Professor Glendon ends her discussion of abortion law by saying that "[i]n the long run, the way in which we name things and imagine them may be decisive for the way we feel and act with respect to them, and for the kind of people we ourselves become." I would ask that she think about whether we want a return to a world in which we imagine motherhood as compulsory, and whether that way of "imagining the real" might indeed be "decisive for the way we feel and act with respect" to women, with disastrous consequences for us all.

TOLERATION AND THE CONSTITUTION. By David A.J. Richards.[1] New York, N.Y.: Oxford University Press. 1986. Pp. xvii, 348. $29.95.

MEN AND MARRIAGE. By George Gilder.[2] Gretna, La.: Pelican Publishing Company. 1986. Pp. xix, 200. $15.95.

Thomas P. Lewis[3]

The only justification for reviewing these books jointly is the study in contrasts they provide. Professor David Richards's book is about constitutional law and judicial review. For academic philosophers, it may be an easy read, but most lawyers will find it a turgid, prolix, and abstruse exercise in hermeneutics. George Gilder's book is not about judicial review or the Constitution. It is a sharp, clear anthropological statement, grounded largely in Gilder's interpretation of empirical evidence about sex roles. Each book covers substantial territory not explored in the other, but there is some overlap of underlying subject matter. When they address the same topics, Richards and Gilder reach markedly different conclusions. Abortion and homosexuality, for example, are constitutional issues that both books discuss. What Professor Richards stoutly concludes are constitutional rights, to be freely exercised in the pursuit of personal wholeness, Gilder dismisses as the ingredients or symptoms of sexual suicide and societal ruin.

1. Professor of Law, New York University.

2. Gilder's book is a revision of his earlier SEXUAL SUICIDE (1973). In the Preface to MEN AND MARRIAGE he says that several prominent publishers had offered to reissue SEXUAL SUICIDE, but in every case called back later "to tell me—or imply strongly—that protests from feminist editors had balked them."

3. Professor of Law, University of Kentucky.

I

In the brief compass of a review I can only mention the highlights of Richards's elaborate argument. He begins simply enough by saying that a sound interpretive approach to the Constitution must derive from an understanding of the political theory and environment surrounding its birth. It is not enough to read the text, along with its narrow "legislative history." Rather, we must look to the larger philosophical and political conceptions that underlay the Bill of Rights. Drawing on such thinkers as Locke,[4] Kant, and Rousseau, Richards surmises that the founders grounded the Constitution on "contractarian political theory" reflecting the "moral sovereignty of the people."

The last phrase must not be confused with "popular sovereignty," relied upon in different ways according to Richards by Raoul Berger and James B. Thayer. The framers should not be regarded as the applicable sovereign, as Richards says Berger would have it, because our generation should not be bound by the will of theirs. Nor can we accept the sovereignty of the people as reflected in legislative majorities, as Thayer suggested. Instead, the moral sovereignty of the people in the context of contractarian theory means that the people—presumably Richards is referring to the founders who acted for them—conditioned constitutional government on a "conception of justice" that "aims to protect an idealized moral conception of persons as free, rational, and equal."

Developing his interpretation of the "abstract intentions," "background rights," and "political and moral culture" that found expression in the Bill of Rights, primarily the religion and free speech clauses of the first amendment, Richards develops a conception of an "inalienable right to conscience" and its natural consequence, "universal toleration," founded on "equal respect for persons." The enforcement of universal toleration depends upon constitutional judicial review, proceeding from a theory of legal interpretation that "must . . . as part of its interpretive task, utilize historical reconstruction of traditions of the community. Such a reconstruction may best define the community's sense of what its traditions now mean or should mean." The implications of the phrase "should mean" will be clear to any careful reader: Because the Constitution represents a "self-conscious" effort by the founders to "use the best political [and moral] theory and political science of the age . . . to create a written text of constraints on state power," so

4. As Professor John Roche has recently noted, quoting Madison, turning to Locke is " 'a field of research which is more likely to perplex than to decide.' " Roche, *Constitutional Scholarship, What Next?*, 5 CONST. COMM. 21 (1988).

continuance of the tradition requires interpretation that would call upon the best modern political and moral theory "of an explicitly contractarian kind." In short, the "community's sense" of its traditions is not to be determined by the community.

