Martha Minow, Lani Guinier, Margaret Jane Radin, Kathleen Sullivan, and Cass Sunstein, to name but a few. For many others, the expanded incorporation of social facts into constitutional theory and practice is highly controversial.

There are two different levels at which to view social facts and the possibilities of their use in constitutional practice and theory. At one level they can be viewed as social facts which are employed in Supreme Court decision-making and arguments before the Court. These I will call social facts "writ small." A second level of social facts are social facts "writ large." Social facts writ large are not case specific. They are embedded in a society's culture and in the political, economic, and social realities in which individuals and groups live their lives. Most important, social facts inform the assumptions upon which constitutional theories are based. It is these theories which provide the standards on which jurists evaluate claims for and against rights, choose and apply precedents, and espouse views on the role of political institutions and Courts in making constitutional choices. It is in the employment of social facts writ large, that is, in constitutional theory, that we may find the greatest opportunity for the expanded use of social facts as a basis for the expansion of individual rights. How my colleagues on this panel view social facts, that is, whether they are to be used writ small or writ large, will tell us much about their views about the prospects for using social facts for social change through law, as well as how they approach Hirsch's pathbreaking work.

II. *Social Facts Writ Small In Supreme Court Decision-making*. Much of the criticism of the use of social facts by my colleagues on the roundtable is due to their emphasizing social facts writ small, their use instrumentally in Supreme Court decision making, rather than as part of what I have called elsewhere a constitutive Supreme Court decision-making (see Kahn 1994).

Bill Haltom views Hirsch's argument for social facts quite skeptically. He argues, "Most stabs at constitutional empiricism overstate our ability to bolster our interpretations with facts and understate our ingenuity at fending off unwelcome evidence. If.. 'social facts' de-legitimize constitutional interpretations far better and far more often than they legitimize interpretations, then such 'facts' will remain far more useful for political rhetoric and ideological critique than for constitutional interpretation."

McCann seems to fall into the instrumental language of Haltom when he argues that there is a place for social facts to fit one's arguments, theory, political philosophy, policy wants, or when responding to the doctrinal twists of the Court, as his analysis of the *Griggs* case suggests. Although McCann places the idea of social facts in a universe of constitutional theory and argues there is a complex relationship among social facts, theory, and constitutional practice, in my opinion he, like Haltom, concentrates too much on social facts writ small. He does not explore the full potential of social facts to act as a basis for the expansion of individual rights for both minority groups and the majority population in our society.

Gillman asks questions that raise issues about both social facts writ small and writ large. He emphasizes "how reality in these cases was constructed within the dominant conceptual apparatus of constitutional law." Thus, he agrees with McCann and others that "one's conceptual framework" is central to the identification of social facts and their significance in deciding cases and questions of doctrinal change. He writes, "The interesting question to consider, then, is not how facts can be used to anchor interpretation, but rather how different political perspectives generate different versions of the indisputable facts." For example, he emphasizes that it was the Supreme Court's conceptual difference between "the general welfare" and "the welfare of favored classes" that was determinative in *Lochner* and many Lochner era cases. Gillman also emphasizes the importance of polity principles in constitutional theory and practice. He points out that trusting legislatures over courts was a central value among those favoring sociological jurisprudence and trusting courts over legislatures is an assumption central to liberal commentators today like Hirsch. However, like Haltom and McCann, Gillman centers his analysis on the use of social facts as a form of argument on individual cases, that is, social facts writ small, and questions their utility for advancing individual rights. Gillman writes,

> It should be clear, then, that professing a general commitment to social reality has no influence whatsoever on the shape or direction of constitutional interpretation. However, there is always a chance that references to particular social facts may have an influence over the resolution of particular disputes, depending on the assumptions embedded in prevailing constitutional discourse. This latter point means that, when we engage in polemical discussions of constitutional politics, it is always appropriate for us to claim that the facts are on our side and that our opponents are out of touch...
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> Setting aside the substance of Hirsch's construction of social reality, it seems to me that he is engaging in a perfectly respectable form of argumentation — by characterizing his position as based on indisputable facts he is paying a compliment to his preferred angle of vision; he is also propping up his perspective by constructing for it a (mythical) ontological foundation. When most of us marshal facts and evidence in support of our positions, we are doing something unexceptional— even inevitable.
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> And so let us continue to emphasize those versions of the facts that are most sympathetic to the plight of disadvantaged and oppressed groups and classes, but let us not assume that our favored facts will have the power over others that they have over us. Moreover, because of this we should also not lose sight of some of the other constituent elements of a persuasive argument. In fact, I think it's fair to say that what makes Hirsch's specific discussions so compelling is not his dispassionate recitation of undisputed facts; it's his use of conventional rhetorical techniques, such as the construction of dramatic narratives that should evoke empathy from anyone who possesses an ounce of human decency.

This is a very questionable formulation. It also is ironic. Gillman centers his analysis on the use of social facts in argumentation and case decisions rather than in constitutional theory. However, constitutional theory is a central component of "the dominant conceptual apparatus of constitutional law" which he argues (with great originality and rigor) is a major determinant of Supreme Court decision-making. (see Kahn 1995). Thus, Gillman, Haltom and McCann grossly understate the role of social facts in the process of constitutional change by centering on social facts writ small. Moreover, as I will explore in the conclusion, they misread Hirsch's work, which is as important

in offering a social facts writ large theory of liberty as it is in discussing social facts, case by case, or social facts writ small.

