

## Judge Robert H. Bork and Constitutional Change: An Essay on *Ollman v Evans*

Steven G. Calabresi† & Lauren Pope††

Judge Robert H. Bork is well known as the father of originalism: the theory of constitutional interpretation that calls on judges to give the words of the Constitution the original public meaning that they had when the Constitution or its relevant amendments were enacted into law.<sup>1</sup> Judge Bork's theory of originalism helped to inspire the originalism of former Attorney General Edwin Meese III, President Ronald Reagan's second attorney general, and it also helped to inspire the originalism of Justice Antonin Scalia, a former administrative law professor, and of Justice Clarence Thomas. Of all of these people, only Judge Bork had written about and was an expert in constitutional theory prior to Ronald Reagan's swearing in as president at noon on January 20, 1981.

One scholar, Professor Raoul Berger, had written in defense of a conservative theory of judicial restraint prior to 1981 in a book called *Government by Judiciary: The Transformation of the Fourteenth Amendment*,<sup>2</sup> but originalism is a very different theory

---

† Clayton J. and Henry R. Barber Professor of Law, Northwestern University School of Law; Visiting Professor of Political Science, Brown University. We would like to thank Guido Calabresi and Gary Lawson for their very helpful comments on an earlier draft of this Essay.

†† AB Candidate 2014, Brown University. We would also like to thank Dean Daniel Rodriguez of the Northwestern University School of Law and Professor John Tomasi of the Political Theory Project at Brown University for making possible the unique working environment that allowed us to write this Essay together. We dedicate this Essay to the memory of Judge Robert H. Bork and to two current Supreme Court Justices who participated in the DC Circuit's decision in *Ollman v Evans*: then-Judge Antonin Scalia, who dissented from Judge Bork's opinion, and then-Judge Ruth Bader Ginsburg, who joined in it.

<sup>1</sup> See Steven G. Calabresi, *In Memoriam: Robert H. Bork*, 36 Harv J L & Pub Pol 1235, 1235 (2013); Bernard Dobranski, *Remembering Judge Bork*, 11 Ave Maria L Rev 207, 207 (2013) (“[Judge Bork] deservedly is called the ‘Father of Originalism.’”).

<sup>2</sup> See generally Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harvard 1977). Raoul Berger's advocacy of judicial restraint grew out of James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (Little, Brown 1893) and many subsequent works elaborating on Thayer's famous rule of Clear Mistake.

of constitutional interpretation than the mere advocacy of judicial restraint. Professor Berger thought judges should do as little as possible, and he criticized *Brown v Board of Education*<sup>3</sup> as being a judicially activist opinion.<sup>4</sup> Judge Bork, in contrast, argued that judges should treat the Constitution as being the supreme law, which meant they should enforce the legal values that were in the Constitution but not make up new constitutional rights out of whole cloth.<sup>5</sup> Judge Bork thus defended *Brown*, and he criticized *Roe v Wade*<sup>6</sup> and *Griswold v Connecticut*.<sup>7</sup> It was largely the Borkean theory of originalism that Attorney General Meese and Justices Scalia and Thomas signed on to, and not Berger's theory of limitless judicial restraint. Bork's criticism of *Griswold* and *Roe* built completely on the famous dissenting opinion of New Deal Supreme Court Justice Hugo Black in *Griswold*.<sup>8</sup> Judge Bork's positions on *Roe* and *Griswold* were textbook examples of 1937-style New Deal rejection of the substantive due process doctrine of *Lochner v New York*.<sup>9</sup>

Judge Bork first wrote about constitutional theory in *Neutral Principles and Some First Amendment Problems*.<sup>10</sup> In that seminal article, then-Professor Bork argued that constitutional principles had to be neutrally derived from the text and history of the Constitution.<sup>11</sup> Judges were not permitted, according to Professor Bork, simply to impose their own value preferences on the general public. They should enforce rights that are in the Constitution, but they should not make up new rights that are not in the Constitution.<sup>12</sup> This was precisely the view of Justice Hugo Black in his *Griswold* dissent.<sup>13</sup> In the context of the First Amendment, Professor Bork called on judges to protect the primacy of political speech since it was the protection of this core

---

<sup>3</sup> 347 US 483 (1954).

<sup>4</sup> See Berger, *Government by Judiciary* at 245 (cited in note 2) (claiming that the *Brown* court "revised the Fourteenth Amendment to mean exactly the opposite of what its framers designed it to mean").

<sup>5</sup> See generally Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 San Diego L Rev 823 (1986).

<sup>6</sup> 410 US 113 (1973).

<sup>7</sup> 381 US 479 (1965).

<sup>8</sup> See *id.* at 507–27 (Black dissenting).

<sup>9</sup> 198 US 45 (1905).

<sup>10</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1 (1971).

<sup>11</sup> *Id.* at 23.

<sup>12</sup> See *id.* at 8.

<sup>13</sup> *Griswold*, 381 US at 520–21 (Black dissenting).

value that animated the First Amendment.<sup>14</sup> In later works, Judge Bork made it clear that academic, philosophical, and artistic speech all should be protected as well, because they inspired and informed political speech.<sup>15</sup> He would not, however, have protected commercial speech or pornography.<sup>16</sup> This is hardly, in our opinion, a radical view.

One of the problems raised by originalism is how and to what extent judges can change constitutional doctrine to adapt it to new technologies, to newly enacted constitutional amendments and statutes, and to the enforcement of standards rather than rules in constitutional law. A standard is a constitutional provision that is open textured—for example a requirement that the president must be a “mature” individual—while a rule is a constitutional provision that admits of no ambiguity in interpretation, such as the requirement that the president must be at least thirty-five years old. Justice Scalia, in *The Rule of Law as a Law of Rules*, famously argued that judges ought not to enforce standards in the Constitution at all but only rules, because in enforcing standards judges would have to be guided by policy judgments, which Justice Scalia thought was a violation of the separation of powers.<sup>17</sup>

Yale law professor Jack Balkin has argued to the contrary in his recent book *Living Originalism*.<sup>18</sup> Professor Balkin argues that judicial avoidance of standards, as called for by Justice Scalia in *The Rule of Law as a Law of Rules*,<sup>19</sup> is lawless and contrary to originalism because it would, for example, render a nullity the Fourth Amendment’s ban on unreasonable searches and seizures.<sup>20</sup> Yale law professor Akhil Reed Amar takes a similar view in his books *The Bill of Rights: Creation and Reconstruction*,<sup>21</sup> *America’s Constitution: A Biography*,<sup>22</sup> and *America’s*

---

<sup>14</sup> See Bork, 47 Ind L J at 23 (cited in note 10).