A key element of Richards's "historiographical" analysis is the decision of the founders to develop a written constitution. He insists on interpreting the document; no extra-constitutional nonsense for him. Yet he rejects any notion that the courts should apply his interpretive theory in a clause-bound fashion. The text seems to be important only as it reflects the founders' larger preoccupation with certain political and moral beliefs. "General political theory" can be used to "explicate larger interpretive patterns common to vertically disjoint constitutional texts." The founders' expression of these patterns "grows out of a larger cultural and moral tradition that conceives political legitimacy on a contractarian model calling for observance by the state of predictable and orderly constraints that acknowledge and express the dignity of persons and citizens as free, rational, and equal."

Although Richards draws heavily on the work of classic philosophers, he believes that only selected portions of their work should now be controlling. For Locke's contractarian theory was, after all, associated with "economic privilege," Rousseau's has been rejected as "totalitarian," and Kant's might make sense only as "proto-utilitarianism." It is only the best *contemporary* contractarian theory that is to be enforced through judicial review. If earlier contractarian theory is "rootedly antiredistributive, antiegalitarian, antiliberal . . . and at bottom, proto-utilitarian" a "contemporary contractarian theory of some depth and sophistication, like Rawls's, not only makes possible a revival of nonutilitarian political philosophy, but enables us [and the Supreme Court] to . . . find a distinctive approach to political legitimacy" which lacks these flaws.

I find this somewhat confusing. Richards avers that the will of a long-dead generation cannot bind present generations, yet he also believes that it can: to a conception of justice founded on the moral sovereignty of the people in a relationship of covenant with the government, a conception to be fleshed out from time to time by a majority of the Justices of the Supreme Court, as they digest and accept the best contemporary political and moral philosophy. But there are limits, to be found in portions of Locke's, or Kant's, or Rousseau's thoughts. Locke is there, at the founding, and he isn't. Kant is there whether he was or not. Certainly, says Richards, we cannot accept Locke's bigotry toward Catholics and atheists, or his

preoccupation with property. Contrary to what Locke would countenance, Richards believes that parents have a right to send their children to parochial schools. At the same time, any form of governmental assistance to those schools would unconstitutionally "endorse" such parental "value imposition," because it would be contrary to the "Lockean political theory so central to the religion clauses . . . ." "Children, for Locke, are neither the property of their parents nor of the state, both of whom are under moral obligations to them to assure the appropriate care and development of their moral powers," that is, their right to form their own beliefs.

Since for Richards belief formation is not limited to religious matters, but covers the waterfront of thought, his ideas come perilously close to condemning compulsory public education as unconstitutional. He concludes, however, that it is a "general good," but the system must "limit itself to imparting the general educational goods that develop our rational and reasonable powers, and avoid endorsing specific substantive conceptions that those powers should adopt." We are not told just how this is to be done without creating classes whose tedium will make students yearn for Latin I.

Through four chapters dealing with religion, conscience, and speech, and two developing his major end product, a "theory of constitutional privacy," Richards seeks to create (or to distill, for he always has at least one foot in the past) and apply the best contractarian political and moral theory. The theme of universal toleration and equal respect is repeated over and over again, with slightly varying phraseology. Every person has "rational" and "moral independence": the right to exercise the "highest order twin moral powers of rationality and reasonableness in belief formation and revision," and the right to "the exercise of the conceptions of a life well and ethically lived and expressive of a mature person's rational and reasonable powers." And so on. Each person may act out these rights, subject to the state's right to protect or conserve "general goods," for "various all-purpose general or primary goods, including life and bodily security," are also entitled to "equal respect." General goods, sometimes called "neutral harms," cannot depend for definition on "conventional conceptions of public morality," Locke to the contrary notwithstanding. Rather, putting moral consensus aside, general goods are "things all persons could reasonably accept as all-purpose conditions of pursuing their aims, whatever they are." They are "only those interests of persons whose necessary protection is acceptable to all reasonable persons at large." Yes, *all* reasonable persons: one man, one veto.

It is clear to Richards that none of this has relevance for such

matters as the commerce clause or substantive economic due process. How he knows that those constitutional values do not require aggressive judicial scrutiny, without first subjecting them to the same type of "historiographical" analysis he gives to the first amendment, is not explained. It occurs to me that the soundest part of his analysis, the background rights idea, but with an eye on the constitutional text, including the truism that all text must have some purpose, would provide strong support for the dissenters in *Garcia v. San Antonio Metropolitan Transit Authority*. But Richards has other fish to fry.

