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IN CELEBRATION OF CONSTITUTIONAL KINDNESS: SOFT SYMBOLISM IN A HARD SHELL

JAMES AUDLEY MCLAUGHLIN*

The bicentennial of any constitution is surely an invitation to much sententious rhetoric. But the bicentennial of THE Constitution, The American Constitution of 1787, is an occasion for oratorical pyrotechnics of the first magnitude. So I shall make my brief tribute to note the importance of the Constitution as symbol — symbol of our national resolve to be a good society.

Constitutions, in general, have two distinct functions: (1) As the outward sign and symbol of a society's fundamental commitment to social values and (2) perhaps more mundanely, as the framework for a political order. Our Constitution of 1787 (or '88 when ratified) has served well in both capacities: it gives prominent notice and articulate voice to our fundamental commitment to our vision of the values of the good society and it has served quite admirably as the framework for our political order.

As a framework for our political order it is, in Professor William W. Van Alstyne's phrase, "hard law." The Constitution as sign and symbol is not "hard law" and, indeed, may appear not to be "law" at all. However, because of the general perception of our Constitution as "hard law," our Constitution's role as sign and symbol is dramatically enhanced. Enhanced, in fact, to the point of being law — albeit "soft law" — and, it is the thesis of this

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This article began as a speech I delivered at W.V.U.'s Law Day dinner in April 1987. It has been substantially expanded since then though its main theme has not changed. I want to thank Patricia Morrison for her benign editing of this essay. Through our numerous discussions, she suggested many ways that I might clarify my ideas (or at least not unnecessarily confuse their presentation). Discussions with faculty colleagues have, as ever, been instrumental in forming my ideas but special thanks is due John Bonsignore and Thomas Barton.

celebratory salute that the Constitution’s soft law role is, ironically, more important than its role as hard law.

I shall develop my thesis by first briefly describing (after Van Alstyne) the hard law aspect of our Constitution, then by describing the soft law aspect—what it means to say that the Constitution is sign and symbol, and of what; how this symbolism is made significant (and not merely an historical or sociological observation) by the hard law nature of our Constitution; and finally, in a grand effort at an original pyrotechnic, I will suggest that the value that our soft law Constitution most importantly symbolizes today is kindness—then you skeptics can look upward and see what a pretty glow it makes!

THE HARD LAW CONSTITUTION

It is as framework for a political order that the Constitution is mostly noted: The three branches of government; its checks and balances of both the horizontal separation of powers and the vertical separation of federalism; its limitations on governmental action, limitations that leave certain areas of both our private lives and public activities exempt from intrusion—no matter how majoritarian, well-intended or benign the intrusion might seem; and finally its guarantees of orderly and fair process in creating and administering law.

It is as this framework for our political order that our Constitution is "Hard Law." Professor Van Alstyne counts its quality of being hard law as our Constitution's principal virtue. The phrase "hard law" connotes two different ideas. Hard law means both permanent, reliable—hard like a diamond—difficult to change, impervious to political caprice; and also hard in the sense of substantial, real, determinant not abstract. It is hard in this second sense because of judicial review. Judicial review gives remedies that are enforceable—and respected even by Congress. When the Court tells Congress that the Constitution means Congress must seat
someone it has refused to seat, Congress seats that person.\textsuperscript{4} When the Constitution (through the Court) tells the President he may not seize the steel mills, the mills remain unseized.\textsuperscript{5} Judicial review causes us to think of constitutional law as \textit{real} hard law, not a set of political ideals for theoreticians in political science but for lawyers taught in law schools and practicing in the real world.

Van Alstyne counts the first kind of hardness — its crystalline hardness or resistance to change — as more important.\textsuperscript{6} But we all know it does change. The Warren Court era is celebrated (and lamented) for such change. The Burger Court is lamented (and celebrated) for slowing down the Warren progress. And the Rehnquist Court is feared (or cheered) because it may reverse the change.

In my view, the Constitution’s being hard law in the sense of real law — not mere political ideals — is more important. Because of judicial review everyone \textit{feels bound} by our Constitution, from Presidents and the administrative bureaucracy through state legislatures, down to city councils, school boards, and the cop on the beat; the Constitution is \textit{binding law} and not just some high-sounding political ideal easily rationalized away under the press of daily exigency. Whether judicial remedy might be available or not, might be sought or not in a particular circumstance, the idea that constitutional limitations are \textit{legal} limitations has a powerful restraining influence. The exclusionary rule of the fourth amendment,\textsuperscript{7} for instance, restricts police behavior in part because the police are punished by being denied the use of unconstitutionally obtained evidence to gain a conviction,\textsuperscript{8} but more importantly the exclusionary rule

\footnotesize
\begin{enumerate}
\item Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).
\item I infer this from the emphasis in Van Alstyne's article (and speech), but he does mention judicial review as important to our Constitution's hardness. Indeed, he states, "One may virtually declare that, to be hard law, a constitution must, in fact, be exceptionally difficult to alter, \textit{as well as readily enforceable in accessible and professionally serious courts}." (emphasis added). Van Alstyne, \textit{supra} note 1, at 181.
\item "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.
\item Mapp v. Ohio, 367 U.S. 643 (1961). Of course, technically it is the fourth amendment as applied to the states through the fourteenth amendment that creates the rights against state and local law enforcement officers. The exclusionary rule was applied to federal officers directly through the
\end{enumerate}
restrains police conduct because it powerfully reinforces the notion that the fourth amendment is hard law. The pull from the duty to obey the law is, I am suggesting, more powerful than the push from the fear of punishment. So the exclusionary rule gives both a push and a pull. Moreover, the exclusionary rule reinforces the notion, by example, that all constitutional rights and the correlative official duties are legally binding rights and duties.⁹


⁹ The relationship between the coercive aspect of law and the sense of obligation created by law is much mooted by legal philosophers. For example, Philip Soper, a Professor of Law at the University of Michigan, contends that the sense of obligation that is essential to lawness comes from the lawgivers purporting to be just:

Legal systems [as opposed to what he calls coercive systems and moral systems] are essentially characterized by the belief in value, the claim in good faith by those who rule that they do so in the interest of all. It is this claim of justice, rather than justice in fact, that one links conceptually with the idea of law. Thus, the differences between law, morality, and coercion may be represented in terms of the variables of force and the belief in value.

Law combines the organized sanction with the claim to justice by those who wield the sanction. Morality makes the same claim but lacks the sanction. Coercive systems rely on the sanction alone, unaccompanied by any concern for justice.


 Constitutional symbolism creates an essentially “moral system” that stands prior to and above the legal system including the system of judicially enforceable constitutional norms. But since this supermoral system of constitutional values is embedded in, intimately associated with and indeed immanent in hard constitutional law, it takes on a more powerful caste, a more influential aura. Why is this? Because when the mind converts “moral obligation” to “legal obligation,” it becomes more obligating, that is, more likely to be honored. And this is so because there is in our society a profound respect for law. That is, there obtains in our society a fundamental moral imperative to obey the law. Thus it is not the fear of punishment for disobedience that causes legal obligation to be more “obligating” than moral obligation but rather the profound sense of moral obligation to obey the law.