III. *Social Facts Writ Large in Constitutional Theory.* Only Susan Burgess speaks about social facts writ large. She makes the important observation that social facts, in Ronai's terms socially produced facts, can inform us that there are different realities of social life which must be respected and incorporated into constitutional theory (see Ronai 1994). She cogently argues that a primary objective of constitutional theory and practice is to identify oppression and ways to overcome it and that social fact theory must be applied to mainstream constitutional theory. Susan Burgess also notes that constitutional theory, because of its faith in democracy and concern for objectivity, has made it difficult for subordinated groups to seek effective relief from oppression through the Courts because such advocacy is viewed as subjective and partisan and hence illegitimate, rather than objective and principled. For Burgess, the need for constitutional theory to be detached from politics and social reality and to be characterized as impartial, objective, and therefore authoritative has made the incorporation of social facts into the definition of rights difficult, if not impossible. Mainstream scholarship is compelled to conceal the social and political basis of its theorizing, and to be uncritical of its stance towards representing reality.

Although Susan Burgess emphasizes questions of social facts writ large, in my opinion she may be too defensive about the legitimacy of the employment of social facts in constitutional theory. She is concerned that "Judicial review, as practiced by electorally unaccountable judges, is difficult, if not impossible to reconcile with liberal democracy because there is no widely accepted standard or uncontroversial constitutional grounding upon which judges might base their decisions." Susan Burgess, and the other participants, emphasize that conventional arguments of "theorists" are viewed as more persuasive than are arguments based on social facts. In so doing, I believe that my colleagues on the panel undervalue the importance of the role played by social facts in the constitutional and political theory of mainstream scholars — that is, in their visions of the role of courts and political institutions in our society, the possibility of individual agency, the relationship of public and private space, and definitions of political malfunction.

Susan Burgess has identified key problems of contemporary constitutional theory and practice. We need to identify the causes of the problems that she has identified and ways to correct them. We need to better understand why the employment of social facts writ small and writ large are viewed as delegitimatizing. We need to consider why, in Susan Burgess's view, "restraintist and activist forms of judicial review appear to be difficult, if not impossible to justify on liberal grounds." I say this because many scholars have analyzed constitutional history, theory, and practice to show why the Court must be counter-majoritarian if it is to support the fundamental rights of minorities against the wishes of the majority and of the majority when government seeks to deny it rights.

If the fundamental rights controversy is not susceptible to resolution in its own terms, as Susan Burgess cogently argues, then might not complex and well-conceived constitutional theories that are built on social facts actually aid in the protection of individual rights. Such theory would incorporate the social facts of the lived experiences and social practices of different groups in our society; it could define far more precisely than contemporary theory the nature of the polity malfunctions and structural inequalities that make individual agency impossible, especially for minorities. In arguing this I am speaking about apologetic pluralists Robert Dahl and Bruce Ackerman, mildly critical pluralists such as John Hart Ely, civic republicans including Frank Michelman and Sanford Levinson, and critical legal theorists, such as Mark Tushnet, who engage in deconstruction, not theory building. (see Dahl 1957, Ackerman 1991, Ely 1980, Michelman 1986, Levinson, 1988, Tushnet 1988, and Kahn 1994). Constitutional theories based upon social facts could provide a needed critical theory, while also affirming new rights.

Moreover, legal scholars, who fail to see structural inequalities in our government and society and are not critical of political institutions and courts, are just as interested in the *advocacy* of *their* assumptions about systemic social facts, that is, about the relationship among law, political power, and the economic, social, racial, ethnic, and sexual orientation realities. They are simply advocating different assumptions than the participants on this roundtable.

The larger problem with the arguments about social facts by Haltom, Gillman, and McCann is that, unlike Burgess, they pay insufficient attention to the role of social facts writ large that are at the core of constitutional theory. This is ironic in light of Gillman's original interpretation of the importance of the difference between "the general welfare" and the "welfare of favored classes" in the Lochner period, Haltom's important statement of positive and dialectical reasoning in separation of powers jurisprudence, and McCann's important recent book on the politics and law of comparable worth (see Gillman 1993, Haltom 1989, and McCann, 1994)

This is also ironic because McCann and Gillman do mention the relationship of social facts writ small and constitutional theory. For example, McCann argues that newly recognized social facts have no meaning apart from the interpretive frames themselves, cannot resolve interpretive disagreements, and may challenge the interpretive frames of officials. He notes that "interpretive frames articulated by courts — and other authoritative institutions—importantly shape how and which facts are constructed by disputing parties in society." Finally, McCann argues how the construction of social facts by the Supreme Court in *Griggs* sent out signals which fostered efforts by liberals and conservatives to change affirmative action law, and in *McCleskey,* to stifle efforts to limit capital punishment. Thus, he emphasizes that social facts may better serve critics than creators of rights.

However, like Haltom and Gillman, McCann's discussion of these cases centers on the use of social facts as argument. He does not emphasize what I suggest is the more important problem — the failure of constitutional scholars to develop constitutional theories that would increase the chances for a different decision in *McCleskey* and different responses by the Court and society to *Griggs*. For example, the problem with *McCleskey* was not simply the Court's refusal to use convincing data on the relationship of race to capital punishment. Of equal importance was its emphasis on the polity principle that we should have faith in jury decision-making which relies on local and state customs and values. Might not constitutional

theory based on the social facts about localism and the treatment of minorities be brought to bear on this aspect of the McCleskey decision, so the social science facts about race and capital punishment will have a context for their interpretation.