In his chapters on privacy Richards deals with contraception, abortion, and sexual autonomy as privacy rights. With respect to the last, he is concerned principally with homosexual acts. His treatment of abortion focuses on the general goods half of his equation to protect individual autonomy. After satisfying himself that person-potential does not make a fetus a person (because the contrary view could be based only on nonneutral religious or metaphysical assumptions), and that therefore the "usual proscription of homicide" does not apply to abortion, he asks whether the preservation of the fetus is an interest that could qualify as a general good. "The lives of nonpersons . . . are not common goods of this kind." Protection of such lives would not be viewed as "so necessary to the lives of all rational people that each person could reasonably accept protections of such goods by the criminal law even at the cost of essential interests in moral independence."

Richards heroically tries to distinguish abortion restrictions from protection of animals, infants, and senile folks. "True," he says, "some philosophers have denied that the neonate is a person and thus claim that infanticide does not violate anyone's natural right to life." All we get in response is an assurance that their view is not "inevitable," that "one may reasonably argue," and "a criterion of dissimilarity may be formulated to sort out these matters."[5] Nowhere do I find Richards stating that *all* people would reasonably agree that protection of a retarded newborn is so "indispensable" to the "lives of all rational people that each person" would accept it even if, for some, the effect was to destroy their independently conceived notions of lives well lived.

It might help if Richards explained more fully how judgments

5. Professor Tribe, who shares Richards's conclusion about abortion, gets there via a somewhat different route. Along the way he has this to say: "But *all* normative judgments are rooted in moral premises; surely the judgment that it is wrong to kill a two-week old infant is no less 'moral' in inspiration than the judgment, less frequently made but no less strongly felt by many of those who make it, that it is wrong to kill a two-day old fetus." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1350 (2d ed. 1988).

are to be made about what all people reasonably will or will not accept. Apparently their "votes" must be reasonable, yet it is clear that as they weigh their choices their premises have to include, as a control on the state, the right of every person capable of reason to think and thus to desire to act in "evil" and "intolerant" ways. For "moral independence" has no meaning as a right if everyone must think and act in a "reasonable" way.[6]

I have tried to figure out why, though I agree with Richards that sodomy, as such, should not be a penal offense, it nevertheless strikes me as so incongruous to find a solemn argument for a constitutional right to engage in anal intercourse at the end of a tome otherwise chiefly devoted to an ornate analysis of the founding era. Perhaps it is because of my feeling that nothing could have been further removed from the "background rights" the founders had in mind when they drafted the Bill of Rights. Or maybe it is because of my impression that the issue is at least partly spurious: American governments are not locking up people who are guilty only of private, consensual sodomy. The real issue, it seems to me, is whether the government may support the taboo against homosexuality, and if so, whether unenforced criminal laws are a permissible means.

Richards has a broader agenda than the decriminalization of homosexual acts, though he makes a passionate and appealing argument about the bad effects of criminalization. His aim is to persuade people that such conduct is simply an alternative lifestyle. "The same considerations that debar the power of the state to homogenize religion or thought or speech require institutional respect for ways of life expressive of a just moral independence." In the case of constitutional privacy, "resources central to the independent exercise of our moral powers are justly protected against a hostile and homogenizing public scrutiny." Certainly this means that organized society is to be neutral; it cannot regulate, teach, or preach to further a viewpoint. It is less clear whether Richards means also to posit a societal obligation to protect against a hostile public scrutiny. His general goods formula might accommodate that approach, but the text of the first amendment could be a problem—for others, if not for Richards. In any event, to support his argument

6. In connection with the similarity of Richards's approach to general or primary goods and the Rawlsian "veil of ignorance," Professor Tushnet observed: "I believe that one of the central controversies over Rawls's approach is whether he has so stripped his rational contractors of their human capacities as to make it incoherent to talk about what 'they' would choose. Richards goes farther than Rawls in making his contractors, quite literally, disembodied." Tushnet, *Sex, Drugs, and Rock 'n' Roll: Some Conservative Reflections on Liberal Jurisprudence* (Book Review), 82 COLUM. L. REV. 1531, 1540 (1982).

Richards feels bound to make the case that all forms of sexual activity are equally wholesome.

