

**DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME.** By Richard E. Morgan.<sup>1</sup> New York: Basic Books, Inc. 1984. Pp. 245. \$16.95.

**TRADITION AND MORALITY IN CONSTITUTIONAL LAW: THE FRANCIS BOYER LECTURES ON PUBLIC POLICY.** By Robert H. Bork.<sup>2</sup> American Enterprise Institute for Public Policy Research. 1984. Pp. 11. \$3.00.

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Relatively few political scientists today specialize in questions of constitutional policy. With Judge Bork, I lament the fact that law, including constitutional law, "is an arena of ideas that is too often ignored by intellectuals interested in public policy."<sup>4</sup> This is a pity because the interaction of these intellectuals and legal scholars would enrich the literature on law and public policy. Professor Richard E. Morgan's book is a notable and welcome addition to that literature.

Professor Morgan was academically trained in "political philosophy, constitutional law, and that stream of political science that deals with the interaction of organized groups in society."<sup>5</sup> In his capacity as a student of constitutional law, Professor Morgan devotes most of his book to a critical analysis of the major decisions dealing with religion, racial desegregation, due process in public schools, and affirmative action. Writing as a political philosopher, he disputes the legitimacy of the "noninterpretivist" mode of constitutional adjudication that he holds responsible for these decisions. Though little he says is new, Morgan's criticism is lively, biting, and lucid. His special contribution is made in his third role, that of a student of "the interaction of organized groups in society." Morgan blames the "rights industry" for manufacturing new constitutional rights that disregard the claims of organized society. These new individual rights, he charges, have disabled America by isolating the churches from society, destabilizing the schools, enfeebling law en-

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4. R. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW*, 1-2 (1984).

5. R. MORGAN, *DISABLING AMERICA* 4 (1984).

forcement, undermining public order and preempting private decisionmaking.

This review will first consider Morgan's attack on the rights industry. It will then evaluate his attack (joined by Judge Bork) on noninterpretivism. Finally, it will suggest a significant contribution that social scientists like Morgan could make.

## I

Morgan tries to tell us "who are these people"<sup>6</sup> that constitute the "rights industry" and how they are responsible for the Supreme Court decisions having these bad effects. His answers are not satisfying. In general terms, Morgan describes the "rights industry" as a "set of specialized elites professionally concerned with" rights and liberties, including "interest group advocates, law professors, activist lawyers and publicists," but mostly lawyers, who may be identified by their politics.<sup>7</sup>

In essence, Morgan charges that the "rights industry" is composed of "idealists of the left" who "broadly" share ten political tenets he sets forth. These tenets demonstrate that they are "profoundly" and "overwhelmingly" "disaffected from American culture and society," and "because of their disaffection . . . feel free to lumber that society with new and expensive rights."<sup>8</sup> The only support Morgan gives for these assertions is a survey of 157 individuals who represent a cross section of the public interest elite, including leaders or top staffers of seventy-four organizations as well as major public interest law firms,<sup>9</sup> and who, according to Morgan, overlap substantially with the "rights industry."<sup>10</sup>

Morgan then specifically mentions only the ACLU, Center for Law and Social Policy, Children's Defense Fund ("a specialized and especially zany rights industry formation") and the Women's Legal Defense Fund.<sup>11</sup> Although civil rights groups, such as the NAACP

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6. *Id.* at 191.

7. *See id.* at 6, 3, 199, 191, respectively.

8. *Id.* at 192, 194-95.

9. *Id.* at 196. The survey referred to is Lichter & Rothman, *What Interests the Public and What Interests the Public Interests*, PUB. OPINION, Apr.-May 1983, at 44. The quotation from the report of the survey is at 45. Professors Lichter and Rothman describe the 157 leaders of the public interest groups and firms they surveyed as "overwhelmingly young, highly educated, well-paid professionals, with secular and liberal outlooks and democratic voting habits." *Id.* at 45. They see the public interest movement as "the purest political expression" of the "new liberalism" that remains concerned with "matters of economic privilege and privation" but "centers on newer social, cultural, and 'life style' issues." *Id.* at 44.

10. R. MORGAN, *supra* note 5, at 196.

11. *Id.* The characterization of the Children's Defense Fund is at p. 70. Professors Lichter and Rothman also mention that Common Cause, Congress Watch, Consumers'

and Lawyers Committee for Civil Rights were not included in the survey, Morgan does not think "this omission affects the results significantly."<sup>12</sup>

In other contexts, Morgan specifies other groups and individuals. In connection with the Supreme Court decisions on the religion clauses, the "rights industry" includes the ACLU, NAACP, Protestants and Other Americans United for the Separation of Church and State, the American Jewish Congress, the General Conference of Seventh Day Adventists, the Order of United American Mechanics, the National Education Association, Paul Blanshard (who expressed "the postwar anti-Catholicism of the American left"), Leo Pfeffer (the "archetypical rights professional"), R. Freeman Butts, V.T. Thayer, Alvin L. Johnson, Irving Brant and Joseph L. Blau.