<sup>15</sup> See Robert H. Bork, *A Time to Speak: Selected Writings and Arguments* 219 (ISI Books 2008).

<sup>16</sup> Judge Bork stated this view to Professor Calabresi in conversation in October 1988 when he worked for Judge Bork as a research assistant on the *The Tempting of America*.

<sup>17</sup> See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1179–83 (1989).

<sup>18</sup> See generally Jack M. Balkin, *Living Originalism* (Belknap 2011).

<sup>19</sup> See Scalia, 56 U Chi L Rev at 1187 (cited in note 17).

<sup>20</sup> See Balkin, *Living Originalism* at 7 (cited in note 18).

<sup>21</sup> Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale 1998).

<sup>22</sup> Akhil Reed Amar, *America’s Constitution: A Biography* (Random House 2005).

*Unwritten Constitution*.<sup>23</sup> Together Professors Amar and Balkin have become the powerful advocates of what might be called the Yale Law School approach of liberal originalism and textualism in constitutional interpretation.

The question of how originalist judges ought to respond to constitutional change and whether they should enforce standards as opposed to rules was debated by Judges Bork and Scalia when they served together on the DC Circuit in the early 1980s. The debate arose in the now-forgotten libel case of *Ollman v Evans*,<sup>24</sup> which addressed the issue of how widely the lower federal courts should apply the Warren Court's landmark opinion in *New York Times Co v Sullivan*,<sup>25</sup> which applied the First Amendment's protection of political speech to libel suits.<sup>26</sup> Judge Bork's concurrence endorsed the Warren Court's *New York Times* opinion as being correctly decided, and he argued for a broad construction of the opinion.<sup>27</sup> Then-Judge Scalia clearly regretted the decision in *New York Times*, and he argued that Judge Bork's approach to the First Amendment led to a standardless balancing test.<sup>28</sup> Strikingly, future Supreme Court Justice Ruth Bader Ginsburg joined Judge Bork's opinion in *Ollman*, as did DC Circuit Judges Malcolm Wilkey and George MacKinnon.<sup>29</sup>

The issues in *Ollman* were timeless and fundamental. How should constitutional originalists address changing technologies and circumstances? Is balancing sometimes constitutionally required, or is it forbidden by the separation of powers? Judge Bork took an approach in *Ollman* that is consistent with Professor Balkin's *Living Originalism* and with Professor Amar's writings, while Justice Antonin Scalia's approach was much narrower and quite different. This Essay addresses Judge Bork's opinion in *Ollman* in light of the debate that is currently raging between Justice Scalia, on the one hand, and Professors Balkin and Amar, on the other. We will show here that Judge Bork's methodological approach in *Ollman* was strikingly similar to the

---

<sup>23</sup> Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books 2012).

<sup>24</sup> 750 F2d 970 (DC Cir 1984) (en banc).

<sup>25</sup> 376 US 254 (1964).

<sup>26</sup> *Id* at 292.

<sup>27</sup> See *Ollman*, 750 F2d at 995 (Bork concurring) (citations and quotation marks omitted).

<sup>28</sup> See *id* at 1037 (Scalia dissenting in part).

<sup>29</sup> *Id* at 993 (Bork concurring).

approach Professor Balkin calls for in *Living Originalism* and that Professor Amar has called for in several books.<sup>30</sup>

We begin with a small but necessary editorial note. Professor Calabresi was Judge Bork's law clerk for the opinion in *Ollman*, and he agreed with Judge Bork at the time the opinion was written, and thus disagreed with then-Judge Scalia on this one issue—as he still does.<sup>31</sup> (Professor Calabresi also clerked for Justice Scalia from 1987 to 1988 and feels a huge debt of loyalty to both men.) It should be emphasized, of course, that Judge Bork wrote the first draft and every subsequent draft of his opinion in the *Ollman* case using then-law clerk Calabresi only as a sounding board and a research assistant. Judge Bork spent a huge amount of time on his opinion in *Ollman*, and he considered it to be one of his most important judicial opinions. He reiterated his faith in his opinion in *Ollman* in *The Tempting of America: The Political Seduction of the Law*, the book he wrote about originalism and constitutional theory that was published in 1990 after Judge Bork was not confirmed by the Senate in his nomination to the Supreme Court.<sup>32</sup> In sum, Judge Bork's opinion in *Ollman* was rewritten many times, it received a lot of his time and attention, and it was affirmed in the judge's book on the theory of originalism.<sup>33</sup> Given Judge Bork's status as the father of originalism, his opinion in *Ollman* deserves to be better known—especially in light of the current debate over “living originalism.”<sup>34</sup>

### I. THE FACTS AT ISSUE IN *OLLMAN V EVANS*

In *Ollman*, two then-famous conservative op-ed writers, Rowland Evans and Robert Novak, had published an allegedly libelous column in *The Washington Post* and other newspapers about Bertell Ollman, a Marxist political science professor who had been nominated to head the Department of Government and

---

<sup>30</sup> See generally Amar, *America's Unwritten Constitution* (cited in note 23); Amar, *The Bill of Rights* (cited in note 21).

<sup>31</sup> This does not change the fact that Justice Scalia is Professor Calabresi's favorite Supreme Court justice of all time.

<sup>32</sup> Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 335 (Free Press 1990).

<sup>33</sup> See *id.*

<sup>34</sup> For a recent discussion of living originalism, see generally Neil S. Siegel, *Jack Balkin's Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System*, 111 Mich L Rev 931 (2013).