It's not easy to define a community's "tradition." Richards would have the Court declare that our traditions require individual moral independence. But if our traditions were really so simple, Richards wouldn't need to write his book. Must the Court ignore those traditions that are exceptions to our general notions of moral laissez-faire?

II

George Gilder does not possess the imposing scholarly credentials of a Milton Friedman. But I have heard him described as the Milton Friedman of sexual sociology—conservative, brilliant, partisan, dogmatic, lucid, and anathema to many professors of constitutional law. His message is simple: "Monogamy is central to any democratic social contract, designed to prevent a breakdown of society. . . ." This conclusion follows from Gilder's analysis of male sexuality and what he regards as crucial differences between the male and the female, whose sexual superiority is quite simply "the prime fact of life." The woman is complete; her sexuality is diffused throughout her body, and her sexual identity so unimpeachable as to be taken for granted by her. The man's role, by contrast, makes him more dispensable, and hence less secure. But his male identity will be asserted somehow. "Voluminous" evidence reveals that hormonal influences shape men and women differently, men being more aggressive, violent, muscular, competitive, and less nurturant, moral, and stable. As societies moved from the male-as-hunter model to the male-as-farmer model, a movement that Gilder says anthropologists frequently credit to women, the problem that Margaret Mead called the "central issue" of every society arose: "what to do with the males." Gilder's answer, developed at some length, is that the male's masculinity must be tamed, his barbarian nature must be socialized, and this is accomplished through subjecting it to female patterns, via monogamous marriage and family responsibilities. Central to this process, says Gilder, is maintenance of the male-as-provider model. Much of the book is devoted to description of what he sees as the consequences for society of a breakdown in this pattern. The picture he draws is not pretty: crime, violence, drugs, homosexuality, and despair.

Gilder paints an especially drab picture of male homosexuality, proceeding from premises that differ in almost every detail from those of Richards. For Richards, homosexuality is a fixed and largely immutable condition; for Gilder this is a myth that is "the

most powerful tool of the homosexual culture." Where Richards can find no evidence of harm from sodomy, Gilder cites startling statistics of infectious diseases among male homosexuals in the 1980s, charging that the "liberal journalists," "pliable psychologists," and "pandering politicians," among others, "who condoned the most extreme homosexual behavior as an acceptable life-style are the true sources of the AIDS epidemic."

For Gilder, however, homosexuality is not the root problem (though for too many it means a squalid life), but rather a symptom and part of a larger problem: the breakdown of monogamy. Because he believes an "enormous number of homosexuals have clearly been recruited from the ranks of the physically normal," he would not relax the social pressures in favor of heterosexuality. "This emphatically does not mean harassing or imprisoning homosexuals." (It occurs to me that such compromises may be our dominant tradition: we create taboos and withhold approval; yet we tacitly recognize a liberty interest.)

The real problem, says Gilder, is single men. Their image is glamorous: "freedom and power"; "The naked nomad in the bedrooms of the land. . . . The hero of the film and television drama; cool, violent, sensuous, fugitive, free." The reality, recognizing that there are millions of exceptions: "Violence and crime join with mental illness, mild neurosis, depression, addiction, AIDS, institutionalization, poverty, unemployment, and nightmares to comprise the specialized culture of single men in America. . . . Of all groups, single males have the highest mortality rate—and suicide is increasingly the way they die."

Gilder's statistics are impressive. But do men have the problems because they are single or are they single because they have the problems? Gilder seeks to make the case that singleness is the cause and marriage is the cure. Along the way he observes that while blacks as perpetrators and victims account for almost half of all violent crimes, "the central facts about crime are not racial; they are sexual."

Like the radical feminists, Gilder sees men as violent. While the radical feminists want to escape from the beast, however, Gilder wants to tame him. For the radical feminists, marriage and children are chains for women, and therefore bad. For Gilder, they are civilizing links for men, and therefore good.

Gilder is somewhat more specific in identifying the sources of the problem than he is in proposing remedies. The alleged sources include social, economic, and educational policies that Gilder sees as contributing to a breakdown in monogamy and two-parent fami-

lies. Among the policies that have this effect are: 1) those that encourage women to leave the home for careers, or worse, make it economically difficult if not impossible for them to choose the home and child care as their role; 2) welfare programs that dissolve "the ties that bind men to their children" (and, incidentally, have a disproportionate effect on black family formation); 3) educational policies, including coeducation, especially in the early grades, and jobs and defense policies that ignore or seek to obliterate differences between the sexes; and 4) attitudes, laws, and technical breakthroughs that increase the woman's control of procreation.