For the school busing cases, the "rights industry" includes not only the many private groups interested in civil rights that make up the Leadership Conference on Civil Rights but also the "rights industry professionals within the federal government," particularly the United States Civil Rights Commission.<sup>13</sup> Morgan also names certain law professors who "were aligned with the fabricators of the constitutional requirement of integration as partners in a common enterprise" — Owen M. Fiss, Ronald Dworkin, and David L. Kirp.<sup>14</sup> Still other groups are named as part of the "affirmative action" sector of the rights industry — the National Committee on Pay Equity, National Organization of Women, the Women's Legal Defense Fund, and the Society of American Law Teachers.<sup>15</sup>

Other law professors are named as leaders of the rights industry seeking to extend the constitutional rights of the accused — Yale Kamisar (the "Leader of the Mirandists"), Anthony Amsterdam (a "rights industry superstar") and Laurence H. Tribe ("the very model of an activist professor"). Though Morgan grants in a footnote that the law schools are not monolithic, he thinks "rights radicalism" dominates the law schools and that this has led to the "extensive interpenetration of legal education and the rights industry."<sup>16</sup>

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Union, Critical Mass, Environmental Defense Fund, and Public Citizen were included in the public interest groups they surveyed.

12. *Id.*

13. See *id.* at 37, 39, 14, 32-41, 54-55, respectively. I assume Morgan would no longer describe the Civil Rights Commission in this fashion. Morgan holds "rights industry" professionals responsible for *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971), "along with the law clerks of the Fifth Circuit and the Supreme Court and their judicial principals." R. MORGAN, *supra* note 5, at 57.

14. *Id.* at 58-60.

15. *Id.* at 153, 154-55.

16. *Id.* at 89, 115, 122, 165.

What does all this amount to? Morgan admits that the "rights industry" is not "centrally directed."<sup>17</sup> Indeed, the cast of culprits changes from constitutional issue to constitutional issue, though some characters may appear in a number of productions. What unites the groups and individuals named by Morgan is merely that they instigated litigation, filed briefs *amici curiae*, or wrote articles urging the courts to make decisions Morgan deploras.<sup>18</sup>

One may speak of an "antirights industry" in the same sense. And some groups, like the American Jewish Committee and the Anti-Defamation League of B'nai Brith, are in the rights industry on some issues and the antirights industry on others. Nor is there any evidence that the antirights industry commands fewer legal and other resources than the rights industry. The contrary is probably the truth.<sup>19</sup>

Only the Supreme Court, not the rights industry, "manufactures" rights, and the rights industry has not always been successful in its strivings. Morgan's analysis of the politics of the rights industry does not help us to understand why the Supreme Court has responded to it, and not to the antirights industry, in the cases Morgan criticizes. Surely Morgan is not implying that the Justices responsible for these decisions are also "idealists of the left" who are profoundly disaffected from American society. This description also does not fit every group and individual Morgan includes in the "rights industry," however accurate it may be for some of them at one time or another.<sup>20</sup> I find greater explanatory power in Profes-

17. *Id.* at 34.

18. *See id.* at 3, 12, 118, 148.

19. For example, in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), the School Board of the Township of Ewing, as Morgan points out, *supra* note 5, at 14, was represented by the state (New Jersey) Attorney General's Office and a partner in Davis, Polk. In addition, six other states filed briefs supporting New Jersey and Ewing. *Id.* at 14.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), *amici curiae* briefs supporting affirmance of the convictions were filed on behalf of twenty-seven states, Puerto Rico, the Virgin Islands, and the National District Attorneys Association.

In *United Steel Workers of America v. Weber*, 443 U.S. 193 (1979), *amici curiae* briefs urging affirmance of the holding below that employment preferences based upon race violated Title VII's prohibition against racial discrimination in employment were filed by the Anti-Defamation League of B'nai Brith, California Correctional Officers Association, Government Contract Employers Association, Pacific Legal Foundation, Polish American Congress, Southwestern Legal Foundation, and United States Justice Foundation.