Gillman, like McCann and Haltom, cogently argues that "facts...only become conspicuous and relevant within particular, contestable theoretical frameworks" and "The interesting question to consider, then, is not how facts can be used to anchor interpretation, but rather how different political perspectives generate different versions of indisputable facts." However, like McCann and Haltom, after making this general point, Gillman spends little time on a discussion of constitutional theory writ large. He offers an analysis of social facts writ small in Hirsch's work, in the constitutional law of the Lochner era, and in legal realism. And then seems to argue against the possibility that social facts in constitutional theory can be a source of social change. Gillman emphasizes,

> a general commitment to social reality has no influence whatsoever on the shape or direction of constitutional interpretation" [but may] "have an influence over the resolution of particular disputes, depending on the assumptions embedded in constitutional discourse... My problem is not with fact-talk per se but rather with the attempt to transform this argumentative tactic into a constitutional epistemology."

IV. *Social Fact-Based Constitutional Theory In the Future.* If the real story of the Lochner Period, as Gillman suggests, was that the reality in these cases was constructed within the dominant conceptual apparatus in the constitutional law of its day, then the way to protect the rights of minorities and majorities today, as Gillman desires, is to alter the dominant conceptual apparatus on which constitutional choices are now made. This would require the development of a constitutional theory that is built on the empirical reality of today, one in which race, gender, sexual orientation, and class inequalities are viewed as cumulative and the premise of the separation of public and private space that is central to liberal theory is questioned. Such a constitutional theory would employ social facts in its definition of polity malfunction, court role, and individual rights.

Gillman's fear, and that of Haltom and McCann, that social facts talk might lead to a second legal realist movement is unwarranted in my view. It is built on an acceptance that there is a distinct separation of social facts writ small and writ large in Court decision-making. Social facts are at the core of all constitutional theory and that a major problem of the legal realist movement was its acceptance of the fact-value distinction and its eschewing of ethical values, moral theory, and foundational principles as a bases for law.

A social facts-based constitutional theory that aims at a new definition of polity malfunction and the relationship of rights to complex definitions of economic, social, and racially-based structural inequalities at first probably might result in a greater problem of legitimacy than is presently faced by that of contemporary scholars, such as Dahl and Ely or the civic republicans (see Dahl 1957, Ely 1980, Michelman 1986, and Levinson 1988). But this is so only because new ideas take time to gain legitimacy, not because the social facts on which the new theories would be built are in any way inherently less legitimate. The acceptance of a social fact-based constitutional theory would depend upon such factors the availability of social science data, the overall quality of presentation and argument, the clarity of revised polity and rights principles, and most important, the linkage of the new theory to previous theory, definitions of constitutional principles, and legal precedents.

Acceptance of a new social fact-based constitutional theory would also require that Supreme Court decision-making be viewed as a constitutive, rather than instrumental, process. That is, jurists and scholars should emphasize that principles, not hoped for case outcomes, are to court decisions and urge the interpretive community to develop new constitutional theories which are informed by social facts to aid the process of doctrinal change. An important objective of contemporary constitutional theory should be to define contemporary malfunctions in the political system, in light of Federalist 10 and other constitutional polity principles, and to define the nature of fundamental rights today — as Hirsch has done with regard to the right of liberty. What is needed is to draw upon modern political science, anthropology, sociology, and economics— all the social sciences — in order to explore why members of subordinated groups do not have an equal opportunity to exercise individual agency and thus might be candidates for the protection of courts through the definition of new individual rights.

Moreover, the use of social facts in constitutional theory will provide bases for redefining the conventional wisdoms of jurists, scholars, and, in the long run, the wider public, as to the role of courts and the political system as a forums for change, the protection of individual rights, the redefinition of fundamental rights, and as forums to secure equality before the law for all citizens. When one starts with an objective of helping x or y group in a particular case, as my colleagues on this panel have demonstrated, one is open to the claim that raw politics, that is, interest group liberalism, is at work rather than a rule of law and the protection of fundamental rights — as one can see from the present debate over equality before the law for African-Americans and affirmative action.

As McCann, Gillman, Haltom, and Burgess point out, the use of social facts writ small, without a firm linkage to constitutional theory, subject those who define them to the criticism of why should I accept "your" definitions of the appropriate facts, since there are alternative formulations of the facts which apply in a case which others will view as equally valid. The Gillman's, Haltom's, Burgess's, and McCann's of this world will lose out if social facts writ small become the primary level at which social facts are employed. Social facts must be built into a deeper constitutional theory.

The objective must be to convince jurists, scholars, elites who make constitutional choices and public policy, and the wider public, that social facts-based constitutional theory should be applied to deciding individual cases and making public policy. First, because the theory's basic principles will be generalizable to many cases, it will be viewed as more legitimate than if one uses social facts in specific cases. Second, one can argue that the complex social facts on which the theory is based, unlike those of traditional constitutional theory, better fit with the complexities of contemporary society.

In addition to Hirsch's important work, Cass Sunstein seeks to develop a wide-ranging constitutional theory, one in which a consideration of social facts is at the core. Cass Sunstein, who continually asks whether what is viewed conventionally as the status quo (in social fact terms) today, and historically, can really be viewed as neutral (see Sunstein 1993 and Kahn 1995). Unless one works at the level of social facts writ large many of Haltom's concerns about liberals losing the war of the facts and Gillman's views of modern sociological jurisprudence might be realized.

Social fact theory writ large also can help in dealing with my colleagues's concerns about how to decide which "knowledge-creating class or stratum" should be "privilege[d]" to make constitutional choices. The answer would lie in the development of principles, based on social facts, of the conditions under which courts should be counter-majoritarian.