Gilder finds more implications in each of these trends than would meet the eye of the casual observer. All have to do with sex roles and the problems that result if large numbers of males find their sexual identity outside marriage and family. Gilder insists that men and women have different and essential sex roles, in relation to work, sports, combat, and the home. They have different interests, mature at different rates, and hence learn and excel in different ways. The man's role as chief provider and the woman's role as chief nurturer are crucial; they are not merely cultural conventions. "[Steven] Goldberg's rigorously argued *The Inevitability of Patriarchy* refutes every anthropological claim that there has ever existed in human affairs either a society where women rule, or a society where final authority resides with them in male-female relations." To try to ignore sexual differences, says Gilder, is to try to abolish human nature.

I gather that the remedies Gilder would endorse include a radical departure from established welfare policy, remaining steadfast in restricting combat roles to males, ending the right to abortion on demand, and holding the line on further expansion of coeducation. Notably absent is any overt call for a repeal of laws forbidding sex discrimination in employment. Perhaps this is because he believes the evidence shows that sex roles in employment generally persist, and his welfare reform proposal would remove some of the economic incentives that lead so many women to leave the home for work. His proposal, developed in a chapter aptly titled "Supporting Families," is borrowed from Patrick Moynihan and the experience of some countries, notably France and Japan. He calls for strengthening all families through a rather complex scheme of "family allowances" related to children in the home.

III

As an abstraction, the individual right of moral autonomy is appealing and almost universally accepted in this country. But how

to give concrete content to the right from time to time, when it is asserted as a justification for behavior in various contexts, is another matter indeed. A crucially important subquestion, how responsibility for the task is allocated in our constitutional system, cannot be answered by moral philosophers. Richards's approach to "interpretation" of the Constitution is philosophical sleight of hand, designed to maintain the pretense of interpretation while the text of the document is being stripped of any function as a constraint on the Justices.

If it is not pretentious to claim that there are "best" moral and political philosophies, it is dangerous to suppose that Supreme Court Justices are the people best suited to find and enforce them. Richards confuses what the founders thought about moral philosophy with what they thought (or would have thought) about giving open-ended judicial review to life-tenured Justices. After all, the founders' credentials as political architects were considerably more impressive than their credentials as moral philosophers. So even if Professor Richards is right about their values, and the implications of those values for modern issues, I see no reason to reject their system of government in order to enforce their system of philosophy. If anything about the Court emerged with clarity from our founding history, it was that the Justices were not to be a Council of Revision. And what emerges with clarity from our larger history is that morality and the shaping of our traditions are the subjects of continuing debate. Our moral traditions are always in a state of becoming. All of this strongly suggests the wisdom of renewing one of our most fundamental political traditions: expecting legislators to take seriously questions about who we as a people are and ought to strive to be. Again, history suggests that legislators can be as eloquent in these respects as the Court.[7]

I cannot imagine why Richards or anyone else would choose Richards's approach to constitutional law, except to obtain specific judicial decisions that they cherish. He says that orderly and predictable constraints on government were intended. But when his approach is brought to bear on specific issues it does not contribute to predictability. At least I could not discern where he was going

7. A well done reminder on this point is Farber & Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMM. 235 (1984). The authors review the natural law thought (background interests?) that was pervasive during the country's founding and later, from the 1850s through the drafting of the fourteenth amendment. Locke's views were still influential, as were the ideas expressed in the Declaration of Independence. Private contracts and property were prominent among the concepts claimed by influential writers of the times to be recognized by even a "higher law" than the Constitution. But what also shows through, at least as a matter of expression, are the ideals of equality and human dignity.

on many occasions until he told me. He argues, for example, that the state cannot, in any way, assist parental provision of parochial education. How could we predict that five Justices would select this theory of the parent-child-state relationship as the best? Or take another example: Would the reader who has not encountered the idea elsewhere guess that "equal respect" means that newspapers must be treated as public forums, with fair and equal access to all?