*Amici curiae* briefs in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), urging affirmance of the California Supreme Court's decision that the special admissions program of the Davis medical school was invalid under the equal protection clause were filed by the American Federation of Teachers, American Jewish Committee, American Subcontractors Association, Anti-Defamation League of B'nai Brith, Fraternal Order of Police, Order of Sons of Italy, Pacific Legal Foundation, Queens Jewish Community Council, and Young Americans for Freedom.

20. I think Morgan recognizes this. He acknowledges that the "civil libertarian enter-

sor Nathan Glazer's insight that "the nature of the law itself emphasizes many themes that have become the essence of liberalism: due process, a careful consideration of rights, a system of reasoning by analogy, which permits moving from restricted conceptions of due process to more extended ones."<sup>21</sup> But I do not think even this is the whole story. Nor does Professor Glazer.

## II

Morgan's indictment of "noninterpretivism" is a powerful one, which Judge Bork joins. Yet the positions taken by both reveal the difficulties of "interpretivism."

Judge Bork believes "[w]e are entering . . . a period in which our legal culture and constitutional law may be transformed, with even more power accruing to judges than is presently the case." He attributes this development to the "fact . . . that the law [including constitutional law] possesses very little theory about itself," about "the sources of law, or its capacities and limits, or the prerequisites for its vitality." Consequently, legal scholars "are becoming increasingly converted to an ideology of the Constitution that demands . . . an infusion of extraconstitutional moral and political notions." "[N]ew theories of moral relativism and egalitarianism" dominate "constitutional thinking in a number of leading law schools." These theories "are increasingly abstract and philosophical; they are sometimes nihilistic; they always lack what law requires, democratic legitimacy." Judges who are instructed they "may properly reason to constitutional decisions" by applying "abstractions of moral philosophy," rather than the "historical Constitution," are "being educated to engage in really heroic adventures in policy making." When these abstractions fail to achieve desired results, constitutional "nihilism" nevertheless advocates the use of judicial power to produce them. Thus, "[c]onstitutional scholarship today is dominated by the creation of arguments that will encourage judges to thwart democratic choice." This scholarship, Judge Bork charges, conflicts with the views of the "majority of living Americans about where the balance between individual freedom

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prise" is important to America's development and its future, (*supra* note 5, at 6), the "rights industry" has an "honorable history of opposing and curbing" "serious abuses of public and private power in America" (*id.* at 213), "there is much that is admirable about the people and groups" he criticizes, (*id.* at 214), and the disabling of major private and governmental institutions has been "largely unintended by them" (*id.* at 1). But he concludes that the "rights industry" in our time "needs to moderate and ideologically detoxify itself in order to serve effectively as guardian of the open society rather than its traducers." *Id.* at 214.

21. Glazer, *Lawyers, the New Class, and the Constitution*, 2 CONST. COMM. 27, 37 (1985).

and social order lies."<sup>22</sup>

Like Judge Bork, I deplore the antimajoritarianism of much current constitutional scholarship. I wish we would curb our desires for immediate results and stop looking to the Supreme Court to act as an instrument of social change. But choosing between interpretivism and noninterpretivism will do little to resolve disputes over the merits of particular opinions.

Even if we possessed the most complete theory about law's sources, its capacities and limits and the prerequisites for its vitality (and I think Judge Bork underestimates how much of such theory we do have), we would still have to go to fields of learning outside the law in order to evaluate it. Indeed, legal scholars must resort to other intellectual disciplines to develop theories about law's capacities and limits and the prerequisites for its vitality. However one may value process, criteria for evaluating outcomes are also necessary. The "law and economics" movement, for example, uses abstract theory for this purpose, without apparent objection from Judge Bork.

Judge Bork may not be as much troubled by the infusion of "extraconstitutional moral and political notions" into constitutional adjudication as by the infusion of particular notions he finds anathema. For he quotes Richard John Neuhaus's statement that "[I]aw that is recognized as legitimate is . . . organically related to . . . the larger universe of moral discourse that helps share human behavior. In short, if law is not also a moral enterprise, it is without legitimacy or binding force."<sup>23</sup> I find Neuhaus's statement unexceptionable, but obviously the "larger universe of moral discourse" is "extraconstitutional."

Judge Bork tries to reconcile Neuhaus's statement with his own views by insisting that in "a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge."<sup>24</sup> Morgan agrees.<sup>25</sup>

Here lies the difficulty. Law and morals may conflict. Existing law may be immoral when judged by criteria supplied by the "larger universe of moral discourse." Take *Griswold v. Connecticut*,<sup>26</sup> in which the Court rejected the morality of the legislator and invalidated a Connecticut statute making it a crime for married persons

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22. For the quoted language, see R. BORK, *supra* note 4, at 2-3, 5-9.

23. *Id.* at 11.