 On the other hand, Soper implies (but does not draw out) that it is not just the claim of justice that converts coercion to law, it is the “claim of coercion” that converts morality to law. Thus what causes moral obligation to become legal obligation is coercion or the equivalent of coercion, i.e., breach of the obligation makes a concrete difference in an official forum such as a court of law. That is what the “exclusionary rule” does for the fourth amendment. Disobedience makes a difference. The wrongfully obtained evidence cannot be used though it is otherwise perfectly probative of the guilt of some social-malfactor. Because it cannot be used, the “wrongfully obtained” is converted into the “illegally obtained” evidence, the constitutional duty goes from being a mere moral duty to a legal duty, and compliance is much more likely.

 Whether you are persuaded by this argument will depend primarily on whether or not you believe my factual assertion that legal obligation is a (perhaps “the”) primary moral obligation in our society. Like any merely factual assertion it cannot be conclusively proved, but being a factual assertion of vast generality even the idea of marshalling evidence is problematic: what counts as evidence of this phenomenon; how much does it take? I am persuaded that my proposition is true by the following
As wonderful as our hard law Constitution is, it is its soft law aspect I wish to particularly celebrate: the Constitution as the repository of fundamental values — as the outward sign of our social resolve to be a good society — and as articulate symbol of our kinds of things I have observed (by just living in this society): the constant reference to, and veneration of, “the law-abiding citizen” in the press, in literature, in schools, in meetings; by and large we pay our taxes; by and large we obey regulatory law except traffic law that seem unreasonable; national mythology about being a government of law, not men, etc.; and the desire for an equal rights amendment long after it was needed.

The Constitution as symbol is not a new theme. In Cornell historian Michael Kammen’s recent book, M. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986), he points out that:

Edward S. Corwin published an essay in 1936 entitled ‘The Constitution as Instrument and as Symbol’ [30 AM. POL. SCI. REV. 1071 (1936)] that swiftly became a scholarly classic. Significant for having alerted students of government and history to the dual role the Constitution has played in American political culture, it remains fascinating because it is so resonant to major public issues of the mid-1930’s. Corwin attacked the ‘rise of constitutional negativism’ in general, and a conservative organization called the Liberty League in particular for its tendency to perceive the Constitution only in terms of constraints, and for the League’s ‘fetishism’ and unwillingness to accept the inevitability of change.

Corwin’s treatment of the genesis and development of the constitution as a national symbol was necessarily sketchy. No one subsequently has enlarged upon his cursory schematization, however. It is both logical and essential to do so here. It may be correct to contend, as Corwin did, that the U.S. Constitution emerged as a national symbol between 1789 and 1860; but that assertion only becomes meaningful and valid if we add that the process occurred both haltingly and incompletely in antebellum America.

Kammen goes on to enlarge upon that theme. He concludes the chapter with:

By contrast [with Latin American Constitutions], the U.S. Constitution had been a genuine outgrowth of indigenous political experience during the long phase of colonial apprenticeship and the swifter transformation of Revolutionary adolescence. The framers were fully aware of European constitutional ideas, but had drawn upon them selectively and modified them wherever it seemed appropriate. Fenimore Cooper combined chauvinism with realistic self-recognition when he wrote from Dresden in 1830 that ‘we are unique as a government, and we must look for our maxims in the natural corollaries of the Constitution.’ Twenty years later Secretary of State Daniel Webster wrote less thoughtfully but with typical panache that the U.S. Constitution ‘is all that gives us a NATIONAL character.’ That was an outrageous overstatement—a half-truth at best. What matters, however, is that by 1850 a great many Americans shared his assumption. The instrument was finally becoming a symbol, one that the society regarded as culturally determinative.

As can be noted from the excerpt, Kammen (and Corwin) were referring to the Constitution as a symbol of nationhood much like the flag, national anthem or pledge of allegiance. Although Kammen’s Constitution as symbol of nationhood is a somewhat more articulate symbolism than the flag etc. as symbol, it is a less articulate symbolism than I am here arguing obtains. Even the Constitution as symbol of permanent, shared values (regardless of content) referred to at the very end of this article is somewhat more expressive than the notion of a unique national character.
vision of the values that make a good society. Freedom, equality, fairness and kindness\(^\text{11}\) are not only official policy but have become

\(^{11}\) Obviously, other formulations of America's fundamental values could be made. For instance "justice" and "law" are fundamental ideals. Indeed, they are so fundamental, so general, and so vague as to constitute overarching ideals. Justice includes equality, fairness and social welfare or kindness, while law is the *form* through which our moral values are largely realized. As suggested above, legal obligation is itself probably the most powerful moral obligation in our culture (See supra note 9). That constitutional duties are legal duties is quite important to their observance. That certain values of public or political morality can be ranked as constitutional values is made much more significant by the fact of the association of our constitution with law, hard law as suggested above.

But *privacy*, why not privacy as a fundamental value? The right of privacy is often mentioned in constitutional discourse. Kindness never is. The right of privacy encompasses the two distinct values: (1) of personal secrecy/anonymity and (2) autonomy. Roe v. Wade, 410 U.S. 113 (1973) fits the latter notion. Autonomy is another word for liberty. It means "independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589 (1977) (Stevens, J.).

The autonomy (or liberty) associated with the privacy decisions is limited to the right to marry (Zablocki v. Redhail, 434 U.S. 374 (1978)); to procreate (Skinner v. Oklahoma, 316 U.S. 535 (1942)); to make procreative decisions (Griswold v. Connecticut, 381 U.S. 479 (1965), especially as interpreted in Eisenstadt v. Baird, 405 U.S. 438 (1972) and Carey v. Population Servs. Int'l, 432 U.S. 678 (1977)); to make childbearing decisions (Roe v. Wade, 410 U.S. 113 (1973)); and to make certain childrearing decisions (See Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to send children to parochial school); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to have children learn German in school) especially as resurrected and reinterpreted in *Griswold*, 381 U.S. 479, (see Justice Black's dissent at 507); Wisconsin v. Yoder, 406 U.S. 205 (1972) (right to withdraw child from school after eighth grade in violation of truancy law if decision to withdraw is based on "deep religious conviction, shared by an organized group and intimately related to daily living." Id. at 216)).

This notion of autonomy in matters of private morality as traditionally conceived has been rejected by the Court in all matters outside the traditional family area. Bowers v. Hardwick, 106 S. Ct. 2841 (1986) *reh'g denied*, 107 S. Ct. 1985 (1987) (no fundamental right to engage in private homosexual consensual sodomy). The five to four vote in that case (Blackmun, Brennan, Marshall and Stevens dissented) shows the matter to be close and that there is movement (i.e., Justice Blackmun) in the direction of a right of general sexual autonomy. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976) *summarily aff'g*, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court). Such a movement toward sexual (or lifestyle) autonomy is certainly maturing but even when it does come to fruition in constitutional law it is simply another aspect of freedom.

