The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*

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As things now stand, everything is up for grabs.
Nevertheless:
Napalming babies is bad.
Starving the poor is wicked.
Buying and selling each other is depraved.
Those who stood up to and died resisting
Hitler, Stalin, Amin, and Pol Pot—and General
Custer too—have earned salvation.
Those who acquiesced deserve to be damned.
There is in the world such a thing as evil.
[All together now:] Sez who?
God help us.
—Arthur Leff**

I shall argue that the controversy over the legitimacy of judicial review in a democratic polity—the historic obsession of normative constitutional law scholarship[1]—is essentially incoherent and unresolvable.

The controversy is currently manifested in the body of scholarship that centers on substantive due process decisions such as *Griswold v.*

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** Leff, *Unspeakable Ethics, Unnatural Law,* 1979 DUKE L.J. 1229, 1249.

1. Normative constitutional scholarship assesses decisionmaking authority, competence, procedures, criteria, and results, in contrast to, say, historical or sociological treatments of constitutional law. *See, e.g.,* Grey, *Eros, Civilization and the Burger Court,* LAW & CONTEMP. PROB., Summer 1980, at 83 (treating fundamental rights decisions from a psychoanalytic and sociological perspective).

Connecticut,[2] *Eisenstadt v. Baird*,[3] *Roe v. Wade*,[4] and *Doe v. Commonwealth's Attorney*.[5] The judges and scholars who support judicial intervention usually acknowledge that the rights at stake—variously described in terms of privacy, procreational choice, sexual autonomy, lifestyle choices, and intimate association—are not specified by the text or original history of the Constitution. They argue that the judiciary is nonetheless authorized, if not duty-bound, to protect individuals against government interference with these rights, which can be discovered in conventional morality or derived through the methods of philosophy and adjudication. The critics argue that judicial review may be exercised only to enforce explicit constitutional provisions or to ensure the integrity of representative government. They deny that shared social values or fundamental rights exist or, in any case, that courts can ascertain them.

The fundamental rights controversy deserves a place in a symposium on legal scholarship: It is concerned with issues that lie at the core of contemporary constitutional discourse—judicial methodology, institutional competence, and democratic theory. My own scholarly agenda also influenced this choice of topic. Several years ago, I started work on an affirmative theory of constitutional decisionmaking based on interpretation—broadly conceived—of the history, structure, and values of American society. I began by examining, and rejecting, "originalist" constitutional interpretation (that is, interpretation rooted in the text and original understanding of the Constitution).[6] The publication of John Hart Ely's important proposals for value-neutral "representation-reinforcing" modes of judicial review[7] occasioned a detour, which confirmed my belief that such process-oriented strate-

2. 381 U.S. 479 (1965). *Griswold* held that a Connecticut statute prohibiting the use of contraceptives could not be applied to married couples. Justice Douglas's opinion for the Court relied on "penumbras" of various provisions of the Bill of Rights. Concurring Justices invoked the Ninth Amendment and the due process clause of the Fourteenth Amendment. The Court has not since recurred to penumbral analysis.

3. 405 U.S. 438 (1972). *Eisenstadt* invalidated a statute that, in effect, prohibited distributing contraceptives to unmarried persons. The Court remarked that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.

4. 410 U.S. 113 (1973). *Roe* invalidated a Texas statute prohibiting abortions before as well as after viability.

5. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). *Doe* sustained Virginia's sodomy statute as applied to private consensual homosexual conduct. The Supreme Court affirmed without opinion. Justices Brennan, Marshall, and Stevens voted to note probable jurisdiction and set the case for argument.

6. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980).

7. J. Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

gies were covertly value-laden.[8] As I turned to the possibilities of non-originalist, substantive, value-oriented constitutional adjudication, I became increasingly uncertain about the criteria we[9] implicitly invoke to assess theories of judicial review. In this article I conclude that no defensible criteria exist.

Part I of the article reviews Alexander Bickel's discussion of judicial review in *The Least Dangerous Branch*,[10] which presaged the contemporary fundamental rights controversy and established its parameters. Part II describes the controversy itself and concludes with a critique of fundamental rights theories. Part III argues that the alternative strategies of judicial review proposed by the critics cannot withstand the same kinds of criticisms they levy against fundamental rights adjudication. Part IV shows how the fundamental rights controversy is generated by a liberal theory of democracy, which Part V locates in the broader context of modern liberal ideology.

I. The Legacy of Alexander Bickel

Although *The Least Dangerous Branch* was published in 1962, before the contemporary revival of substantive due process, the fundamental rights controversy cannot be understood without reference to this extraordinarily influential book. Bickel sought both to justify judicial review and to constrain it; in retrospect, he thereby embraced both sides of the controversy.

The difficulty with judicial review, Bickel wrote, is that it is a "counter-majoritarian force in our system":

> [W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens.[11]

Although legislative processes are often imperfectly representative and the judiciary is not politically unresponsive, "nothing . . . can alter the essential reality that judicial review is a deviant institution in the American democracy."[12]

8. Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981).
9. By "we" I refer to normative constitutional law scholars, among whom I include myself, and not to the "Americans," "right-thinking Americans," "civilized peoples," etc., whom we often refer to as "we."
10. A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).
11. *Id.* at 16-17.
12. *Id.* at 17-19.

Bickel's justification for judicial review began with the premise that "the good society not only will want to satisfy the immediate needs of the greatest number but also will strive to support and maintain enduring general values."[13] He proceeded to argue that "courts have certain capacities for dealing with matters of principle that legislators and executives do not possess":[14]

> [M]any actions of government have . . . unintended or unappreciated bearing on values we hold to have more general and permanent interest . . . . [W]hen the pressure for immediate results is strong enough and emotions ride high enough, [legislators] will ordinarily prefer to act on expediency rather than take the long view . . . . Not merely respect for the rule of established principles but the creative establishment and renewal of a coherent body of principled rules—that is what our legislatures have proven themselves ill equipped to give us.
>
> Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society . . . . [Courts can] appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry . . . .[15]

This does not establish "full consistency with democratic theory,"[16] but it blunts the charge that judicial review is antidemocratic. "[I]f the process is properly carried out, an aspect of the current—not only the timeless, mystic—popular will will find expression in constitutional adjudication. The result may be a tolerable accommodation with the theory and practice of democracy."[17]

Despite his expansive description of the judicial function, Bickel's commitment to fundamental rights adjudication was ambivalent and coupled with a strong belief in judicial self-restraint.[18] The contemporary proponents of fundamental rights adjudication tend to embrace his most expansive views. The critics emphasize the "countermajoritarian difficulty" and the need for restraint.

13. *Id.* at 27.
14. *Id.* at 25.
15. *Id.* at 24-26.
16. *Id.* at 27.
17. *Id.* at 28.
18. *See id. passim.* Bickel's concern for judicial restraint became even more dominant in his later writings. *See* A. BICKEL, THE MORALITY OF CONSENT (1975); A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970). *See generally* Purcell, *Alexander M. Bickel and the Post-Realist Constitution,* 11 HARV. C.R.-C.L. L. REV. 521 (1976) (tracing Bickel's work).

II. The Controversy over Methodology and the Source of Values

This part describes the internal discourse of the fundamental rights controversy. It begins with seven representative scholars who favor one or another form of fundamental rights adjudication. Although not all of the proponents approve of all the Supreme Court's fundamental rights decisions, they share the mission of justifying the Court's willingness to engage in this mode of adjudication. I treat the advocates of fundamental rights adjudication in two groups. The first consists of consensus or conventional morality theorists. Dean Harry Wellington of Yale believes that there are no fundamental rights as such, but only a conventional morality to be judicially ascertained and enforced.[19] Michael Perry of Ohio State articulates a similar theory but reaches significantly different results from Wellington.[20] The "rights" theorists in the second group—Laurence Tribe of Harvard,[21] Kenneth Karst of U.C.L.A.,[22] J. Harvey Wilkinson and G. Edward White of Virginia,[23] and David A. J. Richards of New York University[24]—draw on a variety of sources to derive fundamental rights that enjoy some independence from conventional moral views.

In contrast to the profusion of articles supporting fundamental rights adjudication, the scholarly literature contains relatively few unsympathetic analyses.[25] I conclude by discussing the writings of the three most prominent critics of the practice: Raoul Berger, a Charles

19. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

20. Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976) [hereinafter cited as Perry, *Ethical Function*]; Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417 (1977) [hereinafter cited as Perry, *Reflections*]. Professor Perry has since adopted a different theory of judicial review. *See* M. Perry, The Constitution, The Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary (forthcoming 1982) (Court, constrained by Congress's power over the appellate jurisdiction, plays role in nation's moral development).

21. L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978).

22. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

23. Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977).

24. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979) [hereinafter cited as Richards, *Sexual Autonomy*]; Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977); D. RICHARDS, THE MORAL CRITICISM OF LAW (1977) (applying Rawlsian theory to constitutional law).

25. I do not include Richard Epstein's *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, or similar articles criticizing particular decisions but not discussing the methodology of fundamental rights adjudication.