V. *Conclusions.* I conclude with several thoughts about Hirsch's *A Theory of Liberty: The Constitution and Minorities.* In contrast to the views of Gillman and McCann, I want to emphasize that Hirsch's discussion of social facts does more than "call attention to the important discursive practice of fact construction in political as well as academic life;" it is a call for the construction of constitutional theories in which social facts are integrated into definitions of polity malfunction, interpretations of the 14th Amendment, and reasons for the counter-majoritarian nature of the Supreme Court. Moreover, Hirsch does not rely in a greater degree on delegitimatizing social facts than do Ely and Dahl; he only relies on *different* (and a more precise statement of) social facts. Most importantly, Hirsch emphasizes the need to incorporate social facts within the context of a historically and theoretically based theory of liberty. As I discuss elsewhere, Hirsch's original and important scholarly contribution is its contribution to constitutional theory, not to the analysis of social facts writ small, this is, in cases. (see Kahn 1993).

I want to explore why scholars have not fully appreciated the contribution of Hirsch's book to constitutional theory — that is, its call to incorporate social facts into constitutional theory. What *in Hirsch's book* leads scholars to focus primarily on social facts writ small and raise serious questions of their legitimacy? Part of the answer to this question may be found in Hirsch's definition of social facts. For Hirsch, social facts are based upon the following: the presence or absence of a societal consensus on the values, possible issues, and policy outcomes in a case; what happens between the parties in a case; the existence of widespread prejudice; and the science and social science which support the facts which are crucial to a case.

Hirsch's definition of social facts fosters problems of legitimacy, especially if the rights are based on social facts concerning the presence or absence of a societal consensus on a particular constitutional question. Constitutional rights need protection even when the social facts indicate there is majority or strong minority opposition to a particular legal principle. The Supreme Court is required to be counter-majoritarian in the name of rights protection. It is when there is no consensus in society, and even opposition to a right by the majority, that Court action is most needed and justified under our republican, not purely democratic, constitutional scheme. Moreover, if, for example, *Roe v. Wade* were decided because of the social fact that there was a consensus in our nation that abortion is not murder, as Hirsch argues, then there would be little need for constitutional theory, the separation of law and politics, constitutive rather than instrumental Court decision-making, or the requirement that the Court be counter-majoritarian in defense of rights. Moreover, if the Court made decisions on the basis of public opinion and the level of consensus in the nation, we could not explain the 1992 *Casey* decision, in which Nixon, Reagan, Ford, and Bush appointees supported the right to abortion choice. Nor would the Court have permitted flag burning and hate crimes and outlawed state sanctioned prayers in public schools (see Kahn 1994).

Nor are the particular facts in a case, and the needs of the particular parties in a case important to its resolution in most areas of constitutional law. Except in the areas of defendant rights, cruel and unusual punishment, and imminent and irreparable danger or damage to the parties in a case, rarely is what happens specifically to the parties in a constitutional law case the determining factor in the Court taking a case and its final decision. Of greater significance is the importance to the Court of the constitutional questions in a case and confusion among lower courts on important doctrinal questions.

Nor should reliance directly on scientific data be viewed as important to court decision-making in specific cases and thus be included on a list of important social facts. To *Brown v. Board of Education*, a case in which the use of social science data was central, on can juxtapose the case of *Craig v. Boren* in which the Court rejected social science evidence on the relationship among drinking, driving, and gender, when it decided to subject gender classifications to heightened scrutiny.

I think that the problem with Hirsch's theory is that it places too great a faith in the use of social facts in specific Court decisions as engines of social change. Social facts will gain hegemony in constitutional law and produce social change only if they are embedded in constitutional theories that are not case specific. In contrast to Hirsch's definition of social facts and their use *in cases*, I am arguing for the use of social facts to inform the basis assumptions of constitutional theory about whether we are to trust political institutions to protect subordinated groups and how class, race, gender, and sexual orientation influence the possibility of individual agency in our nation. Maximum liberty is an important value, as is equality of opportunity. To achieve these values one must introduce systemic social facts into the constitutional theory that jurists employ to set the standards for evaluating the issues in specific cases.

Fortunately, the Supreme Court refuses to decide most cases upon the wants of the public — or the needs of specific parties to cases. Rather, it asks what constitutes liberty, equal protection, and First Amendment rights today in light of ever more complex and refined visions of political system, structural inequalities facing individuals and groups, precedent, and the possibilities of individual agency. Constitutional theories, which are built upon social facts that are based upon the best social science evidence, are needed to aid the Court in its constitutive decision-making process. This will do far more than using social facts in specific cases to produce the social change through law that all on this symposium advocate.

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IN MEMORIAM

C. HERMAN PRITCHETT

Professor C. Herman Pritchett, of the University of Chicago and the University of California, Santa Barbara, died April 28, 1995. He was 88 years old. Having served as President of the APSA in 1963-64, thirteen years as Chair of the Department at the University of Chicago, and as the one who showed precisely how judges were political, Herman Pritchett's life provides an occasion to elevate our knowledge of what man can be. In the reflections that follow, faculty and student colleagues recall a quietly extraordinary scholar and a gentleperson.

—John Brigham

From **J. Woodford Howard, Jr.**, The Johns Hopkins University...

"I missed the joy of taking courses with Herman Pritchett, but I am grateful for his profound influence as a model of what a scholar, teacher, and humane professor of political science should be. For Herman all these roles were a seamless whole. His scholarship was superb. It is easy to forget how revolutionary his studies of voting alignments on the Roosevelt and Vinson Courts were in their time. His once controversial methods are now annual features in the Harvard Law Review. *Rightly praised for pioneering empirical research on the judiciary, he also warned against pushing behavioralism too far. Distinctions between law and politics as well as uniformity and uniqueness in the judicial process remained enduring challenges.*

As a teacher at Chicago and Santa Barbara he groomed some of the finest political scientists in the land. His teaching, perhaps more than he realized, also affected many of us far beyond his classroom. Let me illustrate from my own experience. Once I imposed on him to support my application for a Guggenheim Fellowship. After its rejection, he promptly sent a comforting postcard — "Welcome to the club!" — a neat lesson in how to lose. His uncommonly faithful attendance at panels of professional meetings always impressed me. From Herman I learned how cost-effective is this way of keeping up with new ideas and talent in our field. I am thankful to be among Herman Pritchett's countless students by indirection. His life affirms the axiom that example is the great teacher." (6/23/95)

From **Mary Cornelia Porter**, Professor Emeritus...