As to the other meaning of privacy—secrecy/anonymity or "avoiding disclosure of personal matters" Whalen v. Roe, 429 U.S. 589, 599, (1977) (Stevens, J.) — it has not had significant constitutional development although it has had some constitutional recognition. See *Griswold*, 381 U.S. 479, opinion by Justice Douglas, *but see* his concurrence in Roe v. Wade, 410 U.S. at 167. In Roberts v. United States Jaycees, 468 U.S. 609 (1984), the Court referred for the first time to "freedom of intimate association" (as contrasted with "freedom of expressive association," *Id.* at 610). *See also* Board of Directors v. Rotary Club, 107 S. Ct. 1940 (1987) (refusing to find such a "right of intimate association" in an association of thousands of local Rotary Clubs). Thus privacy as anonymity could also be seen as a freedom.

However, the value of intimate associations seems to me to be quite distinct from the right to choose one's intimates which is clearly a freedom. The value of intimate associations when more fully recognized in cultural practice will ultimately be the basis for the protection of homosexual practice. *See* Karst, *Freedom of Intimate Associations*, 89 Yale L. J. 624 (1980).

Moreover, in *Roberts and Rotary Club* the intimacy value (however weakly manifested in service
living ideals — ideals so deeply imbedded that they are "our Constitution" in the sense of how we are constituted as a political community.

The Constitution announces fundamental values only indirectly, but the language of rights in which the values are immanent is often sharp, precise and hard. "Congress shall make no law abridging the freedom of speech";12 "no state shall deny to any person — within its jurisdiction the equal protection of the laws";13 "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury";14 and "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments imposed."15

That these values are not fully realized — or realized as fully as one's personal ideals would require — does not mean they are not enshrined. As Hanna Pitkin suggests, a constitution is not only something we have, but something we are (our nature as a political community) and something we do (we are constituting ourselves).16

clubs) was pitted against the moral cruelty of sexist practice which the states (Minnesota and California) had intervened against (See J. SHKLAR, infra note 26 and accompanying text). See Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 HARV. C.R.-C.L. L. REV. 321 (1983). Of course more than the psychic pain of moral cruelty is involved in such sexist practice: equality of opportunity is systematically denied.

12 U.S. CONST. amend. I.
13 Id. amend. XIV, § 1.
14 Id. amend. VI.
15 Id. amend. VIII.

In part she says:

With respect to a community, this use of 'constitution' [in the sense of composition or fundamental make-up] suggests a characteristic way of life, the national character of a people, their ethos or fundamental nature as a people, a product of their particular history and social conditions. In this sense, our constitution is less something we have than something we are. . . .

The second use of 'constitution' which deserves our attention is its function as a verbal noun pointing to action or activity of constituting — that is, of founding, framing, shaping something new. In this sense, our constitution is neither something we have nor something we are so much as something we do — or in any rate can do. . . .

. . . Unless we succeed in creating — together with others — something lasting, inclusive, principled and fundamental, we have not succeeded in constituting anything . . . . [A]lthough constituting is always a free action, how we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history. Thus
So we are a community where freedom, equality, fairness and kindness is our communal makeup — our communal constitution — and the particular realization of those values, their interrelationships, the actualized meaning of each is shifting and, hopefully, growing, for we as a community are constituting ourselves.\textsuperscript{17}

there is a sense, after all, in which our constitution is sacred and demands our respectful acknowledgement. If we mistake who we are, our efforts at constitutive action will fail.

So there you have the hedgehog’s song: the constitution we have depends upon the constitution we make and do and are. Except insofar as we do, what we have is powerless and will soon disappear. Except insofar as, in doing, we respect what we are — both our actuality and the genuine potential within us — our doing will be a disaster. Neglect any one of these dimensions, and you will get the idea of our United States Constitution very wrong.

\textit{Id.} at 167-69 (emphasis in the original).

\textsuperscript{17} Of course, acts of constituting need not be judicial nor even governmental. Many constitutive acts — in Pitkin’s phrase (supra note 16) acts of “founding, framing, shaping”. . . “something lasting, inclusive, principled and fundamental” — are non-governmental, public, collective and deliberative. A striking example of such “constituting” is the movement against domestic violence. In West Virginia, for instance, there is the \textit{West Virginia Coalition Against Domestic Violence (WVCADV)} composed of thirteen autonomous local chapters (with very different names, e.g. “HOPE, Inc.”, “Family Crisis Center”, “Branches”, “YWCA Resolve Family Abuse”, “Rape and Domestic Violence Information Center”) twelve of which provide shelters for victims as well as counseling, community education and social advocacy. Some have programs for the abusers as well. Each local group is funded by a combination of governmental monies (West Virginia Department of Human Services; Governor’s Commission on Crime, Delinquency and Corrections, county commissions; city counsels), collective private fund raising such as United Way, and individual gifts. WVCADV information brochure gives a brief history of this movement:

\begin{quote}
\textbf{History of WVCADV}

Before 1970, there was virtually no help for battered women and their children in West Virginia. In the 1970’s grassroots, community-based programs began to focus on the need to respond to domestic violence assault in the communities.

By 1978, several domestic violence programs had developed across the state. The magnitude and scope of violence in the home heightened the need for those working in shelter programs to meet. Inspired by shared values and goals, representatives from the shelter program chose to form a statewide coalition.

Formed in 1979, the West Virginia Coalition Against Domestic Violence is committed to the elimination of personal and institutional violence against women and their children. Its aim is to insure and improve provisions of services to survivors of domestic violence through a forum of support, training and resources. Additionally, WVCADV serves as a vehicle for promoting change in systems affecting all persons who live in homes where violence and abuse occur.

WVCADV is an active member of the National Coalition Against Domestic Violence.
\end{quote}
The written Constitution and its interpretation and practice remind us of fundamental values, enshrine them, teach them, and in particular cases where there has been back sliding, give such vivid and vital actualization of the value that they become occasions for celebrations — for dancing in the streets. Each new decision by anyone purporting to interpret the Constitution is an act by which we constitute ourselves.

But ultimately the Constitution is but an outward sign of the moral life of the community. It enshrines what is already fundamental. The Court in *Gideon v. Wainwright* said that the right to counsel means a right to court appointed counsel if the accused cannot afford to hire his own; all but a few states had done that for years, presumably because virtually everyone thought fundamental fairness required it.

NCADV's ultimate goal is the building of a non-violent world. It is in this way that kindness is "constituted" until another aspect of kindness or manifestation of the value of social kindness becomes part of our collective "constitution" ultimately to be realized in the Constitution we "have."

I was struck some years ago by Professor Harry Kalven's closing out an article celebrating *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) with the following footnote:

It is perhaps a fitting postscript to say that I had occasion this summer to discuss the *Times* case with Mr. [Alexander] Meiklejohn. Before I had disclosed my own views, I asked him for his judgment on the *Times* case. 'It is,' he said, 'an occasion for dancing in the streets.' As always, I am inclined to think he is right.