24. *Id.*

25. R. MORGAN, *supra* note 5, at 177 (the morality that the law should enforce "is the legislatively ratified conventional morality").

26. 381 U.S. 479 (1965).

to use contraceptives. The decision may have reflected the individual morality of each of the Justices in the majority. But is there any doubt that the Connecticut statute violated the standards of morality shared by the American people? To insist that the legislator's morality should govern in such a case would indeed divorce constitutional law from the "larger universe of moral discourse."<sup>27</sup> Interpretivism offers no guide to the Justices in such a situation.

Neither Judge Bork nor Professor Morgan are strict interpretivists. Morgan "does not insist that the meaning of a constitutional provision is fixed forever by the immediate concerns of the framers or bound in hoops of steel by history." Unlike Raoul Berger, he justifies *Brown v. Board of Education* on interpretivist grounds. But his interpretivism allows only for "controlled innovation"; he insists that the Court must "create new constitutional rights by interpretation of the text or some known (or discoverable) tradition of prior understanding of what the text means." But what "successive generations took [particular] constitutional provisions to mean" may at successive times have involved innovation and new policymaking. Why should this process end with any particular generation?<sup>28</sup>

Judge Bork does not elaborate his views of "interpretivism." In this lecture, he says judges should govern according to the "historical Constitution" and accept "the proposition that the framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed." But proceed it may, and so Judge Bork calls for "theory that relates the framers' values to today's world."<sup>29</sup> I find it impossible to see how such a theory can avoid resorting to fields of learning outside the law, or how judges may avoid the influence of their own moral values in developing and applying any such theory. The objective moral standards Americans share are not static. By their decisions, judges may draw moral issues into public discussion, and a new consensus may emerge. In any case, I do not find "interpretivism" or "noninterpretivism" as expounded by their respective adherents helpful in defining the scope and limits of constitutional policymaking by judges in a democratic society.

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27. Nor is it quite fair for Judge Bork (*supra* note 4, at 3-4) to charge that Justice Harlan's opinion in *Cohen v. California*, 403 U.S. 15 (1971), reflects moral relativism. Justice Harlan appreciated the need for civility in political discourse in a democracy. Nevertheless, he held that the first amendment prohibited government from trying to enforce civility. See Farber, *Civilizing Public Discourse*, 1980 DUKE L.J. 283. I doubt that the objective standards of morality that Americans share would condemn Cohen's actions as "immoral," though many might well view it as offensively rude.

28. R. MORGAN, *supra* note 5, at 166-70.

29. R. BORK, *supra* note 4, at 7, 10.

## III

Disputes about the merits of the particular constitutional policies Morgan attacks may be clarified, if not resolved, by considering their social consequences. Morgan's major thesis is that these policies are disabling America by imposing monetary and other costs that render major American institutions "less able to pursue excellence in performing their primary function."<sup>30</sup> Yet he devotes relatively few pages to proving his thesis. He presents little evidence that major American institutions are less effective than they used to be, let alone evidence on the extent to which the Court is to blame for any decrease in effectiveness. Morgan argues that it is "puerile" to "respond to an argument about a particular social cost with the defense of multivariant causality."<sup>31</sup> But I am not suggesting that the fact of multivariant causality itself *justifies* the imposition by the Supreme Court of *any* additional social cost; only that a more informed evaluation of the Court's decisions would be possible with data permitting a balance to be struck of their costs and benefits, including those that cannot be assessed quantitatively.

Thus, for example, Morgan blames the decisions on the religion clauses for depriving the nation "of the option of enlisting church-related social service institutions (a large and richly experienced institutional sector) in implementing public programs"; and making "it difficult for government to act through private sector institutions at all," because "legislators are often unwilling to vote for programs utilizing private sector institutions if the church-related institutions, which loom large in their particular constituencies must be left out."<sup>32</sup> But other legislators may often be unwilling to vote for programs utilizing private sector institutions if church-related institutions must be included. And some legislators, as in Minnesota,<sup>33</sup> may vote to aid nonparochial private schools only in order to aid parochial schools. Morgan gives us no basis for assessing the overall impact of these conflicting attitudes.

To the constitutional constraints against financial aid, Morgan also attributes the possibility that private schools, including church schools, may go out of business.<sup>34</sup> Yet some of these constitutional constraints, particularly the school prayer and Bible reading cases, may have resulted in an expansion of the parochial school system, even among Protestant groups. Again, Morgan gives no basis for

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30. R. MORGAN, *supra* note 5, at 7.

31. *Id.* at 9.

32. *Id.* at 41.

33. *Mueller v. Allen*, 103 S. Ct. 3062 (1983).