Warren Senior Fellow at Harvard,[26] Robert Bork of Yale,[27] and John Hart Ely of Harvard.[28]

A. *The Proponents*

1. *Two Versions of Conventional Morality*

Harry Wellington. Dean Harry Wellington argues that proper constitutional adjudication closely resembles common-law adjudication. Both consist of reasoning from principles rooted in conventional morality and elaborated through judicial doctrine:

> [W]hen dealing with legal principles a court must take a moral point of view.[29] Yet I doubt that one would want to say that a court is entitled or required to assert *its* moral point of view. Unlike the moral philosopher, the court is required to assert *ours*. This requirement imposes constraints: Judicial reasoning in concrete cases must proceed from society's set of moral principles and ideals . . . . And that is why we must be concerned with conventional morality, for it is there that society's set of moral principles and ideals are located.[30]

Wellington defines conventional morality as "standards of conduct which are widely shared in a particular society."[31] A society's conventional moral "principles" differ from its moral "ideals." Principles impose obligations; ideals are "a guide to the virtuous, inviting him 'to carry forward beyond the limited extent which duty demands.' "[32] Although a society's ideals "help us understand how its moral principles apply in concrete situations,"[33] judges are authorized to implement only its principles. To the claim that contemporary American society is too heterogeneous to share conventional moral principles, Wellington responds:

> Although the sub-culture problem is real, too much can be made of it. Much of the cleavage that results from diversity manifests itself in interest group politics. Diverse groups can pursue different policies while sharing a basically common morality.

26. R. BERGER, GOVERNMENT BY JUDICIARY (1977).
27. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).
28. J. ELY, *supra* note 7.
29. That is, it must base decisions on "principles, general in form and universal in application." Wellington, *supra* note 19, at 243.
30. *Id.* at 244.
31. *Id.* (quoting H.L.A. HART, THE CONCEPT OF LAW 165 (1961)).
32. *Id.* at 245.
33. *Id.*

> More important, the melting pot phenomenon is a real one . . . . The American people have a history and tradition which interact with their common problems to fashion attitudes, values, and aspirations that tend toward a dynamic, but nevertheless relatively cohesive, society, and that make it possible to discern a conventional morality.[34]

To discern a society's conventional morality, one must live in the society, "become sensitive to it, experience widely, read extensively, and ruminate, reflect, and analyze situations that seem to call moral obligations into play. This task may be called the *method of philosophy*,"[35] and it is not adequately performed by legislators:

> The major difficulty for the official charged with the task of determining how the moral principles bear in a particular case is in disengaging himself from contemporary prejudices which are easily confused with moral principles. He must escape the passion of the moment and achieve an appropriately historical perspective . . . .
>
> . . . . [L]egislators, of course, are often professionally concerned with morality . . . . But the environment in which legislators function makes difficult a bias-free perspective. It is often hard for law-makers to resist pressure from their constituents who react to particular events . . . with a passion that conflicts with common morality . . . . Nor is it an easy matter for legislators to find conventional morality when there are well-organized interest groups insisting upon moral positions of their own.[36]

By comparison, the process of adjudication "has some promise of filtering out the prejudices and passions of the moment, some promise of providing the judge with distance and a necessary historical perspective."[37]

Discerning conventional morality differs radically from deriving rights independent of their basis in conventional morality. Wellington characterizes "fundamental rights" as a terminological mistake because it implies that those rights have a special status derived from the Constitution or imposed by the judge "as wise philosopher":[38] "The Fourteenth Amendment, as Holmes has said, does 'not enact Mr.

34. *Id.*
35. *Id.* at 246.
36. *Id.* at 248-49.
37. *Id.* at 248. With virtually no discussion, Wellington dismisses the methods of behavioral science as too expensive and not up to the task of unpacking the complexities of moral issues. *Id.* at 247.
38. *Id.* at 299.

Herbert Spencer's Social Statics.' Nor does it enact Mr. John Rawls's *A Theory of Justice*."[39] Rather, "[t]he Court's task is to ascertain the weight of the principle in conventional morality and to convert the moral principle into a legal one by connecting it with the body of constitutional law."[40]

Wellington applies this approach to the regulation of contraception and abortion. I pass over the first, noting only that he approves of *Griswold* because the Connecticut anticontraceptive law interfered with the conventionally rooted intimacy of the marital relationship,[41] but finds *Eisenstadt* problematic because he doubts whether a consensus protects the sexual intimacy of unmarried couples.[42]

Wellington introduces the abortion issue by establishing the principle that "every person has a right (qualified by context) to decide what happens in or to his body."[43] He posits a hypothetical statute making it a crime to remove a person's gall bladder except to save her life. The law "deprives any person with a diseased gall bladder of his or her liberty without due process of law" because it imposes physical and psychological pain.[44] Although the state has no conceivable interest in insuring the survival of diseased gall bladders, Wellington argues that this is not true of the survival of fetuses. The analogy therefore does not establish that a woman has a constitutional right to an abortion if it will cause the death of the fetus.

Wellington argues that conventional morality nonetheless permits abortion if the fetus was conceived through rape. His analysis proceeds from an example devised by the philosopher Judith Thomson:[45] You are kidnapped and taken to a hospital where a famous violinist who has a fatal kidney ailment is plugged into your circulatory system. If he is disconnected, he will die; otherwise, at the end of nine months he will be cured and you will be unplugged, inconvenienced but unharmed. "Is it morally incumbent on you to accede to that situation?"[46] Thomson answers "no," and Wellington agrees that this is "the only answer that can be defended by an appeal to our attitudes and practices."[47] He also agrees that the "example [cannot] be distinguished from abortion where pregnancy results from rape."[48]

39. *Id.* at 285.
40. *Id.* at 284.
41. *See id.* at 292-95.
42. *See id.* at 296-97.
43. *Id.* at 305.
44. *Id.*
45. Thomson, *A Defense of Abortion*, 1 PHILOSOPHY & PUB. AFF. 47, 48-49 (1971).
46. *Id.* at 49.
47. Wellington, *supra* note 19, at 307.
48. *Id.*

The fact that a majority of states permitted abortions to preserve the mother's life shows that this practice was also supported by conventional morality. But Wellington believes that *Roe v. Wade* went too far in permitting abortions to preserve the mother's physical or mental health. To be sure, the American Law Institute's Model Penal Code would permit such abortions, and the ALI is "some evidence of society's moral position on these questions. It is indeed better evidence than state legislation, for the Institute, while not free of politics, is not nearly as subject to the pressures of special interest groups as is a legislature."[49] The Institute's recommendation does not reflect social consensus, however: "I do not understand how, by noticing commonly held attitudes, one can conclude that a healthy fetus is less important than a sick mother."[50]

Dean Wellington's source of values for constitutional adjudication is conventional morality elucidated by intuitionistic reasoning. By intuitionistic reasoning, I refer to the method of testing a posited outcome (*e.g.*, "a woman has a right to abort a fetus conceived by rape") by comparing it to seemingly analogous situations about which the decisionmaker has clear intuitions (the kidnapped person needn't stay hooked up to the violinist). Philosophers and lawyers often argue about moral and legal principles in this manner.[51] In effect, Wellington employs it as a device for interpolating between conventional moral principles to apply them to particular situations.

Michael Perry. For Professor Perry, as for Dean Wellington, the Court's task is limited to ascertaining and enforcing conventional morality.[52] Judicial review is designed "to correct the occasional myopia, to moderate the occasional excesses of the political processes":[53]

49. *Id.* at 311.

50. *Id.*

51. Of course, the writer takes the chance that the reader will not share her intuition or that, because the mind-experiment is so far removed from the reader's experience, he will not feel much confidence in the validity of the intuition. *See also* Hare, *Abortion and the Golden Rule,* 4 PHILOSOPHY & PUB. AFF. 201 (1975) (criticism of intuitionistic moral reasoning).

52. "[T]he Court should not function as an antimajoritarian agency . . . . Thus, when an individual Justice knows that his own views diverge from those of conventional moral culture, his responsibility is to defer to the public morals." Perry, *Ethical Function, supra* note 20, at 731. Perry criticizes Judge Merhige for basing his dissent in Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.,* 425 U.S. 901 (1976) on a libertarian principle not rooted in conventional morality:

> The dimensions of the right of privacy are determined by conventional morality. Whether or not the sodomy statute challenged in *Doe* violates the right of privacy is a question to be answered not by deductions from a Millian philosophical principle, but by a careful (if inevitably imprecise) inquiry into the contemporary character of conventional American attitudes toward homosexuality.

Perry, *Reflections, supra* note 20, at 439 (footnotes omitted).

53. Perry, *Ethical Function, supra* note 20, at 716 (footnotes omitted).

> A law may remain on the books for so long that it no longer reflects contemporary moral culture . . . . Or a piece of legislation might have been put on the books only because a sufficiently interested minority has lobbied—and perhaps bartered—for it . . . .
>
> Fervent minority lobbying and bartering is not wrong in a pluralist democracy. But when trying to ascertain the content of the public morals, it simply will not do to pretend that minority success is a conclusive index of conventional moral culture.[54]

In performing its function, the Court should look to "cases establishing relevant 'first principles'; cases involving related or analogous issues; evidence indicating a shift in the moral culture, such as recently enacted legislation dealing with an aspect of the issue before the Court; or credible studies of shifts in contemporary social attitudes":[55]

> Ultimately, however, each individual Justice . . . must ask whether particularized claims about that culture resonate with him or her. The Justices, after all, are not unfamiliar with conventional mores and attitudes; in truth it is unlikely that a very unconventional person would become a Justice of the Supreme Court. The collectivity which is the Supreme Court is, in this sense, a jury, and as a matter of political reality the Court is a jury that generally will reflect and mediate the temper of the dominant political and moral culture.[56]

Perry's inquiry differs from Wellington's in two significant respects. First, Perry is explicitly concerned with "public morality": The relevant question is "not whether the conduct is disapproved by conventional morality, but whether conventional morality supports state enforcement of its disapproval through criminal and civil sanctions."[57] Second, Perry's Court holds the legislature to society's moral ideals,[58] while Wellington's enforces only lower level conventional moral principles.