Politics at the University of Maryland.<sup>35</sup> In summarizing the facts of the case, Judge Kenneth Starr's plurality opinion began by noting that Professor Ollman's nomination by the Department's search committee "was duly approved by the Provost of the University and the Chancellor of the College Park campus."<sup>36</sup> It was in light of this impending career move that the Evans and Novak article was published. The court noted that the two authors framed the "crucial question" as:

[N]ot Ollman's beliefs, but his intentions. *His candid writings avow his desire to use the classroom as an instrument for preparing what he calls "the revolution."* Whether this is a form of indoctrination that could transform the real function of a university and transcend limits of academic freedom is a concern to academicians who are neither McCarythite [sic] nor know-nothing.<sup>37</sup>

The court further quoted the two authors as stating that "professors throughout the country troubled by the nomination, clearly a minority, dare not say a word in today's campus climate."<sup>38</sup>

Turning to Evans and Novak's treatment of Professor Ollman and his writings, the court described how the article identified Professor Ollman as a political, not merely philosophical, Marxist.<sup>39</sup> The two authors treated Professor Ollman's two unsuccessful bids to win election to the council of the American Political Science Association as a direct rebuke of this political orientation.<sup>40</sup> Evans and Novak specifically focused on an article written by Professor Ollman, entitled *On Teaching Marxism and Building the Movement*, in which he concluded that most of his students complete his courses with a "Marxist outlook."<sup>41</sup> Drawing on this language, Evans and Novak wrote that

Ollman concedes that will be seen "as an admission that the purpose of my course is to convert students to socialism."

That bothers him not at all because "a correct understanding of Marxism (as indeed of any body of scientific truths)

---

<sup>35</sup> *Ollman*, 750 F2d at 971–72.

<sup>36</sup> *Id.* at 972 (citation and quotation marks omitted).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Ollman*, 750 F2d at 972.

<sup>40</sup> *See id.*

<sup>41</sup> *Id.* at 972–73.

leads automatically to its acceptance.” . . . The “classroom” is a place where the students’ bourgeois ideology is being dismantled. “Our prior task” before the revolution, he writes, “is to make more revolutionaries.”<sup>42</sup>

Evans and Novak next turned their attention to Professor Ollman’s principal work, *Alienation: Marx’s Conception of Man in Capitalist Society*, describing it as “a ponderous tome in adoration of the master (Marxism ‘is like a magnificently rich tapestry’).”<sup>43</sup> This brought the court to Evans and Novak’s defining statement, later identified in the complaint as defamatory:

*Such pamphleteering is hooted at by one political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known. “Ollman has no status within the profession, but is a pure and simple activist,” he said. Would he say that publicly? “No chance of it. Our academic culture does not permit the raising of such questions.”*<sup>44</sup>

This “no status within the profession” statement was the central issue in the subsequent libel lawsuit filed by Professor Ollman against Evans and Novak.

## II. THE OPINIONS OF THE DC CIRCUIT, SITTING EN BANC, IN *OLLMAN V EVANS*

Professor Ollman’s lawsuit against Evans and Novak for libel failed in the United States District Court for the District of Columbia.<sup>45</sup> The district court held that Evans and Novak had merely expressed their own opinion about Professor Ollman and his work, and that mere expressions of political opinion as opposed to statements of fact were entirely protected under the First Amendment.<sup>46</sup> The case was appealed to the DC Circuit, and as stated above the plurality opinion of the court was written by Judge Kenneth Starr. Judge Starr was a Reagan appointee who later served as solicitor general and then as the independent counsel who investigated President Bill Clinton and

---

<sup>42</sup> *Id.* at 973.

<sup>43</sup> *Ollman*, 750 F.2d at 973.

<sup>44</sup> *Id.*

<sup>45</sup> *Ollman v Evans*, 479 F. Supp. 292, 294 (D.D.C. 1979).

<sup>46</sup> *See id.*

Hillary Clinton's involvement in the so-called Whitewater scandal and many other matters.<sup>47</sup>

Judge Starr wrote a somewhat bland but lawyerly plurality opinion for the DC Circuit affirming the district court. Judge Starr's plurality opinion interpreted language in the Supreme Court's 1974 libel law opinion in *Gertz v Robert Welch, Inc*<sup>48</sup> as creating a rule that statements of opinion have almost absolute immunity from defamation actions, whereas statements of fact are legally actionable. Judge Starr thus concluded that the federal courts of appeals were bound by the Supreme Court's *Gertz* precedent to distinguish between statements of fact, which were unprotected, and statements of opinion, which were protected.<sup>49</sup> The former could be the basis of a libel suit, but the latter were constitutionally protected by the First Amendment pursuant to the rule of *New York Times*.<sup>50</sup>

Judge Starr's plurality opinion in *Ollman* established a four-part test to distinguish statements of fact from statements of opinion: first, a judge should analyze the common meaning of the language in the statement in question; second, a judge should analyze whether the statement can be objectively labeled as true or false; third, a judge should analyze the full context of the statement; and fourth, a judge should consider the larger context in which the statement appears.<sup>51</sup> Applying this logic to Professor Ollman's libel law case, Judge Starr held the statements by Evans and Novak, including the "no status within the profession" statement, to be protected speech under the First Amendment as construed by the Supreme Court in *Gertz* because they were expressions of opinion rather than of fact.<sup>52</sup>

Judge Bork concurred separately.<sup>53</sup> He argued that Judge Starr had misinterpreted the US Supreme Court's *Gertz* precedent, and he argued that nothing in the First Amendment nor in the Supreme Court's case law required the lower federal courts to apply a rigid fact-versus-opinion dichotomy. Judge Bork argued that if Judge Starr's rigid four-part test were treated as binding law, then a court would have to categorize Evans and

---

<sup>47</sup> See Susan Schmidt and Michael Weiskopf, *Truth at Any Cost: Ken Starr and the Unmaking of Bill Clinton* 1–9 (HarperCollins 2000).

<sup>48</sup> 418 US 323 (1974).

<sup>49</sup> *Ollman*, 750 F2d at 974–75. See also *Gertz*, 418 US at 339–40.

<sup>50</sup> See *Ollman*, 750 F2d at 974–77.