34. R. MORGAN, *supra* note 5, at 42.

assessing these conflicting possibilities, let alone the social costs of separating children by religion during their most formative years.

Morgan asserts that few positive educational benefits have resulted from "heroic integration measures" and holds the Supreme Court decisions requiring busing responsible for the "ravages of white flight and resegregation of the school systems of larger cities (and many middle sized cities)."<sup>35</sup> Here he relies upon the work of David J. Armor and Nancy St. John.<sup>36</sup>

In fact, social scientists disagree as to the effects of school integration and mandatory busing. Morgan does not independently evaluate the work that has been done but simply accepts that which supports his contentions.<sup>37</sup>

To the "wrong headed and sometimes vindictive pursuit of racial balance and the utopian conception of children's rights" Morgan attributes, in significant measure, the "erosion of the moral authority of teachers, administrators and parents" which, in turn, accounts for the "disappointing contemporary performance of American public education."<sup>38</sup> No evidence is presented concerning the erosion of moral authority or the extent to which the Supreme Court decisions are responsible therefor. The factors that may account for the inadequacies of public education are indeed multiple. Morgan acknowledges some of them—"t[er]rendy egalitarianism, abandonment of the fundamental subjects in pursuit of fashionable ephemera, and the inferior educations received by so many teachers in their universities."<sup>39</sup> Other factors may be equally important—such as the social and psychological problems children suffer (including depression and lack of concentration) because of hunger, poverty, divorce, abuse, and drugs.<sup>40</sup> What is the weight of the Supreme Court's decisions on procedural due process in the

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35. *Id.* at 60.

36. Armor, *The Evidence on Busing*, PUB. INTEREST, Summer 1972, at 90; *The Double Standard: A Reply*, PUB. INTEREST, Winter 1973, at 119; N. ST. JOHN, *SCHOOL DESEGREGATION: OUTCOMES FOR CHILDREN* (1975); *The Effects of School Desegregation on Children: a Re-Review of Research Evidence* (October 1977) (paper presented to the American Academy of Arts and Sciences Study Group on Urban School Desegregation).

37. The various studies that had been done up to 1978 are cited in Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 L. & CONTEMP. PROB., particularly at 57, 61-63, 59 n.14, 61-62 n.27-33 (1978). See also Hawley, *The New Mythology of School Desegregation*, 42 L. & CONTEMP. PROB. 214, 228 (1978). As "the most thorough and careful pro-busing response," Morgan cites G. ORFIELD, *MUST WE BUS?* (1978), with the comment that he will "leave it to the judgment of anyone up to Orfield's 450 pages to judge how well his arguments stand up six years later." R. MORGAN, *supra* note 5, at 221 n.35.

38. R. MORGAN, *supra* note 5, at 73.

39. *Id.*

40. See generally *The Human Factor: A Key to Excellence in Education*, 1985 Report of the National Association of Social Workers.

public schools in the midst of all these factors? How shall we assess the benefits these decisions confer?

The same difficulties reappear in Morgan's discussion of the Supreme Court decisions that he maintains have enfeebled law enforcement and the maintenance of public order. He recognizes that

[b]asic social factors such as the size of the youth cohort relative to the rest of the population, rural to urban migrations, and the extent to which nongovernmental institutions (families, churches and neighborhood groups) operate effectively and self-confidently on the basis of an accepted morality to discourage deviance, have greater impact on crime rates than the numbers of police, their level of professionalism, or whether judges are tough or permissive.<sup>41</sup>

Nevertheless, although "we do not have high levels of crime and disorder because law enforcement is weak," weak law enforcement "will leave the community both psychologically and physically vulnerable to a degree beyond that decreed by demographic, economic, and social forces over which we (properly) have little control" and "ultimately corrode the bonds of trust between people and government."<sup>42</sup>

One may agree with everything Morgan says about the great value of the "marginal benefits" to be derived from improved law enforcement. Yet questions would remain whether the Supreme Court has in fact weakened law enforcement and handicapped the maintenance of public order; and, if so, to what extent, and, finally, whether that is a reasonable price to pay for the benefits that accrue from expanding the constitutional rights of the accused. On these questions, Morgan proffers no evidence.

What I ask for may tax the capacities of social scientists, particularly if they are expected to help the Supreme Court make particular decisions. More can be expected of them in assessing the consequences of these decisions. The task will be more manageable if more social scientists become interested in the legal order and its role in the larger social order. Only by undertaking this task can social scientists make a special contribution to the illumination of constitutional policy making.

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41. R. MORGAN, *supra* note 5, at 74-75.

42. *Id.* at 75-96.