54. *Id.* at 727-28.
55. *Id.* at 730 (footnotes omitted).
56. *Id.* at 730-31 (footnotes omitted).
57. Perry, *Reflections, supra* note 20, at 447. For example, "the issue is not whether conventional morality disfavors sodomy, but only whether it supports treating sodomy as an issue implicating the *public* morals, by criminalizing consensual sodomous conduct by adults in private." *Id.*
58. "American society, though committed to certain politico-philosophical principles and ideals . . . often finds it difficult to order its affairs consistently with those ideals. . . . The courts can serve society well by keeping these ideals in focus, or by bringing them back into focus." *Id.* at 431-32 (footnote omitted).

The two scholars' conclusions differ widely. Unlike Wellington, Perry finds Eisenstadt entirely unproblematic[59] and *Roe v. Wade* quite an easy case.[60] Although Wellington does not discuss antihomosexual legislation, his analysis of the contraception and abortion cases indicates that he would sustain laws prohibiting sodomy. Perry easily concludes that the punishment of homosexual conduct is not grounded in conventional morality. He relies on the widespread nonenforcement of sodomy laws, resolutions of various professional associations calling for the decriminalization of private consensual sexual behavior, and the American Psychiatric Association's decision to remove homosexuality from its list of mental diseases.[61]

2. *Rights Theories*

a. *The Theories.* Laurence Tribe devotes one hundred pages of his treatise to elaborating broadly defined "rights of privacy and personhood,"[62] with the ultimate objective of identifying "those attributes of an individual which are irreducible in his selfhood."[63] In contrast to Wellington and Perry, Tribe explicitly rejects the limitations of social consensus:

> [A]ttempts to ground constitutional rights of privacy or personhood in conventional morality . . . are helpful but have inherently limited power. For we are talking, necessarily, about rights of individuals or groups *against* the larger community, and against the majority . . . . Subject to all of the perils of antimajoritarian judgment, courts—and all who take seriously their constitutional oaths—must ultimately define and defend rights against government in terms independent of consensus or majority will.[64]

Kenneth Karst seeks to establish a freedom of "intimate association," which he defines as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or a family relationship."[65] Karst links the freedom of intimate association to other domains of constitutional doctrine, especially to the equal protection clause:

59. Perry, *Ethical Function*, *supra* note 20, at 732.
60. *Id.* at 733. Public opinion polls indicate "that the Court's implicit evaluation of conventional moral culture vis-a-vis restrictive abortion legislation was essentially accurate." *Id.*
61. Perry, *Reflections*, *supra* note 20, at 447-48.
62. L. TRIBE, *supra* note 21, at 886-990.
63. *Id.* at 889 (quoting 52d A.L.I. ANN. MTG. 42-43 (remarks of Paul Freund)).
64. *Id.* at 896 (footnotes omitted); *cf.* Tribe, *supra* note 21, at 573-74 (discussing sources of constitutional rights).
65. Karst, *supra* note 22, at 629.

> The substantive heart of the Fourteenth Amendment . . . is a principle of equal citizenship, a presumptive guarantee of the right to be treated by the organized society as a respected, responsible, participating member. Some of the values in intimate association are closely bound up with a person's sense of self: caring, commitment, intimacy, self-identification. When the state seriously impairs those values by restricting intimate association, the equal protection clause is at its most demanding, insisting on justifications of the highest order if the state is to be allowed to persist.[66]

Wilkinson and White argue for a freedom of "lifestyle choices," which they expressly limit to matters of "domestic companionship, sexual conduct, and personal appearance."[67] These "choices themselves are intimate"; "for the most part [they] involve little prospect of direct or intentional harm to others"; and they are indispensable "in fulfilling individuality."[68] Although the authors acknowledge that "lifestyle freedoms are not expressly safeguarded" by the Constitution, they write that "the spirit of the Constitution operates to protect them":[69]

> A compelling mission of the Constitution has been to protect sanctuaries of individual behavior from the hands of the state . . . . [T]he Bill of Rights teaches that human dignity is meaningless without a proper measure of personal freedom from governmental interference.
>
> That dignity is seriously diminished unless it includes those choices that most express our uniqueness and individuality. By our style of dress and appearance, our personal associations, our manner of speech, and our sexual behavior we seek to express our uniqueness as humans and to realize our destinies as individual beings . . . . [N]othing is more central to self-realization and fulfillment than these very personal decisions.
>
> . . . The Constitution, as interpreted by the Supreme Court,

66. *Id.* at 663. *See also* Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment,* 91 HARV. L. REV. 1 (1977) (deriving constitutional rights from concept of citizenship).

67. Wilkinson & White, *supra* note 23, at 614.

68. *Id.* at 615. The authors grant that choices involving education and career also express one's individuality; but those "depend greatly upon economic means or personal ability," while "there is a greater universality to lifestyle choices." *Id.* at 615.

> Thus it is ultimately irrelevant to our analysis that the right to choose a career seems easily more important than the right to wear long hair. Career choices simply lack, in our view, the degree of personal intimacy necessary to characterize them as lifestyle choices. Expanding the concept of lifestyle freedom to include all important marketplace decisions having some personal element would eventually weaken the force of a lifestyle right and dilute the protection our most intimate choices ought to receive.

Id. at 615-16 (footnote omitted).

69. *Id.* at 611.

> has increasingly served to protect powerless minorities—casualties of the majoritarian political process . . . . [T]he subjects of lifestyle protection are likely to be persons unable to gain redress through the political process . . . .
>
> The purposes served by protection of lifestyle choices are also strikingly similar to those served by the first amendment. In personal behavior as well as in ideas, protection of individual choices preserves dissent from the tastes of the majority.[70]

David Richards poses the question: "What is the constitutionally permissible content of the legal enforcement of morals?"[71] His answer invokes a liberal theory of human rights traced from Milton, Locke, Rousseau, and Kant, to Ronald Dworkin and John Rawls. Richards asserts that underlying any concept of human rights are "two crucial assumptions: first, that persons have the *capacity* to be autonomous in living their life; second, that persons are entitled, as persons, to equal concern and respect in exercising their capacities for living autonomously."[72] He argues that "[c]ontemporary understanding of the strategic importance to self-respect and personhood of sexual autonomy requires that we . . . guarantee full liberty to enjoy and express love."[73] And he invokes Ronald Dworkin's "rights thesis"[74] to translate these observations into principles of constitutional law: "Under the constitutional order, certain human rights are elevated into legally enforceable rights, so that if a law infringes on these moral rights, the law is not valid."[75] The rights thesis treats rights as "trump cards that, by definition, outweigh utilitarian or quasi-utilitarian considerations and can legitimately only be weighed against other rights":[76]

> This principle explains and justifies the sense in which the constitutional right to privacy is a *right*. The constitutional concept expresses an underlying moral principle resting on the enhancement of sexual autonomy, the self-determination of the role of sexuality in one's life which protects the values foundational to the concept of human rights, equal concern and respect for autonomy. Accordingly, in the absence of countervailing moral argument, laws which determine how one will have sex and with what consequences are constitutionally invalid.[77]

70. *Id.* at 611-13.
71. Richards, *Sexual Autonomy*, *supra* note 24, at 976.
72. *Id.* at 964.
73. *Id.* at 1001.
74. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-90 (1978).
75. Richards, *Sexual Autonomy*, *supra* note 24, at 958.
76. *Id.* at 959.
77. *Id.* at 1006.

Our "constitutional morality" incorporates these principles and, by contrast to conventional morality, is subject to the metaethical constraints of moral reasoning. It follows that

> not everything invoked by democratic majorities as justified by "public morality" is, in fact, morally justified. From the moral point of view, we must always assess such claims by whether they can be sustained by the underlying structure of moral reasoning . . . . In this regard, constitutional morality is at one with the moral point of view.[78]

b. *Competing Interests.* The Court and proponents of fundamental rights adjudication do not regard constitutional rights as absolutely protected under every conceivable circumstance; they are defeasible by strong legitimate governmental interests. Wellington and Perry do not engage in the accommodation or balancing of interests, for the conventional moral view on any particular issue already reflects the balance of competing interests. By contrast, the rights theorists directly address the legitimacy and strength of justifications for interfering with fundamental rights. The two most prominent justifications are promoting public morality and protecting the institutions of marriage and the family.

Tribe's only comment on promoting morality is that "*no* unconventional form of consensual human sexuality can be excluded from the protected sphere *solely* on the ground that it is thought by the majority not to draw on the historically deepest wellsprings of human emotions and instincts."[79] Although he assumes that the state may legitimately seek to protect and strengthen marriages, he doubts that this interest suffices to sustain most regulations of sexual conduct.[80]

78. *Id.* at 977. In discussing Rawls's concept of a "reflective equilibrium," Dworkin emphasizes that where a particular intuition conflicts with general principles to which one adheres, one must act on principle and not ignore the contradiction in the faith that a more sophisticated set of principles will eventually be discovered that will reconcile the conflict. *See* R. DWORKIN, *supra* note 74, at 159-68.

79. L. TRIBE, *supra* note 21, at 947.

80. *Id.* at 946. Tribe is unusually sensitive to the potential threat that fundamental rights adjudication poses to intermediate forms of association:

> [T]he stereotypical "family unit" that is so much a part of our constitutional rhetoric is becoming decreasingly central to our constitutional reality. Such "exercises of familial rights and responsibilities" as remain prove to be *individual* powers to resist governmental determination of who shall be born, with whom one shall live, and what values shall be transmitted.
>
> This shift might well represent an irresistible corollary of changes in the structure of American family life and social and cultural existence. Whatever its cause, the issue it raises most sharply is the recurring puzzle of liberal individualism: Once the State, whether acting through its courts or otherwise, has "liberated" the child—and the adult—from the shackles of such intermediate groups as family, what is to defend

Karst writes that, although freedom of intimate association "does not imply that the state is wholly disabled from promoting majoritarian views of morality,"[81] the state may not invoke this legitimate objective as an excuse to "prevent the expression of a particular idea, or . . . some harm that it fears will flow from the expressive aspects of the conduct . . . ."[82] Karst suggests that most laws regulating intimate association are impermissibly concerned "to regulate the content of messages about sexual preference."[83] He also implies that the state has no significant interest in protecting the family beyond the wishes of its members.