See Pitkin, *supra* note 16. The passing of new legislation by a state legislature is a small constitutive step. The passing of extraordinary legislation — especially that which breaks with tradition — can be singularly constitutive. For example, West Virginia abolished capital punishment in 1965 (W. Va. Code § 61-11-2), and the legislature has since resisted bi-annual efforts to reinstate it. Such abolition of a fundamental and traditional form of punishment and then persisting in the reform for some twenty years is constitutive for the West Virginia community and for the larger community of the nation. When many states do this, then we will be a nation largely without capital punishment, that is it will be part of what we are and the Supreme Court (even an extremely conservative one) will declare it so and "no capital punishment" will be part of what we have as a constitution and the least deserving will have a constitutional right to life.


Only Alabama, Florida, Mississippi, and North and South Carolina did not provide court-appointed counsel in felony cases when *Gideon* was decided in 1963. *Israel, Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 212.
We could all recite dozens of cases that articulated, enshrined and perpetuated the values of freedom — especially political freedom — and equality and fairness. But *kindness*, what of and equality *kindness* as a constitutional value?

**Kindness as Constitutional Value**

To begin with, I must confess that "kindness" as a word for a constitutional value has no ring to it and is not perfectly suggestive of the meaning I wish to convey. I wish to convey two distinct notions: (1) the idea of an enlarged and enlarging community of moral concern, an expansion of a community’s notion of who counts morally (*i.e.*, of who has moral rights or of who counts in the utilitarian calculus of pains and pleasures) and (2) the idea of some minimum due each member of the moral community in terms of alleviation of suffering, and giving comfort and pleasure. Kindness, in short, is concern for others, the very heart of morality. By way of contrast with the other constitutionally enshrined social virtues: *Freedom* is concerned with human choosing, striving for happiness (the pursuit of happiness, say); kindness is concerned with human comfort (happiness itself). *Equality* is concerned with parity of striving (as in equality of opportunity) and parity of laws (as in equal protection of). *Kindness* is concerned with the worst case, those unable to strive or who strive ineffectively. In this sense, equal protection cases that require society to pay for an indigent defendant’s transcript on appeal or attorney at trial are instances of kindness, not equality. 22 *Fairness* is concerned with truth (when it is not con-


Indeed, a case can be made that the value of social kindness informs at least half of the new equal protection doctrine. The “modern” doctrine has two tiers (with an ambiguous intermediate third tier lately developed, *see* Craig v. Boren, 429 U.S. 190 (1976)). The upper tier of this new doctrine which has roots in Skinner v. Oklahoma, 316 U.S. 535 (1942) and the now infamous Korematsu v. United States, 323 U.S. 214 (1944) has two branches: one rooted in perfecting political process, the other in concern for pain caused by moral cruelty (*See infra* note 26). If a classification disadvantages people based on race or national origin, then it adds to the moral cruelty of societal prejudice which systematically humiliates and degrades based on an accident of birth, an unchosen and immutable characteristic. In order to justify such classification, the state must show a very powerful counter-balancing interest, *i.e.*, the classification must be absolutely necessary to a compelling interest. This is the social kindness branch. Sensitivity to the hurt, the psychic pain, caused by clas-
cerned with equality, as when people say "unequal treatment" is "unfair") in meting out life's pains and pleasures, the accurate following of standards for such distribution; kindness is concerned with the standard of distribution itself and with the feeling of fairness that comes from the use of some traditional institution of fairness such as a hearing or legal representation.

Some may suggest that "social justice" is a better word for what is above described as kindness because "kindness" sounds less like a right and more like a privilege or grace (a favor rendered by one without moral obligation to do so or as an unmerited gift from God). It may be claimed that "kindness" in ordinary usage means actions over and above the call of moral duty. "Social justice" sounds the clarion call of natural rights and, after all, the Constitution creates rights for all time, not the sharing of booty of a too rich elite or a too well rewarded middle class patronizing the poor and less fortunate. But "social justice" has several flaws as a word for the constitutional value here described:

(1) It is ambiguous—whose notion of social justice do we adopt, that of Aristotle, Marx or Posner?

(2) Even if one opts for a particular view of social justice that is convergent to kindness — e.g., the Fabian Socialism of R. H. Tawney or Critical Legal Studies — such social justice is not descriptive of the social value that is becoming part of our social fab-

sifying according to traits the individual "can't help" and from which quotidian humiliation results is a mark of growth in constitutional kindness.

The other branch of the new equal protection is concerned with the trustworthiness of the political process. Ordinarily, the political process can be trusted to make rational classifications and therefore is owed great deference. But where there is a history of prejudice against a group which otherwise has little power to protect itself in the political market place, then a court is suspicious of legislative motive when legislation disadvantages that group. Trust vanishes and with it deference. The court will "closely scrutinize" such legislation, i.e., it will require the government to prove it has an interest of overriding importance. Whoever has the burden of proving a legislative fact (bears the de facto risk of non-persuasion) usually loses (See, e.g., Craig, 429 U.S. 190).

Indeed, even in cases where the lower tier (rational basis) is used, it is manifest that social kindness is a value strong enough to overcome majority predilection, fear, and prejudice. Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (striking down the denial by the city of Cleburne, Texas, of a special permit to operate a group home for the mentally retarded in a residential neighborhood) (See especially Marshall, J., concurring, id. at 455).

23 See R. Terrill, R. H. Tawney and His Times, Socialism As Fellowship (1973).
ric, of how we are constituted, of our national Constitution. In short, social justice (in that "radical" sense people would say) is not what I mean when I am talking about a value that our actual, real, present Constitution symbolizes.

(3) Kindness includes the amelioration of pain inflicted by society in the name of retributive justice or corrective (restitutionary) justice as well as the amelioration of deprivations caused by maldistributions of wealth, while social justice suggests only the latter. Moreover, "social justice" strongly suggests that the market system of distribution of wealth is fundamentally wrong and at fault for maldistribution. "Kindness" only suggests that deprivations caused by the inability to create marketable wealth should be alleviated. In sum "social justice" is a word for a value not yet held, or an "ought" not an "is." Kindness is a value I claim is presently fundamental to American political and legal action.

Other alternatives to "kindness" may capture the meaning of this constituting value more vividly but, I feel, less completely: community, altruism, human dignity, decency, compassion, humane-

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24 Community or solidarity is one motive for kindness: the feeling of oneness with others, of belonging, of a reciprocal protection and stroking that comes from protecting or helping others. But the word community does not capture an alternative motive for kindness which is better captured by the word "altruism". Altruistic motives for acts or policies of kindness may be purely egoistic: one simply feels better for helping others — a feeling which if probed may depend on empathy (I feel your pain, your joy); indeed, the assumption that empathy precedes sympathy (I feel your pain (empathy) and want to express that fact and help (sympathy)) has caused the former word to replace the latter in much popular discourse. That altruism may ultimately be (indeed probably is) egotistical does not detract at all from its counting as a moral virtue.

