Bork's "Neutral Principles and Some First Amendment Problems"

Summary: Supreme Court cannot rightly choose "fundamental values" because that implies some decision-making authority that is independent of the court's constitutional underpinning. For cases where textual/structural arguments don't apply, Bork argues against virtually any decision grounded in ethical or natural law concepts.

Prof. Bickell (Bork colleague): Justice Kranfurter never found a "rigorous general accord between judicial supremacy and democratic theory." Unresolved dilemna: In a democracy, the majority rules, but a court may rule against the majority.

Bork draws distinction between neutrality of application of principles (as "neutrailty" is commonly understood) and neutrality of the definition and derivation of principles. Strict neutrality of application would mean that minors can do everything that adults (drink, get married, etc), which is clearly not how court decisions are made. Hence, neutrality of application is not used in courts.

Neutrality of definition is problematic because it requires a justice to decide what "fundamental values" are paramount in the court's logical operation.

In the Court's Griswold v. Connecticut (1965), Warren court ruled that a Conn law prohibiting the use of contraceptives is not allowed, based on a right to privacy that is included in the "penumbras" and "emanations" of other specifically protected freedoms. Essentially, this line of reasoning requires that a reader of the Constitution find the rights to free exercise of religion, freedom of speech, and other listed freedoms, and "fill in" a right to privacy. The space of protected freedoms would not be logically consistent and complete with a gap at "privacy," and so freedom is extended by Warren's court to privacy.

With regard to Griswold Bork concludes that to define or derive a neutral principle when a case is at hand is impossible. "To choose the principle and define it is to decide the cases." Since the Constitution does not state anything, any judgement of fundamental values will necessarily require some personal (non-legal) decision from each justice.

Limited interpretation of equal protection: (1) procedural equality protected, (2) no racial discrimination
Lists 6 cases showing how a broad interpretation of equal protection produces personal value judgements. Two examples:
Goesaert v. Cleary: a state does not deny equality when it refuses bartending licenses to women unless they are related to male owners of licensed liquor establishments
Shapiro v. Thompson: a state does deny equality if it pays welfare only to persons residing in-state for at least one year)

Crux of Bork's complaint: "There is no principled way in which anyone can define the spheres in which liberty is required and spheres in which equality is required. These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community."

Bork counters Prof. Henkin's belief re Shelley v. Kraemer (1948), that the 14th Amendment does in fact prohibit racist property deed regulations (to maintain racial homogeneity in a residential district). The 14th prohibited governmental discrimination, but the Shelley decision interfered in private discrimination. Henkin's description of the Shelley judicial considerations include: (i) prevailing philosophy, (ii) continuing movement from laissez-faire gov't toward welfare and meliorism, (iii) adequacy of progress toward equality as a result of social and econ progress, (iv) effect of lack of progress on the life of the Negro, (v) role of official state forces in . . . this progress. Since these 5 considerations are the same for legislators, Bork believes that the Shelley court decision merely legislated from bench, and undermined the Constitution.

Bork divides rights into two classes: those specified by the Constitution and those derived from government processes delineated in the Constitution. Where does he go with this?

He argues that one man, one vote is not in fact a neutral principle and is not integral to democracy (citing executive veto, committees, and filibusters as non-majoritarian instruments in democratic law-making). The guarantee clause (A. IV sec. 4) guarantees "to every State in this Union a Republican Form of Government." There is nothing about one man or one vote.

Bork's Search for Theory in Defining and Applying 1st Amendment
Would only certify protection for political speech (not for art, science, or porn). He believes that these other forms of speech would still be legal by popular, political demand, but they should not be guarded by the courts. He claims to have libertarian feelings but says that those are merely his opinions and not relevant to constitutional jurisprudence. He does not agree with the body of 20th century U.S. Supreme Court decisions regarding free speech, as they tend to expand free speech. He favors minority opinions and dissenting opinions, such as those written by Brandeis and Holmes, which emphasize speech benefits: (i) development mental faculties, (ii) happiness derived from expression, (iii) safety valve, (iv) discovery of political truth. The first are not more valuable than fishing or skateboarding. (iii) seems critical but it really is an executive decision made by legislators and prosecutors who are also responsible for other gov't duties. (iv) is the only really essential benefit of free speech.

Gitlow: Gitlow convicted under NY statute for distributed a Manifesto calling for violent political action. Justice Sanford (writing for the majority) argued that the speech did not assist the search for any political truth but rather it threatened the society in which truth may be better understood. Therefore Gitlow's conviction was upheld, rightly by Bork's account.