Wilkinson and White find the general promotion of morality a weak justification for regulating lifestyles:

> The privilege of living in a free and open society entails . . . some obligation to tolerate ideas and moral choices with which one disagrees . . . . Moreover, to uphold legal proscriptions on grounds of abstract morality would permit the state to ferret out and ultimately to try and punish offenders upon the assertion, not that the given behavior was socially harmful, but that it was revolting and unnatural. Such a rule of law would invite the majority to act upon its least noble and most prejudiced impulses.[84]

On the other hand, they urge that

> [f]amily life has been a central unifying experience throughout American society. Preserving the strength of this basic, organic unit is a central and legitimate end of the police power. The state ought to be concerned that if allegiance to traditional family arrangements declines, society as a whole may well suffer.[85]

The state's "proper concern derives from the basic functions performed by 'family' units in society: from sexual fulfillment and reproduction, to education and rearing of the young, to economic support and emotional security."[86]

the individual against the combined tyranny of the state and her own alienation? *Id.* at 987-88 (footnotes omitted). *See also id.* at 892 (need for flexibility in defining fundamental rights of personhood).

81. Karst, *supra* note 22, at 627.

82. *Id.* at 657.

83. *Id.* at 658 (referring to anti-homosexual legislation). *See also id.* at 672-73 (incest and cohabitation).

84. Wilkinson & White, *supra* note 23, at 618 (footnote omitted). *But see id.* at 568 ("Law is a vehicle by which democratic majorities reaffirm shared moral aspirations and summon society's allegiance to a common set of behavioral goals.")

85. *Id.* at 595. *See also id.* at 569 (marriage as "a cornerstone of American society").

86. *Id.* at 623.

Richards believes that there is "no constitutional objection to prohibiting clearly immoral acts that threaten the existence of society."[87] But enforcing mere *conventional* morality "is incompatible with the moral theory of human rights implicit in the constitutional order."[88] For the same reason, Richards believes that the state may not require conformity to any particular notion of the family unit.[89]

c. *Applications.* All of the rights theorists find *Griswold* and *Eisenstadt* easy cases, and they ultimately approve of *Roe v. Wade.* Their treatment of laws punishing homosexual conduct illuminates some differences in their approaches.

Tribe believes that private consensual homosexual conduct should be protected because it "is central to the personal identities of those singled out by the state's law."[90] He concedes that the "history of homosexuality has been largely a history of disapproval and disgrace." However,

> it makes all the difference in the world what level of generality one employs to test the pedigree of an asserted liberty claim . . . . It is crucial, in asking whether an alleged right forms part of a traditional liberty, to define the liberty at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct . . . . [T]he tradition of respecting the intimate noncoercive sexual actions of others . . . provides an umbrella capacious enough to subsume homosexual as well as heterosexual variants.[91]

For Karst, "[a]ll of the values of intimate association are potentially involved in homosexual relationships . . . ."[92] "[A]ny effort by the state to forbid intimate homosexual association must be justified by the same sort of heroic state interests that would be necessary to justify forbidding heterosexual marriage or other forms of heterosexual association."[93] Indeed, "the freedom of intimate association demands some important justification for the state's offering the marital status to heterosexuals and denying *any* comparable status to homosexuals."[94]

87. Richards, *Sexual Autonomy, supra* note 24, at 991.
88. *Id.* at 992.
89. *Id.* at 993-96.
90. L. TRIBE, *supra* note 21, at 943.
91. *Id.* at 944-46.
92. Karst, *supra* note 22, at 682.
93. *Id.* at 685. Karst suggests that a state could justify laws penalizing homosexual conduct only by showing that it caused noticeable damage; for example, "that a lesbian mother . . . was unfit to have custody of her child," or that a "male homosexual teacher . . . created special risk of seduction of children assigned to his classes." *Id.* at 685.
94. *Id.* at 684.

Wilkinson and White are troubled by the punishment of homosexual conduct, because the "autonomy right to freely engage in sex combines with a seclusion right not to be disturbed in the private practice of intimate sex to produce a constitutional lifestyle claim of some power."[95] Nonetheless, "state interests of significant strength support a prohibition of homosexuality."[96] Of these, the most significant is protecting the family by preventing homosexuality from becoming a viable alternative to heterosexual intimacy.[97] The authors disagree about the ultimate resolution:

> Mr. Wilkinson would uphold the state's interest in the preservation of the traditional family; Mr. White would desire stronger empirical proof that the state interest is truly put in jeopardy by homosexual practices among consenting adults. Both authors acknowledge the intuitive elements in their judgments.[98]

Richards argues that homosexual conduct is not immoral[99] and doubts that its legalization would have any significant effect on normal family life.[100] "In any event," he concludes, "it is difficult to understand how the state has the right, on moral grounds, to protect heterosexual love at the expense of homosexual love. Equal concern and respect for autonomous choice seem precisely to forbid the kind of calculation that this sort of sacrifice contemplates."[101]

* * *

The rights theorists invoke many of the same sources of values that the consensus theorists employ to ascertain conventional morality. A consensus theorist, however, is more immediately constrained by conventional morality. If Wellington's Court determines that conventional morality permits the punishment of homosexual conduct, it must uphold the legislation. A rights theorist looks to conventional morality as a nonexclusive guide to defining the breadth and contours of higher level moral principles. Once articulated, these prin-

95. Wilkinson & White, *supra* note 23, at 593.
96. *Id.*
97. *Id.* at 595.
98. *Id.* at 596.
99. Richards, *Sexual Autonomy*, *supra* note 24, at 981-89.
100. *Id.* at 994-95. Richards adds that "there is reason to believe that the argument for protecting marriage and the family is hypocritically proposed. If the argument were meant seriously, state laws against fornication and adultery would be vigorously pressed in addition to the anti-homosexuality laws." *Id.* at 996.
101. *Id.* at 996.

ciples operate independently of particular conventional views and may even invalidate laws that are supported by a strong contrary consensus.[102] Although Perry characterizes himself as a conventional moralist, his willingness to hold society to its relatively abstract conventional "ideals" aligns him more with the rights theorists than with Wellington.

B. *The Critics*

In *Democracy and Distrust*,[103] John Hart Ely criticizes seven possible approaches to fundamental rights adjudication: the judge's own values, neutral principles, predicting progress, natural law, reason, consensus, and tradition.[104] Because no contemporary proponent of fundamental rights adjudication relies on the first three approaches,[105] I restrict my comments to Ely's discussions of natural law and reason, directed mainly against the rights theorists, and his critiques of theories based on consensus and tradition. I then consider two other criticisms of fundamental rights adjudication: Robert Bork's argument that the choice of the level of abstraction on which to discern rights is inherently arbitrary, and Raoul Berger's claim that fundamental rights adjudication is prohibited by the text and original understanding of the Constitution.

1. *The Critique of Rights Theories*

Ely's critique of rights theories begins with two historical points. He disputes the claim, made by some proponents, that fundamental rights adjudication is heir to a natural law tradition that has been virtually unbroken since the eighteenth century;[106] and he shows

102. *See, e.g.*, p. 1073 *supra*.
103. J. ELY, *supra* note 7.
104. *Id.* at 43-72.
105. Ely argues against the view that the judge "should use his or her *own values* to measure the judgment of the political branches." *Id.* at 44. Although this position is "seldom endorsed in so many words," he suggests that the application of supposedly objective methodologies often comes down to the imposition of the judge's own values.

Ely also argues that the concept of neutral principles, proposed by Herbert Wechsler as a constraint on all modes of constitutional decisionmaking, does "not provide a source of substantive content." *Id.* at 55.

Finally, in *The Supreme Court and the Idea of Progress*, Alexander Bickel suggested that the Warren Court had tried, and failed, to decide cases according to values it believed would be accepted in the future. *See* A. BICKEL, *supra* note 18. Ely suggests that "there was a good deal of prescription folded into Bickel's description," and comments that the Court is incompetent to predict the future and that there is no justification for "[c]ontrolling today's generation by the values of its grandchildren." J. ELY, *supra* note 7, at 69-70.
106. *See, e.g.*, Perry, *Ethical Function*, *supra* note 20, at 695-700.

how natural law "has been summoned in support of all manner of causes in this country—some worthy, others nefarious—and often on both sides of the same issue."[107] Ely's main argument, however, is a metaethical one: Natural law does not exist in a form that is useful for resolving constitutional disputes:

> "[A]ll the many attempts to build a moral and political doctrine upon the conception of a universal human nature have failed. Either the allegedly universal ends are too few and abstract to give content to the idea of the good, or they are too numerous and concrete to be truly universal. One has to choose between triviality and implausibility . . . ." [O]ur society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles.[108]

Although few contemporary fundamental rights theorists invoke "natural law" as such, some have suggested that judges seek values in "the writings of good contemporary moral philosophers."[109] Ely responds:

> Some moral philosophers think utilitarianism is the answer; others feel just as strongly it is not. Some regard enforced economic redistribution as a moral imperative; others find it morally censurable. What may be the two most renowned recent works of moral and political philosophy, John Rawls's *A Theory of Justice* and Robert Nozick's *Anarchy, State and Utopia,* reach very different conclusions.[110]

And he sardonically proposes a Supreme Court opinion that reads: "We like Rawls, you like Nozick. We win six to three. Statute invalidated."[111]

Although he denies the existence of absolute ethical truths, Ely believes that "we *can* reason about moral issues . . . [by proceeding] from ethical principles or conclusions it is felt the reader is likely already to accept to other conclusions or principles he or she might not previously have perceived as related in the way the writer suggests."[112] But he disputes the claim that "moral judgments are sounder if made dispassionately, and that because of their comparative insulation judges are more likely so to make them."[113]

107. J. ELY, *supra* note 7, at 50.
108. *Id.* at 51-54 (quoting R. UNGER, KNOWLEDGE AND POLITICS 241 (1975)).
109. *Id.* at 58.
110. *Id.*
111. *Id.*
112. *Id.* at 54.
113. *Id.* at 57.