Kind acts, of course, can be motivated by something other than the communitarian or altruistic impulse. Such acts may flow from individualistic egotism. One may help others not because of some present feeling of solidarity or empathy but because one will in the long run gain something for oneself. This is often called enlightened self-interest. Expressions such as "charity is good policy" suggest such motivation. Charity will redound to our benefit by keeping "the poor" from stealing from us, disrupting our lives, or engaging in other "anti-social" behavior. "Kind acts," therefore, may not be "acts of kindness" if only communitarian and altruistic motives are allowed for "true" kindness.

Moreover, apparent kind acts may be first order egotism and not kind acts at all (let alone, acts of kindness) where the act of sacrifice or sharing is forced by the beneficiary. If one gives away one's money at gunpoint, such giving is hardly a kind act. If the rich are forced to give up half their wealth to the politically powerful poor, that is hardly kindness or a kind act. (The poor recipients would no doubt call it justice.) But notice that in the case of expropriation of wealth as above described two acts of first order egotism (acting in one's immediate tangible self-interest) are involved — the donor avoids immediate pain (or death), the donee (the one immediately or directly benefited) is
ness or humanitarianism and even charity, love, tenderness or mercy.

also the one forcing the transaction. The donor acts to avoid pain to himself — the donee acts to gain a benefit for himself.

Contrast that with transactions where a third party (say) Robin Hood forces the rich to give to the poor. Robin Hood's act may indeed be an act of kindness (as in the real Robin Hood myth) or at least a kind act — Robin may be afraid that if the poor are not fed they may overrun his forest or become a health hazard to his group. If Robin is a stand-in for the broad middle-class, at least some of whose support was required for passing a "soak the rich" tax, and some or all of such necessary support is motivated by a desire to benefit the poor for their own sake (out of sympathy, solidarity, or humaneness), then the soak-the-rich tax is an act of kindness. (See infra note 25, for Duncan Kennedy's discussion of involuntary altruism.) Thus, one can see (I hope) that much modern social welfare legislation can be seen as acts of kindness. A necessary cause, if not a sufficient cause, of the legislative act is kindness. Of course, other motivations may also have been necessary to passage: enlightened self-interest and greed (of the poor or helpless!). Whether one in fact sees welfare legislation as an act of kindness or as a product purely of self-interest (interest group political action is the assumption of legal positivists of the radical moral relativism variety, morality being pure personal preference) will be a function of one's meta-political assumptions.

Communitarianism as explained by Professor Mark Tushnet also involves placing society prior to the individual in a fundamental way:

I argue below, however, that the only coherent basis for the requisite continuities of history and meaning is found in the communitarian assumptions of conservative social thought — that, in fact, only these communitarian assumptions can provide the foundations upon which both interpretivism and neutral principles ultimately depend. Conservative social thought places society prior to individuals by developing the implications of the idea that we can understand what we think and do only with reference to the social matrix within which we find ourselves. If I am correct, the liberal account of the social world is inevitably incomplete, for it proves unable to provide a constitutional theory of the sort that it demands without depending on communitarian assumptions that contradict its fundamental individualism.


My idea of "social kindness" is perfectly consistent with individualism, albeit not "rugged individualism."

25 In Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976), Duncan Kennedy defends altruism as a counterethic to individualism:

The rhetoric of individualism so thoroughly dominates legal discourse at present that it is difficult even to identify a counterethic. Nonetheless, I think there is a coherent, pervasive notion that constantly competes with individualism, and I will call it altruism. The essence of altruism is the belief that one ought not to indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful. It has roots in culture, in religion, ethics and art, that are as deep as those of individualism. (Love thy neighbor as thyself.)

* * *

Individualism is to pure egotism as altruism is to total selflessness or saintliness. Thus the altruist is unwilling to carry his premise of solidarity to the extreme of making everyone responsible for the welfare of everyone else. The altruist believes in the necessity and desirability of a sphere of autonomy or liberty or freedom or privacy within which one is free to ignore both the plights of others and the consequences of one's own acts for their
Without detailing why each word alternative is incomplete or not

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welfare.

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Private legal justice supposedly consists in the respect for rights, never in the performance of altruistic duty. The state acts through private law only to protect rights, not to enforce morality.

* * *

Nonetheless, it is easy enough to fit fundamental legal institutions into the altruist mold. The rules against violence, for example, have the effect of changing the balance of power that would exist in the state of nature into that of civil society. The strong, who would supposedly dominate everyone if there were no state, are deprived of their advantages and forced to respect the 'rights' of the weak.

* * *

The rules of tort law can likewise be seen as enforcing some degree of altruism. Compensation for injuries means that the interests of the injured party must be taken into account by the tortfeasor. In deciding what to do, he is no longer free to consult only his own gains and losses, since these are no longer the only gains and losses for which he is legally responsible.

Id. at 1717-19

Then after recounting ways in which altruism is immanent in private law doctrine — indeed in all legal doctrine — and is often a better explanation for the “court’s dilemma” in say a contract case “than either class struggle or the needs of a market economy” he concludes with:

Finally, it is a familiar fact that for about a century there has been a movement of ‘reform’ of private law. It began with the imposition of statutory strict liability on railroads for damage to cattle and crops, and has persisted through the current redefinition of property law in the interest of the environment. In the battles and skirmishes of reform, across an enormous variety of particular issues, it has been common for conservatives to argue that liberals are consciously or unconsciously out to destroy the market system. Liberals respond that the conservative program is a cloak for the interests of big business.

Id. at 1721.

Yet, Kennedy says, neither destroys, or will likely destroy, the other.

If the concepts of individualism and altruism turn out to be useful, it is because they capture something of this struggle of contradictory utopian visions. It is this dimension that the ideas of class domination and of social function cannot easily grasp. The approaches should therefore be complementary rather than conflicting.

Id. at 1722.

Of “forced altruism” he concludes:

The last objection I will consider is that to characterize fundamental legal institutions like tort or contract in terms of altruism is wrong because it is nonsense to speak of forcing someone to behave altruistically. True, the notion requires the experience of solidarity and the voluntary undertaking of vulnerability in consequence. It therefore implies duties that transcend those imposed by the legal order. It is precisely the refusal to take all the advantage to which one is legally, but not morally entitled that is most often offered as an example of altruism. It follows that when the law ‘enforces’ such conduct, it can do no more than make people behave ‘as if’ they had really experienced altruistic motives. Yet nothing could be clearer than that, in many circumstances, this is exactly what we want the law to do. One idea of justice is the organization of society so that the outcomes of interaction are equivalent to those that would occur if everyone behaved altruistically.