For Richards, part of the constitutional text is everything, part is without real meaning, and part provides a launching pad. But his model of interpretation would appear to be as sound for all constitutional provisions as it is for any. The scope of background rights and interests surely varies from provision to provision, but the "best political and moral theory," even of a contractarian kind, covers a lot of ground. Would it be a fair test of Richards's position to put George Gilder on the Court and ask him to follow Richards's general interpretive theory? This idea is not wholly fanciful; after all, those who share Gilder's substantive world view probably outnumber those who share Richards's,[8] and Richards's "Constitution" doesn't need lawyers to interpret it.

What sorts of background rights might Justice Gilder ascribe to the founders? What might he determine to be the best contemporary political and moral theory in a variety of contexts? Gilder professes to stand in awe of women. His professed aim is to protect them from the aggressions of men. Women and weak men (weak in economic power or other attributes that allow some men to be seen as "powerful") are the tragic losers, says Gilder, when there is a breakdown in monogamy. Attractive, young women also prosper, but only while their beauty lasts. Monogamy, according to Gilder, is not merely the most desirable of several tolerable social arrangements. As a core value it is the sine qua non of an enduring and bearable society. As a legislator, Gilder would not make homosexual conduct a crime, but where would he line up as a Justice? Richards's moral theory leads naturally to a "suspect criterion" (immutable characteristic), "compelling interest" analysis that would outlaw discrimination against homosexuals. The same jurisprudential framework, however, might lead a Gilder, convinced that the taboo against homosexuality is exceedingly valuable, to up-

8. John Ely and Mark Tushnet have noted the tendency of scholars such as Richards to reflect a preoccupation with interests and rights of first importance to what, for shorthand purposes, could be called the liberal elite, or more broadly in Ely's phrase, the "upper-middle professional class." J. ELY, DEMOCRACY AND DISTRUST 59 (1980); Tushnet, *supra* note 6 *passim*. Though Gilder as a Harvard graduate is surely a member of this latter class, his concern is with an undifferentiated population, with a recurring focus on poor and average persons.

hold even criminal sanctions against homosexual acts, knowing full well that they will hardly ever be employed.

Richards's argument for abortion on demand would be beside the point for Gilder, who insists that procreative power is a prime source of male affirmation. Gilder believes that the psychological consequences of placing complete control of procreation in the woman are profound. He contends that the voters have repeatedly refused to endorse broad liberalization of the abortion laws because it is an issue that psychologically underlies the "sexual constitution" regarding "sexuality, children and the family." They "instinctively recognize that preservation of the sexual constitution may be even more important to the social order than preservation of the legal constitution," for "no law can prevail against the dissolution of the social connections and personal motivations that sustain a civilized polity." Richards dismisses arguments against abortion based on sexuality and sex roles, because they are grounded in a moral conception of the good life. They are therefore nonneutral and cannot support regulation as a general good. But for Gilder it is not just a matter of morals; it is a matter of civilization versus anarchy. Moreover, Richards's general goods concept does not flow from his interpretive theory; it flows from his "best" contemporary substantive theory, which his interpretive theory permits him to construct.[9] Gilder could be expected to add a distinct layer to the background rights assumed by the founders, who after all had a viewpoint about sex roles that was much closer to Gilder's than to Richards's. We need not conclude that the founders' viewpoint was rejected in toto when a particular expression of it was repudiated by the nineteenth amendment. In Gilder's universe no one—certainly no heterosexual woman—could count on being one of the few "winners" from a breakdown in monogamy, so the protections he would find essential

9. Frequently the debate centering on writers such as Rawls or Richards focuses on whether a given rendition of moral philosophy is "right." Challenging a statement by Professor Ely that *a* method of moral philosophy simply does not exist, Professor Michael Glennon writes that disagreement with Rawls does not mean that Rawls is wrong. Perhaps the critics are wrong. "Democracy may be a great idea, but you can't decide whether a particular moral philosophy is 'fine' (to use Ely's word) through the use of public opinion." Glennon, *Personal Autonomy in Democracy and Distrust*, 1 CONST. COMM. 229, 230 (1984). But if the Supreme Court decides Rawls is wrong, or screws up his theories, it will be open to others to say the Justices are wrong, but it may not do much good. As Justice Jackson observed, the Justices do not have the last word because they are infallible, but they are infallible because they have the last word. Returning to Richards, it is also necessary to remember that he devotes a substantial portion of his book to articulating the interpretive approach that can justify plugging Rawls into the Constitution. But the approach does not dictate that; using the same approach, the Justices could plug in wholly unrelated concepts under various constitutional provisions and ignore Rawls.

to maintenance of monogamy might in his view be acceptable to all reasonable people.