First, he doubts the "alleged incompatibility between popular input on moral questions and 'correct' moral judgment."[114] On the contrary, "our moral sensors function *best* under the pressure of experience. Most of us did not fully wake up to the immorality of our most recent war until we were shown pictures of Vietnamese children being scalded by American napalm."[115]

I find this argument unpersuasive. Granting that a moral judgment is sounder when informed by experience, it also seems more secure after we assimilate the events—after we recollect them in tranquillity—than in their very midst. In any case, Ely's example is not equivalent to the experience of either legislatures or courts. If, however, his point is that our moral sensors respond better to the plights of actual individuals than to abstractions, why are legislators, prescribing the conduct of anonymous people, better situated than courts hearing actual cases?[116]

Second, Ely argues that judicial reasoning results in a "systematic bias in . . . [the] choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class," which constitutes the "reasoning class":[117]

> Thus, the list of values the Court and the commentators have tended to enshrine as fundamental . . . [includes] expression, association, education, academic freedom, the privacy of the home, personal autonomy . . . . But watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing: those are important, sure, but they aren't *fundamental*.[118]

This may overstate the case against some scholarly proponents of fundamental rights adjudication,[119] but it accurately describes others[120] and, more important, perhaps fits the Court itself.[121]

114. *Id.*

115. *Id.*

116. Bickel argued that, while legislatures typically address "abstract or dimly foreseen problems . . . , courts are concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen, everyone's view. It also provides an extremely salutory proving ground for all abstractions . . . ." A. BICKEL, *supra* note 10, at 26.

117. J. ELY, *supra* note 7, at 59 & n.**.

118. *Id.* at 59.

119. *See* D. RICHARDS, *supra* note 24, at 135-91; L. TRIBE, *supra* note 21, at 1116-36; Karst, *supra* note 66, at 59-64 (1977). *But see* Tushnet, *Dia-Tribe* (Book Review), 78 MICH. L. REV. 694 (1980) (criticizing Tribe for not acknowledging socialist implications of constitutional theory). The seminal argument for the constitutional guarantee of material security is Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

120. *See* Wilkinson & White, *supra* note 23.

121. *See* Tushnet, ". . . *And Only Wealth Will Buy You Justice*"—*Some Notes on the*

2. *The Critique of Consensus- and Tradition-Based Theories*

Ely writes that the "idea that society's 'widely shared values' should give content to the Constitution's open-ended provisions . . . turns out to be at the core of most 'fundamental values' positions."[122] Certainly it is at the core of Wellington's and Perry's and plays a role in most rights theories as well.

Ely doubts that American society shares a conventional morality,[123] and argues that even if it did, the consensus is "not reliably discoverable, at least not by courts":[124]

> "The more concrete the allusions to this allegedly timeless moral agreement, the less convincing they become. Therefore, to make their case the proponents of objective value must restrict themselves to a few abstract ideals whose vagueness allows almost any interpretation . . . ." [B]y viewing society's values through one's own spectacles . . . one can convince oneself that some invocable consensus supports almost any position a civilized person might want to see supported.[125]

Ely makes a similar point about the indeterminacy and manipulability of tradition, which "can be invoked in support of almost any cause."[126] He cites the competing American traditions regarding both malign and benign racial discrimination and quotes Garry Wills's pithy remark that "Running men out of town on a rail is at least as much an American tradition as declaring unalienable rights."[127]

Supreme Court, 1972 Term, 1974 WIS. L. REV. 177 (arguing that the Supreme Court favors the well-off). *Compare* Roe v. Wade, 410 U.S. 113 (1973) (state may not punish abortion) *with* Maher v. Roe, 432 U.S. 464 (1977) (state need not fund nontherapeutic abortions for the poor) *and* Harris v. McRae, 100 S. Ct. 2671 (1980) (state need not fund therapeutic abortions for the poor).

122. J. ELY, *supra* note 7, at 63 (footnote omitted).

123. *Id.* at 63, 64.

124. *Id.* at 64.

125. *Id.* at 65-67 (quoting R. UNGER, *supra* note 108, at 78). Ely specifically finds unpersuasive Wellington's analysis of abortions to protect the mother's physical and mental health, *see* pp. 1070-71 *supra,* and cites public opinion polls that contradict the asserted distinction. J. ELY, *supra* note 7, at 66 & 218 n.112.

126. *Id.* at 60.

127. *Id.* He also comments that the "overtly backward-looking character [of tradition] highlights its undemocratic nature: it is hard to square with the theory of our government the proposition that yesterday's majority . . . should control today's." *Id.* at 62. That does not seem responsive to the role that tradition plays in most fundamental rights theories, where it is seldom if ever employed as an independent, or even as the primary, basis for decision, but rather as ancillary support for the existence and stability of a putative *present* consensus. *See* Lupu, *Untangling the Strands of the Fourteenth Amendment,* 77 MICH. L. REV. 981, 1037-41 (1979); Tushnet, *The Newer Property: Suggestions for a Revival of Substantive Due Process,* 1975 SUP. CT. REV. 261.

3. *The Levels-of-Abstraction Problem and the Balancing of Competing Interests*

Ely underscores his argument against tradition as a source for constitutional values by noting the "understandable temptation to vary the relevant tradition's level of abstraction to make it come out right."[128] The levels-of-abstraction problem is pervasive, infecting theories of adjudication based on rights and consensus as well as tradition.

For example, Professor Bork criticizes *Griswold* on the ground that the Court's choice of the level on which to define the protected liberty was necessarily arbitrary. He notes that the Court surely did not adopt the very broad principle that "government may not interfere with any acts done in private."[129] On the other hand, for the Court to define the principle narrowly—"government may not prohibit the use of contraceptives by married couples"—presents problems of "neutral definition":[130]

> Why does the principle extend only to married couples? Why, out of all forms of sexual behavior, only to the use of contraceptives? Why, out of all forms of behavior, only to sex? . . .
>
> To put the matter another way, if a neutral judge must demonstrate why principle *X* applies to cases *A* and *B* but not to case *C* . . ., he must, by the same token, also explain why the principle is defined as *X*, rather than as *X minus*, which would cover *A* but not cases *B* and *C*, or as *X plus*, which would cover all cases, *A*, *B*, and *C*.[131]

This is a powerful criticism. For example, does Judith Thomson's tale of the violinist[132] establish an absolute right to terminate all nonconsensual life-supporting dependencies under all conceivable circumstances? Or does the right depend on the unwilling benefactor's particular relationship to the beneficiary (*e.g.*, strangers, mother-child) and on the severity of the imposition? Does Karst's and Richards's principle of equal respect protect all consensual sexual activity or only sex within a loving intimate association?[133] Why does Wilkinson's

128. J. ELY, *supra* note 7, at 61; *see id.* at 215 n.36 (quoting Tribe's discussion of homosexuality, *see* p. 1078 *supra*).

129. Bork, *supra* note 27, at 7.

130. *Id.*

131. *Id.* at 7.

132. *See* p. 1070 *supra*.

133. Karst would protect casual sexual relationships because, among other things, "they may ripen into durable intimate associations." Karst, *supra* note 22, at 633.

and White's theory extend protection to some lifestyle choices but not others?[134]

The indeterminacy and manipulability of levels of generality is closely related, if not ultimately identical, to the arbitrariness inherent in accommodating fundamental rights with competing government interests. For example, rights theorists must not only speculate about the long-range social consequences of granting various sexual and associational freedoms, but must choose how much *weight* to accord asserted state interests such as protecting the traditional family unit. As Wilkinson and White acknowledge, these judgments are essentially intuitive.[135]

4. *The Ghost of* Lochner *and The Court's Substantive Record*

For critics and proponents alike, *Lochner v. New York*[136] symbolizes the dark side of fundamental rights adjudication. Wellington concedes that the language of the Constitution does not justify "a different scope of review . . . of legislation restricting personal or civil as distinguished from economic liberties";[137] nor does Justice Stone's *Carolene Products* footnote.[138] And the notion that "personal liberties are more important, and in that sense more fundamental, than economic liberties" is simply elitist.[139] Rather, Wellington asserts, the Court's equation of laissez faire economics with personal liberty did not reflect the conventional morality.[140] Perry shares this view,[141] as does Tribe, who writes that if *Lochner* was wrong,

> the reason can *only* be that, in twentieth century America, minimum wage laws, as a substantive matter, are *not* intrusions upon human freedom in any meaningful sense, but are instead entirely reasonable and just ways of attempting to combat economic subjugation and human domination. . . . What was wrong was simply that, as a picture of freedom in industrial society, the one painted by the Justices badly distorted the character and needs of the human condition and the reality of the economic situation. . . . [But] *there is no escape* from the difficult task of painting a better—a morally and economically truer—picture . . . .[142]

134. *See* Wilkinson & White, *supra* note 23, at 614-17 (limits on lifestyle rights); note 68 *supra* (same).
135. *See* p. 1079 *supra*.
136. 198 U.S. 45 (1905).
137. Wellington, *supra* note 19, at 277 (footnote omitted).
138. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
139. Wellington, *supra* note 19, at 279.
140. *Id.* at 282-83.
141. Perry, *Ethical Function*, *supra* note 20, at 702-04.
142. L. Tribe, *supra* note 21, at 453, 455 n.37.