<sup>51</sup> *Id.* at 979.

<sup>52</sup> *Id.* at 990–92.

<sup>53</sup> *Id.* at 993–1010 (Bork concurring).

Novak's "no status within the profession" statement as a statement of fact and not merely of opinion and therefore as legally actionable.<sup>54</sup> Judge Bork thought that Judge Starr and the plurality of judges who joined his opinion were misapplying their own ill-conceived doctrinal test.

Judge Bork's concurring opinion argued that Judge Starr's test was far too rigid, that it was too simplistic, and that it did not adequately take into consideration the ambiguities of the English language, as well as the variety of factors that must go into a thorough-going First Amendment analysis. Judge Bork rejected a simple fact-versus-opinion dichotomy based on grammatical analysis alone, arguing that there should be no "mechanistic" rule that requires the court to apply a test based on semantics.<sup>55</sup>

Judge Bork argued (to then-Judge Scalia's great consternation) that First Amendment libel law cases like *Ollman* should be decided using a "balancing test" whereby the "totality of the circumstances" of the statement in question might be analyzed to determine whether the statement in question was protected under the First Amendment.<sup>56</sup> Judge Bork said that the courts should evaluate statements such as the one made by Evans and Novak using a balancing test to evaluate the meaning of the statement in its full context and to determine the extent to which punishing the statement would have a negative impact in the real world on First Amendment freedoms.<sup>57</sup> Judge Bork's concurrence thus called for something of an overhaul in the way the courts decide libel cases, and he argued that the judicial subjectivity that might result from a balancing test would disappear over time.<sup>58</sup>

In arguing for a balancing test in *Ollman*, Judge Bork may well have had in mind the doctrine in federal antitrust law—a field that he had revolutionized—of the rule of reason as opposed to the rule of per se illegality. The rule of reason in federal antitrust law cases is a doctrine that the US Supreme Court invented in *Standard Oil Co of New Jersey v United States*,<sup>59</sup> under which only uses of private power that *unreasonably* restrain

---

<sup>54</sup> See *Ollman*, 750 F2d at 994 (Bork concurring).

<sup>55</sup> Id at 1002 (Bork concurring).

<sup>56</sup> See id at 997–98 (Bork concurring).

<sup>57</sup> See id (Bork concurring).

<sup>58</sup> See *Ollman*, 750 F2d at 997–98 (Bork concurring).

<sup>59</sup> 221 US 1 (1911).

trade by reducing consumer welfare violate the antitrust laws.<sup>60</sup> This view is in contrast to dicta in the US Supreme Court's opinion in *United States v Trans-Missouri Freight Association*,<sup>61</sup> which established a rule of per se illegality even when private economic activity has a positive effect on consumer welfare.<sup>62</sup> Modern antitrust law, thanks to Judge Bork,<sup>63</sup> has expanded greatly the number of situations that are analyzed under a rule of reason while greatly contracting areas of per se illegality. Judge Bork was thus thoroughly familiar with the debate over whether courts should follow standards rather than rules in the antitrust law context, and he had come down ardently in antitrust law in favor of standards over rules.<sup>64</sup> This put him at odds with his best friend on the DC Circuit at the time, then-Judge Scalia, who was then and is now a tireless proponent of the superiority of rules to balancing tests.<sup>65</sup>

Judge Bork applied his "totality of the circumstances" balancing test to the First Amendment issue in Professor Ollman's libel lawsuit by arguing that Professor Ollman had quite deliberately placed himself in the arena of "political controversy" by, among other things, running twice as a candidate for election to the council of the American Political Science Association on a platform that stated as a campaign pledge that: "If elected . . . I shall use every means at my disposal to promote the study of Marxism and Marxist approaches to politics throughout the profession."<sup>66</sup> Judge Bork argued, unassailably in our view, that when people enter the political arena in this fashion, they become public figures, and they must expect the rough and tumble of a political life.<sup>67</sup> Moreover, Judge Bork argued it was relevant

---

<sup>60</sup> See id at 63–64.

<sup>61</sup> 166 US 290 (1897).

<sup>62</sup> Id at 327–28.

<sup>63</sup> See generally William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 Wayne L Rev 1413 (1990). See also Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 267–70 (Basic Books 1978).

<sup>64</sup> See, for example, *Rothery Storage & Van Co v Atlas Van Lines, Inc.*, 792 F2d 210, 215–16 (DC Cir 1986).

<sup>65</sup> See, for example, Scalia, 56 U Chi L Rev at 1186–87 (cited in note 17) ("We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them. All I urge is that those modes of analysis be avoided where possible; that the *Rule of Law*, [be] the law of *rules*."). See also *McDonald v City of Chicago*, 130 S Ct 3020, 3052 (2010) (Scalia concurring).

<sup>66</sup> *Ollman*, 750 F2d at 1002–03 (Bork concurring).

<sup>67</sup> See id at 1002 (Bork concurring).

that Evans and Novak wrote the statements in question in an op-ed piece, where readers would expect to find opinionated and controversial claims and would take anything that was said with a large grain of salt.<sup>68</sup>

Looked at in this broader context, Judge Bork classified the “no status within the profession” statement by the well-known political science professor as being mere “rhetorical hyperbole” that was not legally actionable.<sup>69</sup> It must be remembered in this context that Judge Bork had been a law professor at Yale Law School for almost twenty years when he said in his *Ollman* concurrence that he had heard all sorts of preposterous instances of rhetorical hyperbole in the context of faculty-tenure questions.<sup>70</sup> (In his twenty-three years of law teaching, Professor Calabresi has had precisely the same experience.) Ironically, the “no status within the profession” statement was essentially the same preposterous claim that was made when Judge Bork was nominated to the Supreme Court by President Reagan in 1987. Academic critics said then that Judge Bork’s support for *Brown* and his opposition to *Roe* and *Griswold* rendered him “outside of the mainstream” of American constitutional thought.<sup>71</sup> Both the “no status within the profession” claim and the “outside the mainstream” claim are clear examples of rhetorical hyperbole about public figures, which should be protected by the First Amendment.

