

Really now, **WHO MAKES THE LAWS?**
or 3 impossible things before breakfast:
INTEGRITY, AGENCY, & ORATORY or
SORTING OUT THE COMMON/SPECIAL INTERESTS

#2182 23 Sept 87
ELLIOTT THINKSHEETS
309 L. Eliz. Dr., Craigville, MA 02636
Phone 617.775.8008
Noncommercial reproduction permitted

In the past three days I've had a harmonic convergence of experiences that, as in the case of visible stars perceived in a field suggesting the presence of an invisible star, suggest something I've been becoming increasingly aware of, viz, that the agendum under the agenda openly debated in political fora & their media afterglow is this: How does any society, from minimost to maximost, (1) locate the depths of power (call it power's primordial chaos, or infrastructure) & (2) so surface, or go public with, that underlevel as to (a) clarify public discourse & (b) advance both order & freedom?.... This Thinksheet surfaces some of these converging experiences:

1. **USA, CAPE COD, BARNSTABLE:** Last night in ConCom (the Conservation Commission) we the citizenry had a debate about the Revised By-Laws to be presented shortly to the Town Meeting. I was for greater empowerment of Con Com, in the interest of (1) defeating developers' schemes for bureaucratic entanglement of cases so long that developers can present the Town with fait accompli (a ploy impossible if ConCom's teeth can immediately bite the law-violater), & (2) advancing our movement for creating a democratic, all-Cape body having, vis-a-vis the environment of the whole Cape, regulatory as well as planning powers. The developers' slick lawyer took an hour to squirt squid-smoke over the toothful sections of the Revised By-Laws. He concluded by requesting that ConCom substitute, everywhere, "suggestions" in the place of "regulations"--or he'd make it as a motion in Town Meeting. (How nice it would be were property owners, including speculating developers, ~~free~~ to take ConCom's conclusions as mere "suggestions"!) His argument: Town commissions should not make laws; laws should be made at higher levels (the Town, the State, the Federal Government). Specious, for ConCom can't make laws: it wants the Town, by accepting ConCom's Revised By-Laws, to delegate more regulative power to ConCom, thus making both the commission & the Town a more supple, efficient instrument of the people's will.

2. What most disturbs me about Robt. Bork's jurisprudential philosophy is his simplistic location of law-making power purely, simply, literally, in Congress: Laws should be made elsewhere than in the Supreme Court. I agree that lawmaking is primarily, & specifically, the task of Congress, which has the advantage of immediate popular sanction (the members being electees with, thank God, short terms). But the downside of that is the disadvantage that "the people is a great beast" (Hobbes), a sea easily set to raging, a short-fused bomb, an irrational mass time & again misperceiving its own interest. My flow of images is not from the anti-democratic arguments heard in the subrosa proceedings of the 1787 Congress, but the substance is the same: wise government must (1) be responsible to the people & (2) protect itself against the people. The whole flow of our first documents, from the Declar. of Indep. to the Federalist Papers, shows a hermeneutics of suspicion vis-a-vis power, its processes & its "natural" & structural locations. Double suspicion: (1) Of the leaders, whose fallen egos would, Parkinson-like, expand to fill power-voids; & (2) Of the people, who without wise leaders under wise laws ("a government of laws & not of men"), would rip to shreds their common garment of domestic warmth & foreign protection. Instead of a people's war, Philadelphia 1787 had the wisdom (as did thereafter the ratifying states' conventions) to accomodate the two un/beliefs (in the people, belief & unbelief; in human leaders, belief & unbelief), a wisdom arrived at by the war between the aristocrats & the democrats.

3. Ironically, the liberal forces opposing Bork's appointment to the Supreme Court are using an aristocratic argument (means) for the demo-

OVER

cratic objectives (ends) of (1) protecting minority rights recognized in present laws resting on past Supreme Court decisions, & (2) promoting consciousness-raising & toothful regulations expanding the rights of the citizenry over the whole rights range, human-civil-economic. I applaud this preference for aristocracy, but I'm uncomfortable when apologists for it deny that their argumentation is aristocratic--or do they innocently imagine it to be democratic? I'm offended at folks who righteously claim they are occupying the high (democratic) ground above me when in reality they are occupying lower ground in ignorantly or dishonorably claiming to be antiaristocratic-democratic. They are at least as elitist as I am, their elite being the Supreme Court, their hope being that that body will continue to be (to use a word from opponents) "adventurist" or "activist."....Incidentally, trust in the Supreme Court is as far as one in our system can get from "one-man-one-vote," a doctrine humanity always needs protections from (eg: the Senate protects the states from "the people," ie, the House; in the case of the UN, the Security Council is a protective association of the major states against the minor states & thus against the General Assembly). Pure one-man-one-vote = majority domination, so I'm tempted to cynicism when friends push for it in S.Africa & push against it in the USA. Prospering Zimbabwe is structured to protect its white minority (3% of the pop), but Robert Mugabe promises to remove that protection in less than two years--a removal these same friends of mine would consider good news, though they would consider it bad news if protections for minorities were removed by (they say) the seating of Robert Bork on the Supreme Court. How disgusting it is to behold the unprincipled parading themselves as principled! Yes, circumstances alter cases; but that is not factored in when the one-man-one-vote preachers attack their opponents as unprincipled. As has been said in many ways, wise government considers people evil (& thus in need of protection from themselves) & good (& thus able to govern themselves)--a complex dynamic requiring nuanced, flexible response (not dogmas, such as one-man-one-vote). The alternatives to this Calvinism are unworkable: monarchism, which considers man evil; and communism, which considers man good. Here we are heirs of the Bible's wisdom, won through the struggles of Hebrews, Israelites, Jews, early Christians.

4. Who makes the laws? Primarily Congress, but also the Supreme Court & the White House (eg, Irancontragate, but also FDR's lend-lease & A. Lincoln's seizure of emergency powers). Note that the question implies & demands a functional rather than a formal definition of "law." Empirical-existential law is functional: formal law is nothing but the structural verbalizations which, as toothful reflections, provide the base for (1) police-&military action & (2) further (precedent-regarding) codical formulations. In the public semantic soup, always in play vis-a-vis "law" are information, misinformation, & disinformation. A contribution religion scholars, religious leaders, & the religious public can make is to become conscious of, & act responsibly in relation to, this soup. But with precious few exceptions, religious types seem to be in the soup with everybody else.

5. Sympathy for Congress: (1) It must outwit the special interests in the interest of the common interest (2) without so enraging the special interests as to lose the next election. Acting unselfishly, (3) it must legislate courageously, not passing the law-making buck to the Court or to the White House. Acting prudently, the members must navigate a minefield of unrealistic public expectations: (4) INTEGRITY (so down with Hart & Biden); (5) AGENCY (giving "the people" what they want when they want it even when "the people" don't know what they want & are not one "people"); and (5) ORATORY (turning on appropriate rousements without offending anybody)....CONCLUSION: The American system is working well.