For John Ely, *Lochner* illustrates the Court's intrinsic perceptual limitations:

> It may be . . . that the "right to an abortion," or noneconomic rights generally, accord more closely with "this generation's idealization of America" than the "rights" asserted in . . . *Lochner* . . . . But that attitude, of course, is *precisely* the point of the *Lochner* philosophy, which would grant unusual protection to those "rights" that somehow *seem* most pressing, regardless of whether the Constitution suggests any special solicitude for them.[143]

Lochner is so evocative because we think the Court enforced the wrong values. (It is difficult to imagine *Griswold* playing the same symbolic role.) Implicit in Ely's charge of "Lochnering"[144] is the claim that "the closer the Court has come to overt fundamental-values reasoning the less impressively it has performed."[145] To pursue this critique would require reference to criteria—which Ely and Bork deny exist[146]—for determining the correctness of judicially enforced values. Whether or not the Court's record can be evaluated, however,[147] *Lochner* remains an embarrassment for proponents of fundamental rights adjudication and cause for skepticism about the practice. Tribe writes:

> *Part* of what was wrong with *Lochner* was the Court's overconfidence, both in its own factual *notions* about working conditions and perhaps also in its own normative convictions about the meaning of liberty; at least by the 1920's, if not yet in 1905, the Court should probably have paid more heed to the mounting agreement, if not the consensus, that the economic "freedom" it was protecting was more myth than reality.[148]

But if, in retrospect, the *Lochner* Court was overconfident about its notion of economic liberty in the face of a mounting agreement to

143. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 939 (1973) (footnote omitted).

144. *Id.* at 944.

145. J. ELY, *supra* note 7, at 213 n.66.

146. *See* pp. 1081, 1085 *supra*.

147. One scholar's recent attempt to assess the "record of judicial review" simply relies on the reader's intuitions of what constitute "advances" and "retreats." *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 79-122 (1980). For an earlier review of the Court's work, see Commager, *Judicial Review and Democracy*, 19 VA. Q. REV. 417 (1943).

148. L. TRIBE, *supra* note 21, at 454.

the contrary, how should the proponents' Court respond to the apparent ascendency of a "moral majority"?

5. *The Text and Original Understanding*

Fundamental rights adjudication is open to the criticisms that it is not *authorized* and not *guided* by the text and original history of the Constitution. Among the critics, only Raoul Berger rests his case exclusively on the lack of authorization. Explaining the scope of his argument, Berger writes:

> Nor will I deal with whether or not judicial review is antidemocritarian, for if judicial review of the Warrenite scope was "authorized" by the Constitution, its antidemocratic nature has constitutional sanction. . . . What is of paramount importance . . . is that the Court "is under obligation to trace its premises to the charter from which it derives its authority . . . ." [T]he "subjectivity" involved in making value choices plays no role in my view of the meaning of the Fourteenth Amendment . . . .[149]

Berger's condemnation of fundamental rights adjudication is incidental to an attack on virtually every significant decision under the Fourteenth Amendment—including *Brown v. Board of Education*[150]—as inconsistent with the adopters' limited intent to incorporate the Civil Rights Act of 1866 into the Constitution. The academic response to Berger has focused on his analysis of the equal protection clause, arguing that it is methodologically and factually problematic.[151] If the Court's race decisions are deeply rooted in the text and original history of the Constitution, however, fundamental rights adjudication seems less secure. Indeed, the proponents' originalist claims tend to be perfunctory at best.[152]

149. R. BERGER, *supra* note 26, at 284-85 (quoting Ely, *supra* note 143, at 949) (footnotes omitted).

150. 347 U.S. 483 (1954).

151. *See, e.g.*, Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History* (Book Review), 54 N.Y.U. L. REV. 651 (1979). *See generally Symposium*, 6 HASTINGS CONST. L.Q. 403 (1979) (symposium on Raoul Berger's theory of the Fourteenth Amendment); *cf.* Brest, *supra* note 6 (discussing problems of originalist constitutional interpretation).

152. For example, though Wellington writes that "the power of judicial review can be exercised only when the principle the Court employs is related to constitutional text," Wellington, *supra* note 19, at 267, he never discloses the textual basis for his consensus theory. Richards also implies that fundamental rights adjudication is grounded in the text of the Constitution, but does not specify its textual basis. Richards, *Sexual Autonomy*, *supra* note 24, at 963-64. The proponents' claims of authority from the original understanding tend to be conclusory and oblique. For example, Perry writes:

> The Founding Fathers and, "perhaps by emulation," those who were responsible for the fourteenth amendment, intended that the specific content of the vague, ethical norms of the Constitution, including due process, remain to some extent an open question to be answered by each generation, for each generation . . . . [I]t

Ironically, Ely is quite ready to acknowledge the originalist credentials of fundamental rights adjudication:

> [T]he most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language—that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding.[153]
>
> . . . [T]he Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution . . . .[154]

For Ely, however, this is "[not] a question on which history can have the last word":[155]

> If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them.[156]

Bork likewise is concerned with the absence of guidance. From the premise that all values are intrinsically subjective, he concludes:

> Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.[157]

* * *

This, then, is the controversy over the sources of fundamental rights and the methods for ascertaining them. The critics are, of course, right

simply will not do to suggest that those who choose to maintain and apply the [public welfare] limit . . . are acting without any constitutional basis. . . . [T]he idea that due process imposes a public welfare limit on the police power is a recurrent, basic theme of American constitutional theory, and one with eminently respectable credentials.

Perry, *Ethical Function*, *supra* note 20, at 706-07 (footnotes omitted). *See also* L. TRIBE, *supra* note 21, at 569-72 (Constitution guarantees rights not specified in text); Richards, *Sexual Autonomy*, *supra* note 24, at 960 (same).

153. J. ELY, *supra* note 7, at 28; *cf. id.* at 14 (Ninth and Fourteenth Amendments invite non-textually-based decisionmaking).

154. *Id.* at 38.

155. *Id.* at 41.

156. *Id.*

157. Bork, *supra* note 26, at 8.

that fundamental rights adjudication is not guided by the text or original history of the Constitution. The interesting question is whether the Court has access to other defensible sources of values.

Even assuming that general principles can be found in social consensus or derived by moral reasoning, the application of those principles is highly indeterminate and subject to manipulation. The point is partly illustrated by disagreements among theorists employing essentially the same methodology: Wilkinson would uphold sodomy laws, while White, Karst, Tribe, and Richards would strike them down; both Wilkinson and White would uphold adultery laws,[158] while Tribe finds them constitutionally doubtful.[159] Even when the scholars are in substantial agreement, however, their conclusions are not obviously determined by their sources and methods. And, ironically, the more sensitive a judge is to the complexities of the social values at stake, the greater the indeterminacy, the scope of discretion, and opportunity for manipulation.[160]

III. The Critics Against Themselves

The critics are not merely critics. They have their own theories, which encompass a range of alternatives to fundamental rights adjudication: Raoul Berger and Robert Bork are both originalists—the former a "strict intentionalist," the latter a constrained "moderate originalist."[161] John Ely proposes a substantially nonoriginalist approach to judicial review, limited to the purpose of ensuring the integrity and representativeness of the legislative process.

I shall argue that none of the critics' affirmative theories can withstand the force of his own criticisms. This casts a somewhat different light on the conclusions of the preceding section and begins to il-

158. *See* Wilkinson & White, *supra* note 23, at 599.

159. *See* L. TRIBE, *supra* note 21, at 946.

160. Consider, for example, the difficulties of heeding Tribe's caution that

> a court must decide, in this society and at this time, whether a person's choice to act or think in a certain way should be fundamentally protected against coercion by law, recognizing that the alternative in some situations may be coercion by economic or peer pressure and, in others, more meaningfully undominated choice. And to add to the difficulty of the task: neither judges nor legislators nor citizens should permit decisions of this kind, focused as each must be upon its precise context, to be taken without attention to the drift of their cumulative result. Those charged with the responsibility of choice must avoid too myopic an adherence to the matter at hand, recognizing that the ultimate results of incremental change might be wholly alien, and perhaps profoundly objectionable, to those who acquiesce step by step.

Id. at 892.

161. *See* Brest, *supra* note 6, at 222-24 (defining these terms).

luminate the contradictions inherent in the fundamental rights controversy.

A. *Raoul Berger's Strict Intentionalism*

For Berger, the only relevant question is how the adopters of the Fourteenth Amendment would have decided a particular case had it arisen in 1868.[162] He is not concerned with their interpretive intentions (the canons of construction by which they intended their provisions to be interpreted) or with the level of abstraction on which they intended their provisions to be read—for example, whether they intended only to establish general principles or, at the other extreme, to bind future interpreters to their particular views on each issue that might arise under the provision.[163]

Berger's indifference to interpretive intent and the intended level of abstraction undermines the very premise of his theory—the obligation of fidelity to the adopters' intentions—by confusing their intentions with their mere personal *views*.[164] There is no reason to suppose that the adopters of the Fourteenth Amendment intended its provisions to be interpreted by Berger's strict intentionalist canons. If they adverted to the matter at all, the adopters more likely intended a textualist approach such as the "plain meaning rule."[165] Thus, fidelity to their intentions may require an interpreter to eschew detailed inquiry into the adopters' particular views and look instead to the text, perhaps understood in the light of their general purposes in enacting the provision.[166]

In fact, we cannot determine the adopters' interpretive intent and often cannot even discover their substantive views with much particularity. Like other formalist strategies, strict intentionalism pretends to constrain constitutional decisionmaking while inviting, if not demanding, arbitrary manipulation of sources and outcomes.