Then-Judge Scalia dissented from Judge Starr’s plurality opinion, and he called the Evans and Novak op-ed a “cooly crafted libel” (which is also an example of rhetorical hyperbole!).<sup>72</sup> He criticized Judge Starr’s plurality opinion and Judge Bork’s concurrence for three reasons. First, then-Judge Scalia dissented because he saw the plurality and the concurrence as asserting that libel is constitutional so long as it occurs in the realm of political controversy.<sup>73</sup> Second, then-Judge Scalia criticized Judge Bork’s use of a balancing test and a “totality of the circumstances” mode of analysis in First Amendment libel law cases, arguing that such tests are too subjective and will lead to a politicized

---

<sup>68</sup> See id at 1010 (Bork concurring).

<sup>69</sup> Id at 994 (Bork concurring), citing *Greenbelt Cooperative Publishing Association v Bresler*, 398 US 6, 14 (1970).

<sup>70</sup> *Ollman*, 750 F2d at 1008 (Bork concurring).

<sup>71</sup> *Nomination of Robert H. Bork to Be an Associate Justice of the United States Supreme Court*, S No 100-7, 100th Cong, 1st Sess 7 (1987), in Neal Devins and Wendy L. Watson, eds, *3 Federal Abortion Politics: A Documentary History* 184–85 (Garland 1995).

<sup>72</sup> *Ollman*, 750 F2d at 1036 (Scalia dissenting in part).

<sup>73</sup> Id at 1038 (Scalia dissenting in part).

body of case law.<sup>74</sup> Third, then-Judge Scalia criticized Judge Bork's originalist bona fides because Judge Bork called for "continuing evolution of [First Amendment] doctrine."<sup>75</sup> He criticized Judge Bork's argument for evolving existing constitutional doctrine, saying that the curtailment of abusive libel suits addressing issues of political speech is a task for legislatures and not for the courts.<sup>76</sup> This assertion almost certainly implies that then-Judge Scalia thought at the time that the Warren Court's landmark precedent in *New York Times* was wrongly decided, whereas Judge Bork obviously disagreed. In Parts III and IV below, we will first take up the disagreement between Judges Bork and Scalia over the use by judges of balancing tests and then take up the questions of constitutional change and of living originalism.

### III. BALANCING TESTS AND *OLLMAN V EVANS*

Then-Judge Scalia's disagreement with Judge Bork's concurrence in *Ollman* was a classic instance of the debate over whether the courts should leave discretion to future judges or should establish only rules so as to ensure uniformity and predictability. Judge Bork's balancing test inevitably conferred some amount of discretion to future judges, while then-Judge Scalia argued for a rule that would restrict future judges so as to ensure that like cases would be treated alike.<sup>77</sup> Judge Bork argued that each First Amendment case should be decided at the judge's discretion by a balancing test and based on the "totality of the circumstances."<sup>78</sup> Then-Judge Scalia rejected Judge Bork's ad hoc approach, arguing that this leads to a "risk of judicial subjectivity."<sup>79</sup>

Justice Scalia's 1989 law review article *The Rule of Law as a Law of Rules* illuminates then-Judge Scalia's opposition to Judge Bork's opinion in *Ollman*, as well as the broader debate between discretion-conferring balancing tests (or standards) on the one hand and legal rules on the other.<sup>80</sup> In that law review article, Justice Scalia pointed out some important costs of a

---

<sup>74</sup> Id at 1037 (Scalia dissenting in part).

<sup>75</sup> Id at 1038 (Scalia dissenting in part) (quotation marks omitted).

<sup>76</sup> See *Ollman*, 750 F2d at 1038–39 (Scalia dissenting in part).

<sup>77</sup> See id at 1038 (Scalia dissenting in part).

<sup>78</sup> Id at 1001–02 (Bork concurring).

<sup>79</sup> Id at 1038 (Scalia dissenting in part).

<sup>80</sup> See generally Scalia, 56 U Chi L Rev 1175 (cited in note 17).

discretion-conferring balancing-test approach. Justice Scalia argued that balancing tests and judicially enforced standards might not result in like cases being treated alike, which Justice Scalia argued was inherently unjust.<sup>81</sup> Justice Scalia also called on the US Supreme Court to eschew balancing tests in particular, because of the very small number of cases the Supreme Court is able to hear each year in proportion to the total number of cases heard in the United States.<sup>82</sup> Finally, Justice Scalia argued quite characteristically that “[t]here are times when even a bad rule is better than no rule at all” because at least a bad rule renders the law predictable.<sup>83</sup> Justice Scalia does not care for consequentialist legal arguments.<sup>84</sup>

We very respectfully disagree with Justice Scalia and agree with Judge Bork that a certain amount of use of balancing tests and of standards is quite simply inevitable in the law. In our opinion, the text and law of the Constitution and its twenty-seven amendments contain both rules and standards, and we respectfully think that it is impossible for judges to avoid enforcing standards and balancing tests so as not to cross the line that separates law from policy making. For example, we think the Fourth Amendment contains a standard thanks to its ban on “*unreasonable* searches and seizures.”<sup>85</sup> We also think that the Eighth Amendment contains three additional standards thanks to its bans on “[e]xcessive bail,” “excessive fines,” and “cruel and unusual punishments.”<sup>86</sup> We respectfully think that judges simply cannot avoid engaging in balancing when applying standards like these, and that it is part of their job to enforce these constitutional standards.

Judicial enforcements of the nondelegation doctrine and of the Necessary and Proper Clause<sup>87</sup> in our opinion raise precisely the same issue. For example, the Nazis came to power in March 1933 when the German parliament delegated all of its legislative power in the infamous Enabling Act to Chancellor Adolf Hitler, who promptly declared himself to be the leader and führer of

---

<sup>81</sup> See *id.* at 1178.

<sup>82</sup> See *id.* at 1178–79.

<sup>83</sup> *Id.* at 1179.

<sup>84</sup> See Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 22 (Thomson West 2012).

<sup>85</sup> US Const Amend IV (emphasis added).

<sup>86</sup> US Const Amend VIII.

<sup>87</sup> US Const Art I, § 8, cl 18.