"I've always been impressed by the varied paths in the study of public law taken by Herman's students. He was, praise be, no guru, didn't seek followers or converts. There have been no Pritchardians. He listened, opened our eyes to possibilities, and was always there for support and encouragement. What better example to all of us." (6/l/95)

From **Judith A. Baer**, Texas A&M University...

"His impact on public law, and on the political science profession, is so great that his contributions have become part of the structure of the field. His work is so basic to our discipline that we don't always recognize his influence. He essentially founded the subfield of judicial behavior, while never taking sides in the specialty wars. He welcomed each new specialty and method, and found ways to integrate them.... Herman's impact on the discipline consists also of the civility he brought to every professional relationship. He was civil even to people who weren't civil to him: a genial, benign presence to people he disagreed with, people who were rude to him, people who were rude to one another. I literally never heard him make a rude remark about anyone — and what a statement that is! Gently, by example, he taught this civility to students, who taught it to their students. We learned how to criticize without savaging, how to disagree without destroying. By the time I got into the profession in the '70s, there were a lot of people around who had learned that behavior. We couldn't always emulate Herman, but we tried. So, when you were Herman's student, you never stood alone in the wind." (6/14/95)

From **Tim Hodson,** California State University, Sacramento...

"Looking back, being a TA for Dr. Pritchett was one of the real joys of my years at UCSB. I have tried, though I suspect not very successfully, to keep him in mind as a model: dignified but warm, successful but without a trace of pompousness, an engaging but not patronizing teacher. I am successful, however, in keeping alive the Pritchett tradition of bad puns. No matter what the class, I manage to work in Dr. Pritchett's truly awful puns about the Supreme Court being Marshalled or Stoned and, my favorite, the Mann Act joke. My students groan in disbelief and I smile in recollection of C. Herman." (6/6/95)

From **Sue Davis,** University of Delaware...

"His undergraduate lectures were scrupulously organized (I still have the outlines he distributed for each class) and devoted to a clear analysis of an unbelievable number of cases. I will never know how he managed to cover so much material but he did it so gracefully that I remained unaware of the difficulty of his task until I began teaching my own classes. He lectures did not contain 'fluff,' yet he entertained the students while he educated them. I discovered an example of this in my notes from 1978 (four years after he 'retired'). The subject was obscenity and he began by asking, 'What is obscene? The Vietnam War, the National Review, *advertisements for big cars during an energy shortage?' He used none of the audio-visual aids that seem so important today; he rarely even used the blackboard. I believe that he was able to keep two hundred and fifty students engaged largely because of the commitment and enthusiasm he brought to his lectures. He also made his liberal values clear and his disdain for the Burger Court was never in doubt — he concluded his lecture on the rights of the accused with, 'we live in a police state, don't we?' How might Herman Pritchett have responded to students who praise Newt Gingrich, condemn 'PC', and proclaim that affirmative action is ruining the lives of innocent white males? Whatever his specific response, I know that it would affirm the principles of human dignity and equality." (6/16/95)*

From **David O'Brien,** University of Virginia...

"Herman Pritchett's undergraduate courses on judicial process and constitutional law at UCSB were among the Department's most popular. They regularly enrolled between 200 and 250 students each quarter (when Pritchett was well into his 70s). CHP had an incredibly sharp analytical mind and his lectures coolly and concisely covered large bodies of material. On one occasion, however, I recall an emotional lecture — the death of William 0. Douglas. Pritchett's lecture revealed as much about that justice's long career as the depth of his own knowledge and, indeed, love affair with the personalities, politics, and institution of the Supreme Court. Graduate seminars at UCSB were rigorous and alternative methodologies for studying courts, judges, and judicial politics were emphasized and examined. By this point in his career, Pritchett was firmly eclectic, still respectful of 'traditional legal analysis' but skeptical about some of the claims made for the contributions of quantitative methods in studying the Court and the judicial process. And he was fond of saying, 'let the many flowers bloom.' "(6/19/95)

From **John Brigham,** University of Massachusetts-Amherst...

"Our academic generations are so short that it is possible to be a senior citizen at 50. Herman Pritchett remained an active member of the profession into his late 80s. He drew life from us and returned it in wit, humility and an enduring commitment to scholarship and the scholar. His teaching continued long after one was in his presence and his writing stayed alive long after the point was made. I once declined an opportunity to TA for Prof. Pritchett and recall that embarrassing fact as I try to understand some of the choices today's graduate students make.

He never wrote or said more than he had to, but left his students room to think. Worried once about my lack of law school training, I asked Prof. Pritchett if I needed to go to law school in order to work in Public Law. His 'I didn't' was all that needed to be said. In trying to understand the consequences of his having taught us that judges are political, I often return to a passage in his 1954 book Civil Liberties and the Vinson Court. *'The individual judge may think that the precedents are wrong or outmoded. If so, he may follow his personal preferences and state his reasons for voting to change the Law. He is free to do that. He is not free to ignore the precedents, to act as though they did not exist. He has free choice, but among limited alternatives.'*

In the early 1970s, C. Herman Pritchett was one of the first real liberals I had met. His commitments to process, to tolerance, and to equality were not simply ways to avoid making a 'substantive' decision or one-dimensional professional ideologies that drew substance from politics. These were commitments that explained behavior." (6/27/95)

From **Louis Fisher,** Congressional Research Service...