B. *Robert Bork's Constrained Moderate Originalism*

Robert Bork believes that all constitutional adjudication must proceed from the text and purposes of particular provisions, but his approach is more expansive than Berger's. For example, Bork approves of *Brown*. He writes that, although the Court cannot ascertain the

162. R. BERGER, *supra* note 26, at 1-19.
163. *See* Brest, *supra* note 6, at 212, 215-17.
164. *See id.* at 220, 227 n.87.
165. *See id.* at 215-16.
166. *See, e.g.*, p. 1091 *infra*.

precise intentions of the adopters of the Fourteenth Amendment, there is

> one thing the Court does know: it was intended to enforce the core idea of black equality against government discrimination. And the Court, because it must be neutral, cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that applies to all cases.[167]

Bork requires the Court to adopt a "general principle of equality," not because the text and history of the Fourteenth Amendment require it—they obviously don't—but to prevent the Justices from imposing their own value choices. The very adoption of such a principle, however, demands an arbitrary choice among levels of abstraction. Just what *is* "the general principle of equality that applies to all cases"? Is it the "core idea of *black* equality" that Bork finds in the original understanding (in which case Alan Bakke did not state a constitutionally cognizable claim),[168] or a broader principle of *"racial* equality" (so that, depending on the precise content of the principle, Bakke might have a case after all), or is it a still broader principle of equality that encompasses discrimination on the basis of gender (or sexual orientation) as well?[169] Why, as Bork asks in his discussion of *Griswold, X* rather than *X minus* or *X plus*?[170]

Bork encounters the same difficulty in his attempt to limit the protection of the First Amendment to "explicitly political speech" rather than, say, "speech."[171] The fact is that all adjudication requires

167. Bork, *supra* note 26, at 14-15.

168. Regents of University of Cal. v. Bakke, 438 U.S. 265 (1978). *But see* Bork, *The Unpersuasive Bakke Decision,* Wall St. J., July 21, 1978, at 8, cols. 3-6.

169. *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976).

170. Curiously, although Bork wishes to adopt a per se equal protection standard to assure neutrality of application, he prefers Justice Stewart's highly discretionary "systematic frustration of the will of a majority" standard in the reapportionment cases, *e.g.,* Reynolds v. Sims, 377 U.S. 533 (1964), to the Court's one-person-one-vote standard. Bork, *supra* note 27, at 18-19. *Compare* M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 245-47 (1964) (Court should take account of realities of political contexts) *with* Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science,* 20 STAN. L. REV. 169, 246-47 (1968) (political realities beyond judiciary's institutional competence).

171. *See* Bork, *supra* note 27, at 20-35. He notes that the text and history of the Amendment provide scant guidance, but finds a rationale implicit in the structure of the Constitution: A representative democracy "would be meaningless without freedom to discuss government and its policies." *Id.* at 23. He then considers Alexander Meiklejohn's and Harry Kalven's view that this rationale extends to all "[f]orms of thought and expression within the range of human communications from which the voter derives the

making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral. No form of constitutional decisionmaking can be salvaged if its legitimacy depends on satisfying Bork's requirements that principles be "neutrally derived, defined and applied."[172]

C. *Ely's "Participation-Oriented, Representation-Reinforcing" Judicial Review*

John Ely's theory of constitutional adjudication also aspires to judicial neutrality in the choice and application of values. Although Ely claims originalist support for his theory, it is essentially unconstrained by the text and original understanding. His theory builds on Justice Stone's suggestion, in footnote 4 of *Carolene Products*,[173] that the judiciary should actively scrutinize legislation (1) "which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or (2) which is based on "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." Ely's thesis is that,

> unlike an approach geared to the judicial imposition of "fundamental values," the representation-reinforcing orientation . . . is not inconsistent with, but on the contrary is entirely suppor-

knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express." *Id.* at 26 (quoting Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255). Bork rejects Kalven's "invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain":

> I agree that there is an analogy between criticism of official behavior and the publication of a novel like *Ulysses*, for the latter may form attitudes that ultimately affect politics. But it is an analogy, not an identity. Other human activities and experiences also form personality, teach and create attitudes just as much as does the novel . . . . If the dialectical progression is not to become an analogical stampede, the protection of the first amendment must be cut off when it reaches the outer limits of political speech.

Id. at 27. Bork therefore would draw the line at "explicitly political speech." But if there exist plausible alternative theories of free expression, or alternative applications of his theory, then his criterion fails his own test of neutrality. Professor Scanlon offers an alternative theory premised on a notion of individual autonomy that treats each person as sovereign in deciding what to believe. Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY & PUB. AFF. 204 (1972). Dean Wellington argues that *only* a nonconsequentialist theory of this sort can be neutrally applied. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1120-21 (1979). Even if one adopts Bork's instrumental rationale, however, there are alternative standards no less *neutral* than "explicitly political speech"—for example, just plain "speech."

172. Bork, *supra* note 27, at 23.

173. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

> tive of, the American system of representative democracy. It . . . [is devoted] to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent.[174]

Ely approves of the Court's reapportionment and other voting-rights decisions; he urges the broad protection of political expression; and he argues for vigorous scrutiny of classifications that disadvantage politically powerless minorities.

Ely's theory of suspect classifications, the book's most significant affirmative contribution, is vulnerable to the same criticisms that he finds fatal to fundamental rights adjudication—vulnerable precisely because it turns out to be a fundamental rights theory, albeit somewhat disguised.[175]

Under Ely's theory, essentially any law disadvantaging a discrete and insular minority that is the object of prejudice is "suspect" and therefore invalid unless it closely "fits" legitimate governmental objectives.[176] This strict scrutiny is justified by two features of prejudice: (1) prejudice is intrinsically wrong—"[t]o disadvantage a group essentially out of dislike is surely to deny its members equal concern and respect";[177] and (2) prejudice distorts legislators' assessments of the costs and benefits of proposed decisions because it induces them to overestimate both the validity of stereotypes disfavoring minorities and the costs of more individualized treatment.[178] Ely asserts that judicial intervention in these cases promotes "participation." He grudgingly concedes that participation may be a value but claims that it

174. J. ELY, *supra* note 7, at 101-02. Curiously, he criticizes consensus theories, which are also designed to remedy defects of representative process, on the ground that "it makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority." *Id.* at 69.

175. Note that Ely's Court must make some value choices even apart from the suspect classification theory, simply in order to protect electoral participation and freedom of expression. For example, it must decide just how representative a government must be and who should be included in the political community. *Compare* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Douglas, J.) (striking down poll tax) *with id.* at 686 (Harlan, J., dissenting). The Court must also balance representation-reinforcing interests against competing social interests, such as preventing riots and espionage, and ensuring that voters possess adequate maturity, loyalty, and interest in the outcome. *Compare, e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (invalidating statute restricting vote in school district elections to owners of taxable property and parents of school children) *with* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (upholding apportionment of vote in public water district in proportion to property ownership). These decisions require assessing the strength of the competing interests, and it is not evident how a Court can do that without relying on social consensus or fundamental values.

176. *See* J. ELY, *supra* note 7, at 145-48.

177. *Id.* at 157.

178. *Id.* at 155-57.

is quite different from the substantive values involved in the theories he criticizes.[179]

Even assuming that participation is a privileged value, however,[180] Ely's theory still requires the court to make unprivileged value choices.[181] Ely asserts that a legislature may not disadvantage people merely because it dislikes them. This sounds like fundamental rights talk. Certainly, a hard-core utilitarian could not distinguish gratifying the majority's hostile (or altruistic) desires from gratifying their aesthetic, moral, or any other kinds of desires.[182] Ely's equal protection theory would collapse, however, if gratifying the majority's dislike for a racial minority were treated as legitimate. At the same time, Ely wishes to permit the legislature to act hostilely toward groups such as burglars.[183] To maintain this distinction. Ely argues that, although gratifying the majority's *dislike* is not a legitimate goal, satisfying its *moral beliefs* is perfectly permissible.

This is where things get tricky. For example, Ely believes that laws disadvantaging homosexuals are suspect because homosexuals are the objects of widespread prejudice.[184] But he would permit a legislature to punish homosexual conduct "due to a bona fide feeling that it is immoral":[185]

> This doesn't mean that simply by incanting "immorality" a state can be permitted successfully to defend a law that in fact was motivated by a desire simply to injure a disfavored group of persons.

179.

> If the objection is . . . that one might well "value" certain decision procedures for their own sake, of course it is right: one might. And to one who insisted on that terminology, my point would be that the "values" the Court should pursue are "participational values" of the sort I have mentioned, since those are the "values" (1) with which our Constitution has preeminently and most successfully concerned itself, (2) whose "imposition" is not incompatible with, but on the contrary supports, the American system of representative democracy, and (3) that courts set apart from the political process are uniquely suited to "impose."

Id. at 75 n.* *See also* pp. 1102-04 *infra* (constrained utilitarian argument for representation-reinforcing judicial review).