Id.
quite right for this constitutional value I have described as kindness, let me detail what kindness suggests to me. I have in mind a moral progression having to do with both pain and pleasure (in the broadest sense). The stages of the progress are (1) not inflicting physical pain on others, physical cruelty being the worst (or at least the most primitive) unkindness and although kindness is usually thought to be more than "not unkindness," it nonetheless is the first stage of a moral actor's rise from cruelty to kindness; (2) the active intervention to prevent others from inflicting physical pain; (3) not inflicting psychic pain either by moral cruelty or psychic cruelty — the reason the cut by Brutus was the "most unkindest cut of all"; (4) preventing others from inflicting psychic pain; (5) providing the physical necessities of life to those unable (or unwilling, in an age that prides itself on psychological sophistication the line between unable and unwilling is quite blurred) to provide themselves; (6) seeing that others, as well, so provide; (7) and (8) are the same as (5) and (6) but for psychic necessities; and (9) and (10) are the mirror images of (1) and (2) with giving of pleasure substituted for not inflicting pain.

Each stage requires some cost to the agency of kindness. In the first stage the agent gives up the satisfaction of appeasing rage — the enraged twist to the wronging hand, just retaliation for an unjust

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26 Professor Judith N. Shklar writes provocatively of cruelty in her recent book J. SHKLAR, ORDINARY VICES (1984). In a chapter called fittingly enough, "Putting cruelty first," she defines cruelty as "the willful inflicting of physical pain on a weaker being in order to cause anguish and fear." Id. at 8.

27 Professor Shklar: "What is moral cruelty? It is not just a matter of hurting someone's feelings. It is deliberate and persistent humiliation, so that the victim can eventually trust neither himself nor anyone else." Id. at 37. One can easily see the moral cruelty of slavery, of apartheid, of antisemitism and of other forms of overt debasement of individuals or groups of people. But what of the cruelty that often comes from pity ("I don't want your pity" is a persistent cry) and from the helping hand? The danger of philanthropy is humiliation. Moral cruelty can be a byproduct of kindness. Moral cruelty is also making someone feel guilty (unjustifiably?) — cruel conscience. But perhaps cruel conscience is a necessary and relatively benign whip. Tied to the irresolvably (but not hopelessly) complex ideas of morality, moral cruelty is a most difficult concept.

28 I do not mean to contrast psychic cruelty with moral cruelty. Psychic cruelty is a more general term and much less problematic. It obviously takes in all moral cruelty however defined. Capital punishment may or may not be physically cruel or morally cruel, but we can all agree it is psychic cruelty of the first order.
In the succeeding stages the moral actor gives his present time and energy and past created wealth to be kind.

Our constitutional history manifests the gradual development of social kindness as a primary American value. The text speaks emphatically against cruel punishment (or at least no "unusually" cruel punishment), the most primitive form of kindness. Moreover, the fifth amendment injunction against compelled incrimination is an expression of the dignity even of those accused of the worst crimes, and even they shall not be forced to undergo the psychological cruelty of self-revelation. But proto-kindness, the absence of cruelty, is only the first step (or two as outlined above) albeit an important

29 Here, we have the notion of the just slap in the face. Again I quote from Professor Shklar: The unique position of cruelty was indeed fully recognized by Montesquieu's and Locke's most distinguished heirs. The Eighth Amendment to the United States Constitution prohibits, among other things, the infliction of 'cruel and unusual punishments.' (citing Granucci, Nor Cruel and Unusual Punishment: The Original Meeting, 54 CALIF. L. REV. 839 (1969)).

Since this amendment has after its long dormancy suddenly come alive, its origins may be of special relevance. It is not that American governments have become more brutal far from it but that the experiences of this century have made many of us more aware of the cruelties that governments generally are capable of. The amendment itself was lifted word for word from the English Bill of Rights of 1689, but it had altered its meaning over the years and as it crossed the ocean. Originally it had meant only that no unprecedented, unlegislated, or disproportionate penalties, especially fines, be imposed. It was perfectly compatible with drawing and quartering, disemboweling, branding, slitting noses, cutting off ears, and burning female felons. The last was not abolished until 1790, the others much later; but Blackstone admitted that 'the humanity of the English nation' no longer authorized judgments that 'savor of torture or cruelty.' When Patrick Henry and his fellow Virginians demanded a 'no torture' clause, they had not novel or excessive penalties, but brutality in mind. To be sure, the phrase was vague, and some gentlemen in the First Congress worried about too much clemency, arguing that cutting off the ears of offenders might still be necessary. However, especially in the debates in the States, Beccaria, Montesquieu's humane disciple, was often invoked by the side that feared cruelty. It was one of the many ways in which Montesquieu came to join Locke in shaping that generation of Americans. The liberalism of fear came to be integrated with the liberalism of rights.

J. Shklar, supra note 26 at 238-39.

Notice that the "First Congress worried about too much clemency, arguing that cutting off the ears of offenders might still be necessary." There are two kinds of justifications for physical cruelty — just or pious cruelty and instrumental cruelty. In the quoted remark, the First Congress saw ear lopping as instrumental cruelty; the slap in the face is pious cruelty. That government no longer justifies any physical punishment is a mark of our progress. Professor Shklar again:

The turn against official cruelty was due to a long but steady moral transformation. I began this book with 'putting cruelty first' partly because it is such a significant source of liberalism for many, the most important. But it also marks a great moral turning point. Its consequences are, moreover, enduring because it remains a fecund source of diversity.

Id. at 239.
one, of establishing kindness as a constitutional value. Developed kindness requires a "helping hand," not merely a muted fist, but no express constitutional language supports the notion of "helping hand" kindness. Therefore, my claim that developed kindness is a constitutional value must be predicated on the judicial gloss given to other constitutional language, or a broadened notion of constitutional value as Hanna Pitkin suggests above, or both.

Our society first extended a "helping hand" by regulating the vagaries of the private work market — limiting hours of work, keeping children from work, setting minimum wages, and establishing compensation for work injuries. The Constitution was no help, no support to that helping hand. Indeed, in a series of well-known cases, the Constitution slapped the helping hand of growing social concern. It did so in the name of freedom (of the private autonomy variety) and a vague fear that the helping hand of welfare regulation would interfere with the just prerogatives of private property. For thirty years, the Court set the Constitution against social legislation designed to ameliorate the harsh conditions of the working class. Finally in the later 1930s, the Court allowed the new legislation not because kindness was explicitly recognized as a constitutional policy but because the constitutional freedom that had weighed against this social concern was recognized as only most tenuously enshrined in the Constitution (no constitutional language supported the notion of freedom of contract) and because the social concern manifested in welfare regulations was at least rational support for constricting contract freedom.

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20 Lochner v. New York, 198 U.S. 45 (1905), is, of course, the leading case. Scholars talk of the Lochner Era or of Lochnering. Lochner involved the limitation by the New York legislature of bakers to a 60 hour week. It was clearly an attempt to ameliorate the harsh conditions of a particularly cruel work place in an industry with a politically insignificant number of workers. It would be difficult to believe the bakers forced such legislation, i.e., that it was interest-group motivated. Rather, their plight was persuasive to the New York lawmakers. The lawmakers were intervening to protect others from physical and psychic pain. Their plight was, however, unpersuasive to the constitutional guardians. Only insofar as the bakers' plight might involve actual sickness, could it count at all to countervail against their right to contract freely to sell their labor.

Viewed starkly as a choice between the values of private autonomy and kindness, Lochner is instructive. Kindness had not yet arrived as a fundamental value.