Richards does not simply suggest the propriety of his interpretive approach; he would regard a failure to adopt it as irresponsible. He might change his mind if we had a Court of Justice Gilders, peppering the U.S. Reports with passages like this:

> There is, in fact, only one fully documented case surviving in the modern world of a tribe so abjectly retarded, or so mystically impervious to its own nature, that it simultaneously rejects and tries to abolish all three of these [universal] human characteristics—sex roles, religion and property rights. That group, not even strictly speaking a tribe, is, of course, the community of social science scholars in America.

There is much more to Richards's thesis than meets his eye.

One need not accept all of Gilder's arguments (I don't) to profit from consideration of his underlying premise. Even those of ardent feminist persuasion, female and male, are likely to be reminded of a good many obvious facts. Gilder makes it clear in his preface that his major goal is to fight what he fears has become the conventional wisdom of sexual liberation and the denial of male and female natures. If he is even half right in his observations, some esteemed works may be basically nonsense. Whatever its faults, Gilder's book is a useful antidote to the literature of unisex on the one hand, and free sex, on the other.

Gilder does have an axe to grind, and this causes occasional overstatement. The very nature of his message leads him to engage in stereotyping on a grand scale. Furthermore, his theory about the effect of the woman's control of abortion on the man's sexual identity is exceedingly speculative.[10] Even if one accepts the theory, the policy implications are not clear unless one also believes with Gilder that civilization is at risk. Unless that is indeed the case, abortion restrictions merely transfer the man's problem (as Gilder sees it) back to the woman. Here, I believe, is the rub in this book. Gilder apparently wants women to submerge their vocational talents and aspirations in the interests of family life, child rearing, and preservation of the male's sexual identity within the restraints of marriage.

10. It is no simple matter to put a label on the abortion decisions as pro men or pro women. Professor Mary Ann Glendon's ABORTION AND DIVORCE IN WESTERN LAW (1987) points out that the strongest supporters of abortion prior to *Roe v. Wade* were affluent white men. This is not necessarily inconsistent with Gilder's viewpoint, but Glendon also notes that more women than men supported the decision of the West German Constitutional Court invalidating the 1974 law that allowed elective abortions within a specified time period. She concludes that though *Roe* might therefore be regarded as a "masculine decision," it is probably not. Rather, it "is more distinctively American than it is masculine in its lonely individualism and libertarianism." *Id.* at 51-52. Professor Glendon unravels some of the complexities of abortion regulation with insight and thoughtfulness.

Charged with indifference to women's interests, Gilder would reply that the female's true interests depend on allowing the male to develop a healthy sexual identity. This will not sound strange to the millions of women in this and past generations who have spent their lives following the advice that Gilder offers. But sociology and economics tell us that if current trends threaten to dissolve the bonds that check male aggression, we will have to find other ways to preserve those bonds. Today's small families do not occupy anyone's full-time attention for more than a brief period. Even if the woman happily accepts the role of mother in the home, she will naturally seek other outlets eventually, and jobs are society's measures of worth. In any event, women have been entering the workforce in increasing numbers since 1964, and it was predictable that as one-earner families became two-earner families, living costs and new minimum standards of the good life would rise to meet new income levels. For most families, the choices Gilder urges are not realistically available. Still, it is not easy to resist the thought that Gilder is on to something when one sees the divorce statistics, and the daily reports linking the persistence of poverty and high crime rates to single parent families. We can learn from Gilder even while rejecting some of his arguments and innuendoes.

GENDER JUSTICE. By David L. Kirp,[1] Mark G. Yudof,[2] Marlene S. Franks.[3] Chicago, Il.: University of Chicago Press. 1986. Pp. x, 296. $19.95.

Suzanna Sherry[4]

Gender Justice is an avowedly liberal tract on the problems of gender discrimination in our society. It seeks to provide an alternative to the visions of both conservatives and radical feminists. The book fails in its liberal mission for some of the same reasons that the new breed of Democrats cannot seem to raise much of a challenge to the Republican ideology currently sweeping the country. The authors endorse many of the policies advocated by conservatives—they reject affirmative action and comparable worth, for example—but they do so by means of a liberal, process-oriented approach.

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