Germany.<sup>88</sup> Surely no Supreme Court or constitutional court would or should accept such a statute as the Enabling Act out of a fear that judges might be enforcing a standard or engaging in balancing. In fact, at about the same time the US Supreme Court struck down the centerpiece of President Franklin D. Roosevelt's New Deal on nondelegation doctrine grounds in *A.L.A. Schechter Poultry Corp v United States*,<sup>89</sup> a case that we think is one of the greatest triumphs of judicial review in American history!

Every major liberal, conservative, and libertarian scholar who has written about the Fourteenth Amendment has concluded that the original public meaning of the Privileges or Immunities Clause is the proper basis on which to justify the incorporation of the Bill of Rights and the judicial protection of rights, which are deeply rooted in American history and tradition. Justice Scalia himself originated the "deeply rooted in [American] history and tradition" test for constitutionally protected unenumerated rights in *Michael H. v Gerald D.*<sup>90</sup> Yet eight out of nine Supreme Court justices refused even to respond to the argument that the Privileges or Immunities Clause ought to be revived on originalist grounds, which was succinctly made by Justice Clarence Thomas in *McDonald v City of Chicago*.<sup>91</sup> Why? Because of what is, in our respectful opinion, an inordinate fear of balancing and of judicial subjectivity.

It was sometimes claimed by former Chief Justice William H. Rehnquist that the Equal Protection Clause of the Fourteenth Amendment outlawed only racial discrimination against "persons" even though the text says nothing of the sort and even though the very same word "person" appears in the Due Process Clause of the Fourteenth Amendment,<sup>92</sup> where it clearly applies to persons of every race and gender.<sup>93</sup> Why? Because we think

---

<sup>88</sup> See Gilbert Fergusson, *A Blueprint for Dictatorship: Hitler's Enabling Law of March 1933*, 40 *Intl Affairs* 245, 256 (1964).

<sup>89</sup> 295 US 495, 529 (1935). For a discussion of the nondelegation doctrine's continuing vitality, see generally Cass R. Sunstein, *Nondelegation Canons*, 67 *U Chi L Rev* 315 (2000).

<sup>90</sup> 491 US 110, 123–25 (1989), quoting *Moore v East Cleveland*, 431 US 494, 503 (1977).

<sup>91</sup> 130 S Ct 3020, 3063–68 (2010) (Thomas concurring in part and concurring in the judgment).

<sup>92</sup> US Const Amend XIV, § 1.

<sup>93</sup> See, for example, *J.E.B. v Alabama*, 511 US 127, 154 (1994) (Rehnquist dissenting); *United States v Virginia*, 518 US 515, 560 (1996) (Rehnquist concurring in the judgment).

the Chief Justice was inordinately afraid of judicial balancing and policy making.

Judicial discretion, judicial policy making, and judicial politicization are and have long been a huge problem in American public life, as is illustrated by such infamous judicial decisions as *Dred Scott v Sandford*,<sup>94</sup> but we respectfully think that judges cannot responsibly respond to that problem by declaring that most of the Constitution and its amendments are judicially unenforceable. The disease of judicial policy making by judges ought not to be treated by prescribing lethal doses of cyanide to the patient. This explains why Judge Bork was right in *Ollman* that some degree of balancing and of a rule of reason has to apply even in First Amendment cases, where freedom of speech and of the press are protected relatively absolutely. Judge Bork did “balance” in *Ollman*, and he did protect Evans’s and Novak’s First Amendment freedoms of political speech, which then-Judge Scalia quite sincerely did not think were constitutionally protected.<sup>95</sup> The First Amendment is, relatively speaking, an absolute rule as to political speech, yet Judge Bork voted to protect such speech under a balancing test, and then-Judge Scalia voted not to protect such speech out of a legitimate but, in our view, misplaced fear of judicial discretion coupled with a legitimate desire to have per se rules wherever possible. We agree with Justice Scalia that per se rules have their place in constitutional law, but so do rules of reason. Judge Bork instinctively knew that from antitrust law, and he knew how centrally important political speech was to the protection of First Amendment values.

We think Judge Bork, joined by then-Judge Ruth Bader Ginsburg, was right to balance in *Ollman*. As Judge Bork said in his opinion:

The only solution to the problem libel actions pose would appear to be close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury. This requires a consideration of the totality of the circumstances that provide the context in which the statement occurs and which determine both its meaning and the extent to which making it actionable would burden freedom of speech or press. That, it must be confessed, is a balancing test and risks admitting

---

<sup>94</sup> 60 US (19 How) 393 (1856).

<sup>95</sup> See text accompanying note 72.

into the law an element of judicial subjectivity. To that objection there are various answers. A balancing test is better than no protection at all. Given the appellate process, moreover, the subjective judgment of no single judge will be controlling. Over time, as reasons are given, the element of subjectivity will be reduced. There is, in any event, at this stage of the law's evolution, no satisfactory alternative. Hard categories and sharply-defined principles are admirable, if they are available, but usually, in the world in which we live, they share the problem of absolutes, of which they are a subgenre: they do not stand up when put to the test of hard cases. In the process of "balancing," I will state my reasons fully so that it may be judged whether they are rooted adequately in central first amendment concerns and so that guidance may be given as to how I think cases should be decided in the future.