31 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), is the breakthrough case. Chief Justice Hughes' majority opinion in referring to the private autonomy called "freedom of contract":
So kindness crept into constitutional law as a "rational basis" for legislative judgments restricting the liberty of private autonomy.

What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law... Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

He goes on to recognize implicitly that kindness as described above is a valid basis for legislation:

What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?... The legislature of the State was clearly entitled to consider... [that] women are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the 'sweating system', the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide.

There are two distinct explanations for the demise of substantive due process (also called economic due process). One focuses on a change in judicial philosophy of the Supreme Court majority, the other on a change in political values.

The judicial philosophy adherents point to Holmes' dissent in *Lochner*, 198 U.S. at 74, as stating the new creed and planting the seed for its ultimate flourishing in the 1930s (United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) by Chief Justice Harlan Fiske Stone is the seminal formulation). Briefly put the Holmesian philosophy views values as culturally determined and majoritarian deliberation as the best test for the existence of such values. Therefore, unless the constitutional right asserted against governmental action is an explicitly written proscription, it creates no right sufficient to overcome the governmental action. This is so because such governmental action by a political branch is presumed to be majoritarian and that conjuring up constitutional value from non-explicit language would be "natural law" conjecture or judicial legislation — natural law being seen as the subjective predilection of judges and judicial legislation as outside the constitutionally authorized role of judges as well as undemocratic counter-majoritarianism. The political value adherents simply assume that the political values of the Court changed such that a majority of the Supreme Court came to "believe" or sympathize with the new social welfare legislation. In other words, the liberal politicians put judges on the Court that shared their political agenda.

The work of the individual judges can be examined and some tentative conclusions reached as to which of the two proposed causes motivated the individual judge. Holmes, Felix Frankfurter, and Hugo Black were clearly of the Holmesian democratic positivist judicial philosophy sometimes called the "damn it let 'em do it" school. Frank Murphy, William Brennan, and Thurgood Marshall seem to be motivated by sympathy with the new political values. Some like William O. Douglas, Charles Evan Hughes and many others are difficult to assess. They are certainly sympathetic to the new public ethic, but also talk the majoritarian line. One guesses both motives played and play a...
Congress by the thirties was enacting more affirmative programs of role in determining the path of the "liberal" judges who have dominated the Court for 50 years.


For in Wade, what appears as a clash between autonomy and kindness (the legislative resolution of which is almost always now deferred to) turns out to be in important part, a clash over kinds of kindness (or, more basically, competing cruelties). A woman's claim to autonomy in choosing whether to abort is strongly buttressed by the fact that having an infant carries with it some powerful and longlasting legal and moral obligations which will seem cruel and oppressive if not freely chosen, i.e., the obligations will seem a kind of involuntary servitude. Thus, the claim for reproductive autonomy is cogently involved with avoiding cruelty and not merely a claim of self-fulfillment or self-determination.

The other horn of the dilemma is obviously a kindness value. A human being is killed. He or she dies a violent death. That is, if a fetus is a human being! This is, of course, a moral question and not a factual question (of biological science) as Justice Blackmun's opinion in Wade would have it. The moral question is "who counts as part of the community of moral concern?" Who (what people or animals — see P. Singer, Animal Liberation (1975)) has moral rights? Without moral rights one is treated as a thing, a mere instrument to the service of those having moral rights.

Historically, world-wide, communities have made race, nationality, language, sex and other fortuities of birth the basis of moral standing in the community. Moral progress is generally seen as the expansion of such standing both as to movement toward fuller standing of those denied full standing and an enlargement of the identity of those having some, at least minimal, standing or, as it is often called, moral "worth." From immediate family to tribe to nation, the moral community has grown, and is growing. "Differences" are at first tolerated, then fully accepted.

However, there has always been an alternative way of defining moral worth. Based on an intuitively appealing notion of reciprocity, one's moral worth is often seen as proportionate to one's moral goodness. One's moral rights are tied to one's faithfulness to moral duty. The more innocent one is the more one deserves moral concern. The good are in God's grace and will have eternal peace. The bad are damned forever. Thus songwriter Billy Joel laments the seeming irony "that only the good die young" and a minister writes a book entitled "When Bad Things Happen to Good People." This notion of tying moral worth to moral virtue is often seen as religiosity. And religions do promote this idea; indeed it is central to much conservative religious practice. But, I believe, the notion of a rough reciprocal bond between moral rights and duties is powerfully intuitive and each of us makes decisions based on it.

The anti-abortionists' definition of person, i.e., of who has moral worth, is tied very closely to goodness. The fetus is entirely innocent and thus deserves more concern even than the mother. Relative innocence as the basis of moral worth explains the apparent paradox that anti-abortionists are often comfortable with capital punishment. It is imposed on those so bad that they have lost all moral worth. To those who so believe, arguments about deterrence (or the lack thereof) fall on deaf ears. To them death is the "just desserts" of a murderer. Assuredly some who favor capital punishment also mix in an instrumentalist's rationale: we must sacrifice the murderer to deter others and the sacrifice is tolerable because of the low moral worth of the culprit. See L. Friedman, A History of American Law (1973), especially Part III, Ch. VIII, "The Underdogs: 1847-1900", where he writes of the different treatment of the "worthy" and "unworthy poor." "Worthy meant, in essence, guiltless." Id. at 431-32.

On the other hand, liberals count it a mark of progress that moral worth not be tied (at least importantly) to goodness. According to this view, bad environments create bad people (or a com-
social welfare. The helping hand did more than merely prevent private harm, it now provided positive relief — old age benefits and unemployment compensation. These too leapt the constitutional hurdles. Still, this provided only passive recognition of social kindness as a constitutional value. Finally, in the late sixties, the Supreme Court gave affirmative recognition to governmental largess for the needy. In Shapiro v. Thomson, Goldberg v. Kelly and Sniadach v. Family Corp., the Court disallowed unfair interference with receipt of one's welfare due. The Court stopped well short of stating that one had a constitutional right to welfare, but, nonetheless, gave strong constitutional recognition to the priorities of social kindness — enshrined welfare kindness in the constitutional pantheon.

But what of capital punishment? Surely the failure to strike down this cruelest of punishments militates against the notion that kind-

bination of inherited genes and inherent circumstance create bad people). Therefore, one ought not be "blamed" for being bad. People do not "deserve" to be punished. Criminal punishment is justified only as deterrent (by setting an example and banishing those with a demonstrated propensity to crime) and as opportunity to intervene in lives and "correct" the harm-causing propensities. The fundamentalists sneer at this view as "secular humanism." Liberals assume the fundamentalists to be ignorant, unthinking and primitive.

What liberals do count as giving moral worth is consciousness of pain and pleasure or of self-consciousness (consciousness of consciousness). It is assumed that a fetus at an early state has neither. (A two or three year old child does not have the latter — which, of course, raises some difficulties for this view). For an excellent brief discussion of most of the arguments other than the differences-in-moral-worth conflict above outlined see Glover, Matters of Life and Death, XXXI N.Y. Rev. of Books, May 30, 1985, at 19.

