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Introduction

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Articles

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by
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Welcome everyone, on behalf of Hastings Law School. For those of you who are from out of town, may I say that what we have outside we do not call rain. That is fog and will no doubt disappear by the afternoon.

I had a student some years ago who expressed an insight I still remember. She said that it seemed to her that no matter what a husband and wife argue about, it always boils down to the same question: Why can't you be more like me? The more I think about constitutional law and the sorts of debates that surround it the more it seems to me they boil down to a single question: How do we explain and justify judicial review in a democratic society? Or in mundane terms, if we don't like *Lochner*,[1] but we like *Roe v. Wade*,[2] what do we have to say for ourselves?

In attempting to answer that question, we have developed by now an extraordinarily rich vocabulary. We have rights that are fundamental and not so fundamental. We have public interests that are insubstantial, substantial, and compelling. We have classes that are suspect, nonsuspect, and somewhat suspect. We have scrutiny that is strict, intermediate, and deferential. We have burdens that are insignificant, significant, and undue. We have balancing that is ad hoc, categorical, or a combination thereof. We have fits that are loose, close, and close enough for government work—and sometimes we just have fits. In short, ladies and gentlemen, we have doctrinal chaos.

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1. Lochner v. New York, 198 U.S. 45 (1905).
2. 410 U.S. 113 (1973).

Now, doctrinal chaos may be considered by some to be an inevitable, and perhaps not wholly undesirable, concomitant with the world's and the law's inherent indeterminacy. But for those of us who profess to teach a subject called constitutional law, for lawyers who would attempt to advise clients and construct arguments, and for judges who are in search of guidance—both about what they are supposed to be doing and about a language with which to explain what they have done—the chaos is disconcerting. And, I might add, as I see in the audience representatives of our California courts, that this doctrinal confusion is a problem not only for federal judges and for the federal constitution. In case you forget, state court judges are not only in the federal constitutional business, but in the state constitutional business as well. Moreover, doctrine at the state level is, if anything, even less coherent.

I suspect you will not be shocked if I tell you that based on my own experience and my knowledge of the experience of other judges I have known, judges do not spend a lot of time reading constitutional theory or for that matter thinking about it. But that is quite a different matter from saying that constitutional theory is unimportant to what they do. Theory has a way of infiltrating perspectives, including judges' perspectives. So this conference, which brings together surely some of the most distinguished and talented constitutional scholars ever to grace the podium and ever to focus upon the most fundamental problems concerning the judicial role, is a most heartening development. All of us in attendance are grateful to David Faigman, my colleague, who is the principal inspiration for this conference; to the editorial staff of the *Hastings Law Journal* (and particularly Catherine Rogers, who spoke earlier, who has devoted enormous time to this event); to the participants who have come from distant parts to allow us to partake of their knowledge; and to all of you in the audience who I hope will participate in the discussions.

The title of the conference comes, as I'm sure you recognize, from Justice Scalia's concurring opinion in *Bendix Autolite v. Midwesco Enterprises*.[3] In *Bendix*, the good justice, with characteristic pithiness, sought to demonstrate his low regard for the balancing metaphor. It is a regard which I happen to share, but for quite different reasons. I think the balancing metaphor, quite apart from the questions of commensurability that Justice Scalia raises, is a misleading metaphor if it is intended to describe the actual decisional process, but I'm sure we will

3. *See* Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

hear more about that. Justice Scalia's critique is aimed at the incommensurability of the factors which are said to be weighed in the process and this morning's panels will focus on the balancing metaphor and in part upon that question of incommensurability. This afternoon the focus will shift to the problem of identifying and evaluating government or public interests that are asserted in justification.

Permit me then to introduce Professor Thomas Grey, who will chair the first panel.