Two general considerations lead me to conclude that Professor Ollman should not be allowed to try his case to a jury. First, the state of doctrine in this area, if not precisely embryonic, is certainly still developing. Nothing in case law that is binding upon this court requires us to ignore context and the purposes of the first amendment and, instead, to apply a rigid opinion-fact dichotomy and to define the compartments of that dichotomy by semantic analysis. Indeed, the Supreme Court has indicated that we are not to do that. . . . We are required, therefore, to continue the evolution of the law in accordance with the deepest rationale of the first amendment. Second, the central concerns of the first amendment are implicated in this case so that a damage award would have a heavily inhibiting effect upon the journalism of opinion. On the other hand, the statement challenged, in practical impact, is more like an expression of opinion than it is like an assertion of fact. It is the kind of hyperbole that must be accepted in the rough and tumble of political argument.<sup>96</sup>

#### IV. LIVING ORIGINALISM AND *OLLMAN V EVANS*

Judge Bork's statement quoted above that judges had "to continue the evolution of the law in accordance with the deepest

---

<sup>96</sup> *Ollman*, 750 F2d at 997-98 (Bork concurring) (citations omitted).

rationale of the first amendment”<sup>97</sup> triggered a strongly worded response from then-Judge Scalia, who explained that Judge Bork, joined by then-Judge Ginsburg, was engaged in what Professor Balkin might call living originalism.<sup>98</sup> Judge Bork did set out a version of originalism in *Ollman* that is subtly, but not insignificantly, different from the version of originalism that has been propounded for the last twenty-five years by Justice Scalia. We quote at length below from Judge Bork’s disagreement with then-Judge Scalia’s vision of originalism in constitutional interpretation because we think it cuts to the heart of the recent debate over originalism between Justice Scalia and Professors Balkin and Amar:

Judge Scalia’s dissent implies that the idea of evolving constitutional doctrine should be anathema to judges who adhere to a philosophy of judicial restraint. But most doctrine is merely the judge-made superstructure that implements basic constitutional principles. There is not at issue here the question of creating new constitutional rights or principles, a question which would divide members of this court along other lines than that of the division in this case. When there is a known principle to be explicated the evolution of doctrine is inevitable. Judges given stewardship of a constitutional provision—such as the first amendment—whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. There would be little need for judges—and certainly no office for a philosophy of judging—if the boundaries of every constitutional provision were self-evident. They are not. In a case like this, it is the task of the judge in this generation to discern how the framers’ values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application. The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy. The commerce power was established by men who did not foresee the scope and intricate interdependence of today’s economic activities. But

---

<sup>97</sup> Id at 998 (Bork concurring).

<sup>98</sup> See id at 1037–38 (Scalia dissenting in part).

that does not make it wrong for judges to forbid states the power to impose burdensome regulations on the interstate movement of trailer trucks. The first amendment's guarantee of freedom of the press was written by men who had not the remotest idea of modern forms of communication. But that does not make it wrong for a judge to find the values of the first amendment relevant to radio and television broadcasting.

So it is with defamation actions. We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know that they gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of those clauses. Perhaps the framers did not envision libel actions as a major threat to that freedom. I may grant that, for the sake of the point to be made. But if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines? Why is it different to refine and evolve doctrine here, so long as one is faithful to the basic meaning of the amendment, than it is to adapt the fourth amendment to take account of electronic surveillance, the commerce clause to adjust to interstate motor carriage, or the first amendment to encompass the electronic media? I do not believe there is a difference. To say that such matters must be left to the legislature is to say that changes in circumstances must be permitted to render constitutional guarantees meaningless. It is to say that not merely the particular rules but the entire enterprise of the Supreme Court in *New York Times v. Sullivan* was illegitimate.

We must never hesitate to apply old values to new circumstances, whether those circumstances are changes in technology or changes in the impact of traditional common law actions. . . . The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat,

is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances. The evolution of doctrine to accomplish that end contravenes no postulate of judicial restraint. The evolution I suggest does not constitute a major change in doctrine but is, as will be shown, entirely consistent with the implications of Supreme Court precedents.

We now face a need similar to that which courts have met in the past. *Sullivan*, for reasons that need not detain us here, seems not to have provided in full measure the protection for the marketplace of ideas that it was intended to do. Instead, in the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment most certainly would not permit. Taking such matters into account is not, as one dissent suggests, to engage in sociological jurisprudence, at least not in any improper sense. Doing what I suggest here does not require courts to take account of social conditions or practical considerations to any greater extent than the Supreme Court has routinely done in such cases as *Sullivan*. Nor does analysis here even approach the degree to which the Supreme Court quite properly took such matters into account in *Brown*. Matters such as the relaxation of legal rules about permissible recovery, the changes in tort law to favor compensation, and the existence of doctrinal confusion are matters that courts know well. Indeed, courts are responsible for these developments.<sup>99</sup>

The vision of originalism that Judge Bork put forward in *Ollman* was less textualist and less formalist than Justice Scalia's originalism and more functionalist and purposive. For Judge Bork, the role of the judge was to enforce constitutional "principles" faithfully in a modern world that inevitably includes technologies, constitutional amendments, and foundational statutes and precedents of which the Framers of the Constitution and the

---

<sup>99</sup> Id at 995–97 (Bork concurring) (citations omitted).

Fourteenth Amendment were not aware.<sup>100</sup> Judge Bork's originalism, as described above, looks an awful lot to us like the descriptions given to living originalism by Professors Amar and Balkin. This is not to say that Judge Bork would have agreed with Professors Balkin and Amar's conclusions any more than it is to say that they would have agreed with Judge Bork's conclusions. Clearly, Judge Bork and Professors Amar and Balkin did disagree about the constitutional law of abortion and of sexual orientation as well as perhaps on many other subjects, including the Warren Court's decision in *Griswold*.<sup>101</sup> But Judge Bork and Professors Amar and Balkin were fundamentally engaged in a similar enterprise of translating original principles into modern contexts. Judge Bork was less of a formalist than then-Judge Scalia, and he was also less willing to go out of his way to avoid balancing tests and standards for fear of judicial discretion.<sup>102</sup> We greatly admire Justice Scalia's formalism and textualism and have practiced it ourselves. Justice Scalia has made constitutional law a much more rigorous body of law than it was prior to 1986, when he joined the Supreme Court. Justice Scalia is right about 90 percent of the time, which is better than any of his colleagues. But every good idea can only be pushed so far. It is neither desirable nor possible to eliminate standards from constitutional law.

#### CONCLUSION

How well has Judge Bork's concurring opinion in *Ollman* withstood the test of time? To begin with, Professor Ollman petitioned the Supreme Court for a writ of certiorari in the case,

---

<sup>100</sup> For historical examples of the understanding of the phrase "freedom of speech" at the time of the ratification of the First Amendment, see Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 *Georgetown L J* 1057, 1063–79 (2009).