Thus the abortion controversy is over two views of cruelty based on conflicting assumptions about the basis of moral worth. It was not a choice of autonomy over kindness in derogation of the opposite legislative choice. It was judicial substitution of its version of the weightier cruelty. Whether such a substitution is consistent with a proper role for judicial review in a democracy is another question. In any event, it was not a victory for autonomy over kindness (the old substantive due process) but an effort, however clumsy and imperfect, to harmonize two visions of human kindness.

32 Shapiro v. Thompson, 394 U.S. 618 (1969). For commentary See Rosenheim, Shapiro v. Thompson: The Beggars Are Coming to Town, 1969 Sup. Ct. Rev. 303. Although a lawyer, Professor Margaret X. Rosenheim taught in the School of Social Service Administration, University of Chicago, and wrote from a social welfare perspective.

33 Goldberg v. Kelly, 397 U.S. 254 (1970). See especially page 262 n.8 ("It may be more realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'") (also citing Reich, The New Property, 73 Yale L. J. 733 (1964) and Reich, Individual Rights and Social Welfare: The Emerging Social Issues, 74 Yale L. J. 1245 (1965)).

34 Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). (Here not welfare largess from the state but private subsistence income was at stake).

35 "Meanwhile, Shapiro stands as a high water mark of judicial indignation over a discrimination which betrays the meanness and inhumanity of public assistance." Rosenheim, supra note 32, at 345-
ness is a constitutional value. But the enshrined value need not be full realization of value. The Court has modified the use of capital punishment. The Court has made halting steps to make fairer its imposition.\textsuperscript{36} We are not yet ready as a polity to constitute ourselves as a society recognizing the basic human dignity of the least deserving, the most hateful, harmful, unkindly and useless among us. It’s a tall order. Constitutional kindness, equality, and fairness tug in that direction. Eventually, we will build new prisons and treat kindly those who do not “deserve it” but do — just because they are human beings.\textsuperscript{37}

**Virtue of Enshrining Values**

Even if our Constitution does broadly stand for an enlarged concern for an expanded human family, does that fact push us anywhere or does it merely stand as an empirical observation, an historical updating of our status as a civilization? Like the other constitutional values, enshrinement matters — it teaches, it reinforces, it entrenches those values against slippage in hard times, and encourages expansion in good times. Ah, yes, Professor Bickel, it encourages progress.\textsuperscript{38} As Mr. Justice Brennan stated recently:\textsuperscript{39}


\textsuperscript{37} In the end one must remain skeptical as to the power of evidence to change ancient beliefs and sentiments. The greater hope lies in the expectation that with better times our sentiments will reach the ‘standards of decency that mark the progress of a maturing society.’ [Chief Justice Warren, writing for the Court, in *Trop v. Dulles*, 356 U.S. 86, 101 (1958)] Justices Brennan and Marshall thought — wrongly it appears — that we had already sufficiently matured.

The conclusion that the personal sentiments of the judges play a decisive role is strengthened by reading the decision of the Massachusetts Supreme Judicial Court in *Commonwealth v. O’Neal*, [367 Mass. 440, 339 N.E.2d 676 (1975)] which held a mandatory death sentence upon a conviction for rape-murder to be unconstitutional. That court had before it on the deterrence issue the very same evidence that was before the United States Supreme Court in * Gregg*. Yet the majority of the Massachusetts court accepted the evidence as proof of the inability of the death sentence to deter. The lack of proof of deterrent effect deprived the government ‘compelling state interest’ to justify the death penalty.

Why did the Supreme Court and the Massachusetts court arrive at a different decision? The decisive factor was the simple fact that in the United States Supreme Court only two of the nine Justices felt that ‘the standard of decency’ required abolition while the Massachusetts court five out of seven felt that way. *Zeisel, The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 Sup. Ct. Rev. 317, 343.


\textsuperscript{39} Brennan, *supra* note 36, at 331.
I am convinced that law can be a vital engine not merely of change but of other civilizing change. That is because law, when it merits the synonym justice, is based on reason and insight. . . . On occasion, these insights are momentous, such as when we finally understand that separate can never be equal. I believe that these steps, which are the building blocks of progress, are fashioned from a great deal more than the changing views of judges over time. I believe that problems are susceptible to rational solution as we work hard at making and understanding arguments that are based on reason and experience. With respect to the death penalty, I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies the humanity and dignity of the victim and transgresses the prohibition against cruel and unusual punishment.

Let me add tendentiously, that the denial of the "humanity and dignity of the victim" (i.e., victim of the state’s cruelty through capital punishment) to that extent denies the humanity and dignity of all of us of We the People. It is the most unkindest cut of all.

And finally because our hard law and soft law Constitution is law, the Constitution as law is itself a symbol of the ideal of permanent values, of unshakable commitment. Such an idea of inalienable rights — an idea shared by most — protects each of us as individuals from the rest of us as a collective, and at the same time, the shared idea of shared ideals brings us together as a community.

And that is worth celebrating.

POSTSCRIPT: BORK AND THE KINDNESS VALUE

The recent defeat of the nomination of Robert Bork to sit on the Supreme Court is suggestive to me of the force of public kindness as a fundamental value. His defeat I believe was due to his being perceived as lacking commitment to the value of public kindness. The milk of personal kindness may have poured from Bork’s every private action. No matter. It is my sense that original intent and majority rule, the cornerstones of his judicial philosophy, were perceived by members of the Judiciary Committee, the Senate, and the public generally as a mask for not deeply caring for other people (people outside one’s circle of family, friends and acquaintances); the folks we don’t know, and seldom see, those people — the very young and the very old, the physically and mentally handicapped and disabled, the sick and dying, the criminally accused and convicted, the victims of physical and moral cruelty, of racist and sexist
practice, the victims of crime and domestic abuse, the victims of unsafe and unhealthy work conditions, the victims of catastrophic loss and economic displacement and hard times — whom public institutions have increasingly protected since early in this century.

How could original intent and majority rule be seen to mask public mean-spiritedness? Because temporary majorities can rule against the measures of the humane society on the basis of panic, fear, loss of economic confidence, ignorance and prejudice. It is not that the public wants the courts to impose such measures wholesale; rather, the public wants courts to be friendly to them, to be solicitous of the people protected by them, to require a "sober second look" (in Alexander Bickle's phrase) before such measures are withdrawn or diminished, and to require the majority to rethink its public measures (as with *Furman v. Georgia*) of both calculated and unconscious cruelty.

And Bork's notion of *original intent* would simply not recognize the constitutional value of public kindness except in a most incipient and stunted form (i.e., a narrow, "as originally conceived" cruel and unusual punishment clause and that alone), and not help it grow. The humane society has roots in the nineteenth century, but has come to flower only recently and still has far to go. *When we really take a careful look*, we want our judges to be sympathetic to this progress. Bork, whether rightly or wrongly, was felt to be cool to human kindness and cold to humane progress.