"Herman Pritchett is rightly remembered as an inspiring teacher, noted scholars and able administrator, but those gifts were especially extraordinary because of the modesty, simplicity, and directness that guided his relations with friends and students. I recall visiting Herman on one occasion where he treated me to lunch at a Mexican restaurant, complete with Margaritas, and then drove me to his new and smaller home, an adjustment he made after his retirement (if he ever really retired). He proceeded to show me each room of the house to give me a glimpse of what retirement is likely to have in store for me, reminding me that whatever stage I was in then I would be in a different stage later. The underlying message for me was: I don't like making this adjustment and somehow it will be a tad easier if I let you know what is down the road for you. When I reflect on Herman I think of someone gentle, intelligent, and considerate to those around him. How nice if some of those wonderful qualities would rub off on us, even if just a smidgen." (6/12/95)

A memorial service for Herman Pritchett was held at *UCSB* May 30, 1995. Speakers were introduced by Stanley Anderson and Tom Schrock, Gordon Baker, Henry Turner, David Danelski, and Walter Murphy were among those who made presentations. Murphy's presentation will be published in *PS.* From Herman's son-in-law Bruce Richards, we learned that the year he started graduate school at Chicago in 1926, Herman became ill with tuberculosis and left to spend over three years in a sanatorium. There he composed a number of poems. After he recovered and passed his qualifying examinations and on his way to Knoxville to begin work for the Tennessee Valley Authority (where he met his wife Marguerite), he wrote the following.

SIC TRANSIT GLORIA TUESDAY

Life, as a subject, will support
A flock of morals, of a sort.
However, one is all I'll draw.
Thermodynamic's second law
Serves as my text in this discourse.
If that means naught, feel no remorse.
It's just a high-brow way to say
That man will see no better day.
It means that every human knave
With each dawn digs a fresher grave.
Life's clock runs down relentlessly —
Each spring drains to a bitter sea.

But no one's saved by similes,
A flag to throw out in the breeze,
A plan of action, is your need?
Then lean upon my slender reed!

Since all alive have but one sequel,
Refuse a battle that's unequal.
Loose the bonds of mind and matter,
Ape the ways of the Mad Hatter.
Throw eggs in fans; be a disturber;
Explain the drawings of James Thurber.
Phone the Shelleys, ask for Percy.
Strain the quality of mercy.
If people say that you are queer,
Confute them from the chandelier.
In short, while shooting down life's slide,
Paint pretty pictures on the side.

If you live thus, you can say Pshaw! To thermodynamic's second law.

—*Decatur Herald,* August 5, 1934

The family has requested that any gifts in remembrance be made payable to the U.C. Regents, marked 'Pritchett Fund." They may be sent to: Pritchett Fund, Department of Political Science, University of California, Santa Barbara, CA 93106-9420.

An Expanded Version of the Database (Continued)

Harold J. Spaeth, *Michigan State University*

As I wrote in my last column, the expanded version of the database has been sent to the Consortium and should soon be available for distribution to member institutions. This version encompasses only the Vinson and Warren Courts (1946-1968 terms), unlike the existing one which dates from the beginning of the Warren Court (1953) through the end of the 1993 term.

As new sources of information become available, we will update the database. Thus, we now have access to the Fortas papers. Any changes resulting from our assessment of these data will appear in the next version of the database along with the correction of such errors as we find in our random efforts to further clean the data. It is our intention to provide the Consortium with an updated version of the Vinson-Warren database concomitantly with the annual update of the original database (Warren-Rehnquist) that includes the Court's most recently completed term. The first page of the documentation and its copyright will indicate how current the accompanying data are.

The previous column considered some of the differences between the expanded database and the existing one. Here, I consider the occasional differences between the report vote (RVOTE), as compiled by my co-principal investigator, Jan Palmer, and my specification (VOTE).

Compatibly with conference voting outcomes generally Jan uses an essentially affirm/accept - reverse/deny coding scheme. Sometimes it does not accord with the subtleties of some of the nonmodal voting in which the justices occasionally engage. Thus, Jan does not distinguish between jurisdictional and meritorious dissents while I treat the former as nonparticipation.

Where I have expanded the vote to account for differences resulting from different voting combinations among the justices in a specific case (ANALU = '4'), RVOTE and VOTE will necessarily differ in at least one of the records for this docket number. Differences also occur where a justice styles his vote concurring and dissenting in part. The presence of such grounds for disagreement are usually identified if VOTEQ = *. Finally, cases where the justices agree on the winner and loser, but disagree on the extent of relief to be offered; *e.g.*, a reversal rather than a remand; will typically produce a discrepancy between RVOTE and VOTE. An asterisk in the DIRD field-direction based on dissent alerts the user to these cites.

Instances of divergence between RVOTE and VOTE will not affect the direction of the Court's decision, however. Every record containing votes in the dedicated VOTETYPE3 (report) and VOTETYPE8 (Spaeth) fields will have a common entry (0, 1, or 2) in their respective field that specifies direction (RDIR and DIR). Note also that if DIRD = *, both RDIR and DIR conform to the respecification. Where MDIR and DIR change because of the presence of a second issue for decision (*i.e.*, ANALU = '2' or '5'), both will continue to have a common entry. Observe, however, that the commonality between the direction of the report vote does not extend to the merits vote (MVOTE). Not uncommonly the justices change their votes after conference, which changes sometimes produce a different case outcome; as a result MDIR may differ from RDIR and DIR. Indeed, I suspect that users will make directional differences between merits and report votes a focal point of their research, addressing such questions as which justices switch? In what sorts of cases? Why? With what effects on case outcome?