<sup>101</sup> Compare Bork, 47 *Ind L J* at 8 (cited in note 10) (stating that the *Griswold* opinion and concurrences "all failed to justify the derivation of any principle used"), with Akhil Reed Amar, *America's Lived Constitution*, 120 *Yale L J* 1734, 1761 (2011) (describing *Griswold* as "the most illustrious instance of judicial protection of a lived right").

<sup>102</sup> For Justice Scalia's stance on constitutional interpretation, see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 37–47 (Princeton 1997). In his book, Justice Scalia says that the "Great Divide" in theories of constitutional interpretation lies between those who believe in "original meaning" and those who believe in "current meaning." *Id.* at 38. Scalia stands with original meaning, arguing that those who adhere to the theory of the "Living Constitution" and evolutionism are incorrect. *Id.* at 41–44. He says that those who adhere to original meaning know what they are looking for in their interpretation (which is obviously the original meaning of the text), while evolutionists do not know what they are looking for when examining a statute. *Id.* at 45–46.

and the petition was denied, with Justice Rehnquist filing a dissent from the denial of the writ of certiorari that was joined by Chief Justice Warren Burger.<sup>103</sup> Justice Rehnquist's dissent sharply disagreed with Judge Starr's plurality opinion and Judge Bork's concurring opinion in *Ollman*.<sup>104</sup> Shortly after that, Chief Justice Burger retired from the Supreme Court, and President Ronald Reagan promoted Justice Rehnquist to be the new Chief Justice of the United States, with then-Judge Scalia filling Rehnquist's former position as an associate justice. Professor Calabresi knows from his work in the Reagan Administration between 1985 and 1987 why Justice Rehnquist was promoted to chief justice and why Justice Scalia was appointed to the Supreme Court in 1986, instead of Judge Bork, and it will suffice for present purposes to say that he is certain that Judge Bork's opinion in *Ollman* did not have anything to do with the decision to nominate him in 1987 rather than in 1986. We should add as well that notwithstanding Professor Calabresi's agreement with Judge Bork and his disagreement with then-Judge Scalia in the *Ollman* case (for both of whom he worked as a law clerk), then-Judge Scalia was Professor Calabresi's very strongly favored second choice for appointment to the Supreme Court after Judge Bork in 1986, and he is extremely proud of the help he was able to provide that led in part to Justice Scalia's Supreme Court appointment. Then-Judge Scalia was, in 1986 as he is today, brilliant, witty, and a national treasure. Professor Calabresi does not always agree with Justice Scalia, but there is no doubt that Justice Scalia has brought excellence to the Supreme Court.

In *Milkovich v Lorain Journal Co.*,<sup>105</sup> Chief Justice Rehnquist wrote a majority opinion, joined by Justice Scalia, which rejected the four-part test of Judge Starr's plurality opinion in *Ollman* as well as Judge Bork's concurring opinion joined by then-Judge Ginsburg.<sup>106</sup> The *Milkovich* majority said that the DC Circuit had misread the Supreme Court's *Gertz* precedent and that *Gertz* had not been meant to create an absolute protection for expressions of opinion as opposed to statements of fact.<sup>107</sup> Chief Justice Rehnquist argued against absolute protection for

---

<sup>103</sup> *Ollman v Evans*, 471 US 1127, 1127–30 (1985) (Rehnquist dissenting from denial of certiorari).

<sup>104</sup> See *id.* at 1129 (Rehnquist dissenting from denial of certiorari).

<sup>105</sup> 497 US 1 (1990).

<sup>106</sup> See *id.* at 21.

<sup>107</sup> See *id.* at 18.

statements of opinion under the First Amendment because under such a rule statements of opinion that asserted facts would be protected under the First Amendment, which he thought was wrong.<sup>108</sup> Chief Justice Rehnquist took the reader through the history of libel law and argued against “the creation of an artificial dichotomy between ‘opinion’ and fact.”<sup>109</sup>

Justice William J. Brennan Jr’s dissenting opinion in *Milkovich* pointed out that the test established by the majority in that case was comparably as open-ended and imprecise as Judge Starr’s four-part test in the *Ollman* plurality opinion and Judge Bork’s concurrence joined by then-Judge Ginsburg.<sup>110</sup> Justice Brennan’s dissent could be read to imply that Judge Bork’s “totality of the circumstances” analysis or “balancing test” is still relevant and available. Judge Bork’s approach in *Ollman* has in fact been used but not cited in subsequent First Amendment cases.<sup>111</sup> In *Phantom Touring, Inc v Affiliated Publications*,<sup>112</sup> for example, the First Circuit referred to the Supreme Court’s *Milkovich* precedent, but actually applied Judge Bork’s “totality of the circumstances” test from *Ollman*.<sup>113</sup> In *Garrett v Tandy Corp*,<sup>114</sup> the First Circuit, while not citing *Ollman*, analyzed a specific word, arguing that the word could be understood in a number of ways, thus applying the same analysis as Bork had used in *Ollman*.<sup>115</sup>

The real legacy of the Bork concurrence in *Ollman*, however, stems from the fact that his descriptions of the processes of originalism, translation, and doctrinal evolution have largely carried the day in the US Supreme Court in one context after another. In the quarter century since the *Ollman* case was decided, the Bork concurrence looks wiser and more sophisticated than anyone appreciated at the time.

---

<sup>108</sup> See *id* at 18–19.

<sup>109</sup> *Milkovich*, 497 US at 19.

<sup>110</sup> *Id* at 26–27 (Brennan dissenting).

<sup>111</sup> See James E. Stewart and Laurie Michelson, *Pure Opinion: Is Ollman v. Evans Making a Comeback?*, 21 *Comm Law* 9, 11–12 (Winter 2004) (arguing that the court’s logic in *Ollman* has appeared in subsequent cases, and providing examples of subsequent cases in which Judge Bork’s logic or Judge Starr’s four-part test in *Ollman* have been applied).

<sup>112</sup> 953 F2d 724 (1st Cir 1992).

<sup>113</sup> *Id* at 727.

<sup>114</sup> 295 F3d 94 (1st Cir 2002).

<sup>115</sup> *Id* at 103–06.