The addition of fields specifying the opinion assigners and assignees comprises a final substantive addition to the expanded database. Although a set of computerized IF statements identified assigners based on the report vote in the existing database (thanks to the programming skills of Jeff Segal), analysis of the conference vote on the merits indicated considerable error because of changes in assigners not detectable by reference to the final conference vote on the merits. Consequently, in the expanded database, Vinson Court assigners have been identified through the docket books; those on the Warren Court by reference to Warren's assignment sheets. The inclusion of these fields supplements the highly reliable comprehensive list of all the votes cast by every justice in conference with an equivalent list of opinion assigners.

Harold J. Spaeth is Professor of Political Science at Michigan State University and Principal Investigator of the United States Supreme Court Judicial Database. Professor Spaeth's address is Department of Political Science, Michigan State University, East Lansing, MI. Phone (517) 355-6583; e-mail HAROLD.SPAETH@SSC.MSU.EDU

Section News

Nominations for Section Officers

The Section's Nominations Committee, chaired by Michael McCann (*University of Washington*), announces the following nominees**:**

Chair-Elect

Thomas G. Walker, *Emory University*

Executive Committee

Ronald Kahn, *Oberlin College*
Susan Sterett, *University of Denver*

Alternative candidates can be nominated by five members of the Section at the Annual Section meeting or by petition to the Chair prior to the meeting.

The other members of the Nominations Committee were: Gregory A. Caldeira, *Ohio State University;* Barbara Perry, *Sweet Briar College* (currently at the Supreme Court); Allison Renteln, *University of Southern California;* Louis Fisher, *Library of Congress;* Martin Edelman, *State University of New York at Albany;* D. Grier Stephenson, Jr., *Franklin and Marshall College.*

Law and Courts Section Meeting

The Business Meeting of the Law and Courts Section will be held on Friday, September 1 at 5:30 pm, during the American Political Science Association Meeting in Chicago. At this meeting new Section officers will be elected, prizes awarded, and announcements made about upcoming Section activities.

The Section's Reception will follow the business Meeting at 6:30 pm.

Law and Courts Short Course:

Positive Political Theory, Public Choice and Public Law

Daniel Rodriguez and I have been busy putting together the program for our short course at APSA. Thanks to all of you who have already preregistered. To those who plan to attend but have yet to preregister, please send in your form soon (See the June issue of *PS* for short course registration materials). We need to know soon who is attending so that we can send out the list of recommended reading in advance of the meetings.

Here is a preliminary schedule for the short course:

9:00 - 10.30 Introduction to Strategic Interaction

We will review the basic lexicon and tools of noncooperative game theory. Students will learn how to approach sequential and simultaneous games. In addition, we will review some basic voting theory, including a discussion of sophisticated voting. We will employ examples taken mostly from judicial politics.

10:45 - 12:15 Policy-making in our Separation of Powers System- The Role of the Court

We will examine the role of the courts in the sequential policy-making process, with attention paid to opportunities for strategic behavior by judges. We will focus on agenda setting, strategic voting, and the importance of Constitutional judicial review. We will review some of the voluminous literature on statutory interpretation.

1:15 - 2:30 Applying and Testing PPT Models of Law and Courts

Several scholars will discuss their experiences applying PPT models to questions not routinely explored this way in the past. What obstacles are unique to the legal arena? Which types of models are most fruitfully brought over from other subfields? How can the Supreme Court Database be used to test models allowing for strategic choice by the Justices? Some of our panelists will also discuss what was involved in retooling to pursue specific research projects

2:45 - 4-.00 From Positive Theory to Normative Theory.

A panel of scholars will discuss how the results from rational choice modeling can be applied to make normative arguments about the law and judicial institutions. Among the topics ripe for discussion are: cannons of statutory interpretation, the role of an independent judiciary, the relative importance of procedure versus substance in the law, and the necessity of a stable constitutional order.

We have solicited the assistance of several important scholars in the field. Among those slated to participate are (subject to change):

Lee Epstein, *Washington University*
John Ferejohn, *Stanford University*
Daniel Farber, *University of Minnesota Law School*
Jack Knight, *Washington University*
Emerson Tiller, *University of Texas Business School*
Jeffrey Segal, *SUNY Stony Brook*
Linda Cohen, *UC Irvine*
Martin Shapiro, *UC Berkeley Law School*

Feel free to contact me (SCHWARTZ@HDC.HARVARD.EDU) or Dan (RODRIGUD@BOALT.BERKELEY.EDU) with any questions about the course. We hope to send out the reading list around the beginning of August. Hope to see many of you in Chicago.

—Edward P. Schwartz

Conference Schedule, 1995-96

American Political Science Association	Chicago, IL	August 31- September 3, 1995
Southern Political Science Association	Tampa, FL	November 1-4, 1995
Northeastern Political Science Association	Newark, NJ	November 11-13, 1995
Western Political Science Association	San Francisco, CA	March 13-17, 1996
Southwestern Political Science Association	Houston, TX	March 20-23, 1996
Midwest Political Science Association	Chicago, IL	April 18-20, 1996

Conferences/Calls for Papers

International Political Science Association

The 1996 Interim Meeting of the International Political Science Association's Research Committee on Comparative Judicial Studies will be held July 2-4, 1996 at The Hebrew University, Jerusalem, Israel. Individuals interested in suggesting panels, topics and/or presenting papers should contact Professor Martin Edelman, Department of Political Science, The University at Albany, Albany, NY 12222-0001. FAX: 518-442-5298; E-mail: ME354@ALBANY.ALBANY.EDU

Hyde Park Sessions at the 1995 APSA Meeting

Hyde Park Session I. "Is there a Right to Discriminate against Gays and Lesbians?"
Friday, September 1, 3:30-5:15, Normandie Lounge, Chicago Hilton

Moderator:	Martin Shapiro, *University of California-Berkeley*
Commentors:	David Novak, *University of Virginia*
	Martha Nussbaum, *University of Chicago*
	Ken Sherrill, *Hunter College*

Hyde Park Session II. "How Angry is the Electorate?"
Thursday, August 31, 3:30-5:15, Normandie Lounge, Chicago Hilton

Moderator:	Catherine Rudder, *American Political Science Association*
Commentators:	Sue Carroll, *Rutgers University*
	Mike Dawson, *University of Chicago*
	E.J. Dionne, *Washington Post*

Center for Law and Public Policy, St. John's University, School of Law: Working Paper Series

The Center for Law and Public Policy is an interdisciplinary forum supporting pure and applied research that addresses legal questions bearing on public policy. You are invited to submit papers relating to public policy issues and agenda in the government arena. Papers containing new data bearing on public policy issues, a new theoretical perspective on such issues, or a combination of the two, are sought. Papers will be made available to the academic and political community.

Please submit for review for the Working Paper Series to either Professor Nina Crimm or Vincent DiLorenzo, St. John's University School of Law, 8000 Utopia Parkway, Jamaica, New York 11439. For further information, please call (718) 990-6092.

FDR After 50 Years

Louisiana State University in Shreveport, the Little White House Historical Site and Roosevelt University call for participants in an international and multidisciplinary conference, "FDR After 50 Years: Politics and Culture of the 1930s and 1940s," to be held on September 14-16, 1995. Contact Bill Pederson, LSU in Shreveport, One University Place, 439 BH, Shreveport, LA 71115-2301; (318) 797-5337; FAX 318/797-5358.

Announcement from NSF

The Law and Social Science Program of the National Science Foundation wishes to remind interested social scientists of its regular and special grant competitions, and to call special attention to a set of SPECIAL FUNDING opportunities.

Types of Proposals

In addition to standard research proposals, the Law and Social Science program welcomes planning grant proposals, travel support, requests for conferences and other activities to lay the foundation for research, and proposals for improving doctoral dissertation research. The types of proposals desired by the special competitions are indicated in the descriptions of these programs, given below.

Regular Competition

The regular grant competition supports social scientific studies of law and law-like systems of rules. These can include, but are not limited to, research designed to enhance the scientific understanding of the impact of law; human behavior and interactions as these relate to law; the dynamics of legal decision making; and the nature, sources, and consequences of variations and changes in legal institutions. The primary consideration is that the research shows promise of advancing a scientific understanding of law and legal process. Within this framework, the Program has an "open window" for diverse theoretical perspectives, methods, and contexts for study. For example, research on social control, crime causation, violence, victimization, legal, social and political change, patterns of discretion, procedural justice, compliance and deterrence, and regulatory enforcement are among the many areas that have recently received program support. The target dates for the submission of proposals in the regular competition are January 15 for proposals to be funded as early as July and August 15 for proposals to be funded in or after January.

Global Perspectives Competition

The Program is also continuing its special competition for research dealing with global perspectives on sociolegal studies. The aim of this initiative is to support research on law and law-related processes and behaviors in light of the growing interdependence and interconnectedness of the world. The competition seeks to encourage examination of both global dimensions of sociolegal phenomena (e.g., disputing, law and social change, legal pluralism, legal system development, social control, crime causation) and sociolegal dimensions of global phenomena (e.g., democratization, economic and commercial transactions, immigration and population shifts, social and ethnic conflict, regulation of the environment, public and private governance). Proposals are welcome that advance fundamental knowledge about legal interactions, processes, relations, and diffusions that extend beyond any single nation as well as about how local and national legal institutions, systems, and cultures affect or are affected by transnational or international phenomena. Thus, proposals may locate the research within a single nation or between or across legal systems or regimes as long as they illuminate or are informed by global perspectives. Proposals submitted to the global perspectives competition must be received at NSF by February 1.

Special Competitions

In addition to the two Law and Social Science Program competitions, researchers should be aware of several special competitions in the social, behavioral and economic sciences: (1) the Human Capital Initiative, (2) Democratization, and (3) Human Dimensions of Global Change, (4) Social Science Instrumentation, (5) a Center/Consortium for Violence Research and (6) a National Center for Environmental Decision Making Research. For more information about any of these competitions, contact the Law and Social Science Program.

Application Procedures

There are specially designated application and review procedures for the instrumentation competitions and the proposed HDGC, Violence, and Environmental Decision Making centers. Details on these will be given in the program announcements for the centers, once they have been approved. Their deadlines will probably fall in the period March 1 to May 1, 1995. For all the other competitions, sociolegal proposals may be submitted to the Law and Social Science program for the program target dates of January 15 and August 15. Proposals should be prepared in strict accordance with the guidelines in NSF's Grant Proposal Guide (NSF 94-2). Proposals that do not conform to these guidelines may not be considered. The review process for the Law and Social Science Program requires approximately six months. It includes appraisal of proposals by ad hoc reviewers selected for their expertise from throughout the social scientific community and by an advisory panel that meets two to three months after the target/closing date for the competition.

For further information, write, call, or e-mail: C. Neal Tate or Patricia White, Program Officers, Law and Social Science Program - Room 995, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Phone: (703) 306-1762; e-mail: CTATE@NSF.GOV or PWHITE@NSF.GOV (Internet); Fax: (703) 306-0485/6.

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Law and Courts

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