180. I am not persuaded by the arguments quoted in the preceding footnote. The claim that the Constitution is preeminently concerned with participational values is based on a selective and idiosyncratic reading of the document. *See* Lynch, Book Review, 80 COLUM. L. REV. 857, 859-62 (1980). In any case, participation is only half the story of democracy, the other half being the protection of individual rights. *See* pp. 1096-1105 *infra.*

181. For a more detailed discussion of some of the points that follow, see Brest, *supra* note 8.

182. Indeed, Ely criticizes Dworkin for excluding "external preferences" from his utilitarian calculus. Ely, *Constitutional Interpretivism: Its Allure and Impossibility,* 53 IND. L.J. 399, 407 & n.32 (1978).

183. J. ELY, *supra* note 7, at 154.

184. *Id.* at 163.

185. *Id.* at 256 n.92.

> . . . The question . . . reduces to whether the claim is credible that the prohibition in question was generated by a sincerely held moral objection to the act (or anything else that transcends a simple desire to injure the parties involved).[186]

Ely forgets that racial segregation and antimiscegenation laws, as well as stereotypical gender classifications, have often been based—perhaps often sincerely—on the supposed immorality of racial intermingling and intermarriage, or of women not fulfilling their missions as mothers and wives. In short, a "conscientious objection" exception for discrimination based on our moral beliefs poses nearly the same threat to Ely's theory as treating dislike and hostility as legitimate objectives.

The theory also presents methodological difficulties. When the government defends a law on moral grounds, the Court must determine whether the belief is actually "moral" and, if so, how "sincerely" it is held. Ely does not suggest how this can be done, and for good reason: In his critique of fundamental rights adjudication he denies that consensus exists on such questions and asserts that a court can identify moral beliefs only by employing dubious "laundering devices."[187]

* * *

Although the fundamental rights proponents' and critics' theories of constitutional adjudication presented in this article are not exhaustive, they are broadly representative. The proponents span the range of nonoriginalist adjudication; Berger and Bork typify the strategies of strict and moderate originalism; and Ely's representation-reinforcing theory lies within a tradition of process-oriented modes of judicial review.[188]

186. *Id.*

187.

> Such techniques are evident in the work of consensus theorists generally, and are sometimes made explicit. Ronald Dworkin argues that community values must be refined by the judge in a way that removes prejudice, emotional reaction, rationalization, and "parroting," and in addition should be tested for sincerity and consistency . . . . [Wellington writes that] courts "must be reasonably confident that they draw on conventional morality and screen out contemporary bias, passion, and prejudice, or indeed, that they distinguish cultivated taste from moral obligation."

Id. at 67 n.* (citations omitted).

188. *See, e.g.*, L. LUSKY, BY WHAT RIGHT? (1975); Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979); Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980); Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

My point so far is not that any of these theories are untenable, but that all are vulnerable to similar criticisms based on their indeterminacy, manipulability, and, ultimately, their reliance on judicial value choices that cannot be "objectively" derived from text, history, consensus, natural rights, or any other source. No theory of constitutional adjudication can defend itself against self-scrutiny. Each critic's assessment of the alternative theories seems rather like an aesthetic judgment issued from the Warsaw Palace of Culture.[189]

At this point, a partisan of representative democracy might be tempted to discard judicial review entirely, or retreat to the extraordinarily permissive standards of the minimum rationality tests.[190] The following section argues, however, that abandoning a rights-oriented theory of judicial review is as problematic as any alternative.

IV. The Contradictions of Madisonian Democracy

In discussing what he terms the dilemma of Madisonian democracy,[191] Professor Bork brings us closer to the central issue of the fundamental rights controversy:

> A Madisonian system is not completely democratic, if by "democratic" we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for no better reason [than] that they are majorities. . . . The model also has a countermajoritarian premise, however, for it assumes that there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.
>
> Some see the model as containing an inherent, perhaps an insoluble, dilemma. Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor minority can be trusted to define the freedom of the other.[192]

189. A (genuine) Polish joke goes: "Why is the best view of Warsaw from the Palace of Culture?" "Because that's the only place in Warsaw where you can't *see* the Palace of Culture."

190. *See* Bennett, *supra* note 188 (discussing rationality standards). This path is not open to an originalist. *See* Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

191. *See* R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

192. Bork, *supra* note 27, at 2-3.

The parties to the fundamental rights controversy resolve the tension between majority rule and minority rights in divergent ways. This section argues that their resolutions are determined by the ways they frame the issues in the first instance, and that the Madisonian dilemma is in fact unresolvable.

Ely echoes Alexander Bickel's characterization of judicial review as a "deviant institution in the American democracy,"[193] while some proponents treat the state's infringement of individual rights as at least as deviant in a constitutional democracy. For example, David Richards applauds the "intrinsically countermajoritarian" nature of judicial review as an acknowledgment of "ideas of human rights that, by definition, government has no moral title to transgress."[194]

Their different premises explain why Ely and Richards reach opposite conclusions. But what underlies the premises themselves? Ely and Bork profess to be Madisonian democrats, not populist majoritarians. Why, then, do they view judicial review as "deviant" rather than as integral to the democratic order? And why do the proponents ignore or give so little weight to majoritarian decisionmaking? Jesse Choper's recent book, *Judicial Review and the National Political Process*,[195] makes transparent some recurring confusions about democracy, and thus helps illuminate these questions.

Professor Choper's "major theme is that although judicial review is incompatible with a fundamental precept of American democracy—majority rule—the Court must exercise this power in order to protect individual rights, which are not adequately represented in the political processes."[196] Initially, he equates democracy with pure majoritarianism;[197] he asserts that "the federal judiciary . . . is the least democratic of the three branches"[198] and that judicial review is "[n]ot merely antimajoritarian . . . [but] seems to cut directly against the grain of traditional democratic philosophy."[199] Choper then acknowledges a Madisonian concept of democracy, which includes some restraints on majority rule.[200] One might hence argue that the Court "constitutes 'a working part of the democratic political life of the nation' because the power of judicial review has been historically exercised to

193. A. BICKEL, *supra* note 10, at 18; *see* J. ELY, *supra* note 7, at 4-5, 67.
194. Richards, *Sexual Autonomy*, *supra* note 24, at 958.
195. J. CHOPER, *supra* note 147.
196. *Id.* at 2.
197. *Id.* at 5.
198. *Id.*
199. *Id.* at 6.
200. *Id.* at 6-7.

restrain the majority from impinging on the constitutionally designated liberties of the individual, thus to assure those ultimate values that are integral to democracy."[201] Choper counters:

> The difficulty with this position is that it commingles substance with procedure. The Supreme Court does advance democratic values by rejecting political action that threatens individual liberty. . . . But irrespective of the *content* of its decisions, the *process* of judicial review is not democratic because the Court is not a politically responsible institution. . . . Although the Supreme Court may play a vital role in the preservation of the American democratic system, the procedure of judicial review is in conflict with the fundamental principle of democracy —majority rule under conditions of political freedom.[202]

Choper also rejects the "most sophisticated" argument, that "the so-called political branches . . . are by no means as democratic as standard belief would hold and that the Court is much more subject to the popular will than conventional wisdom would grant."[203] All things considered, "the Supreme Court is not as democratic as the Congress or President, and the institution of judicial review is not as majoritarian as the lawmaking process."[204]

A. *The Choice Between a Systemic and a Particularistic Perspective and Some Problems of the Second Best*

Choper is pervasively ambiguous about whether the criterion of "being democratic" is applicable to an entire political system or to particular institutions within it. Although he suggests that judicial review might promote democracy by protecting individual rights, he continues to voice the concern that "the Court" and "judicial review" are "the least democratic" of our political institutions. (It is as if, having concluded that the Federal Reserve Bank contributes to the overall efficiency of the economy, one continued to worry that the Fed, as such, is "uneconomic.")

This vacillation between systemic and particularistic perspectives responds to a fantasy most of us hold, that each isolated actor and action within a complex social system will reflect the essence of the

201. *Id.* at 9 (quoting Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573, 576 (1958).

202. *Id.* at 9-10.

203. *Id.* at 10.

204. *Id.* at 58. Choper goes on to argue that the Court should nonetheless review "claimed violations of individual rights." *Id.* at 65.

system—as each fragment of a hologram contains the entire image. Phenomenologically, we find it difficult to grasp the whole and its parts simultaneously; so we move back and forth between them, denying one as we embrace the other. And we maintain a strong normative skepticism about systemic justifications for acts that are troubling when viewed in isolation. This is what makes the problems of "role-differentiated behavior"[205] in professional ethics interesting and troublesome. Choper seems to regard judicial review with the same ambivalence that we might view the successful defense of a guilty criminal or the acquittal of an innocent defendant through perjured testimony.

If these observations do not fully explain the confusing legal discourse about democracy, they at least provide a background against which another, more specific, factor may operate—the psychological and empirical difficulties we confront if we take seriously the political analogue of the "second-best." In economics, the theory of the second best holds that a regulatory scheme that is intrinsically inefficient when viewed in isolation may actually contribute to the overall efficiency of an economy because of the way it interacts with apparent inefficiencies elsewhere in the system. By analogy, as Martin Shapiro has observed,[206] a nonmajoritarian institution may contribute to the democratic functioning of an imperfect system.

The very possibility of second best often seems counterintuitive, however. The empirical uncertainty it engenders disturbs the intellectual repose and formal order we crave. And as applied to judicial review, it requires confronting the conceptual difficulties underlying any definition of "democracy."

Constitutional scholars typically respond by acknowledging the complexity of the issues and immediately offering their intuitive, common sense conclusion for or against judicial review. For example, Ely writes:

> Sophisticated commentary never tires of reminding us that legislatures are only imperfectly democratic. Beyond the fact that the appropriate answer is to make them more democratic, however, the point is one that may on analysis backfire. The existing antimajoritarian influences in Congress and the state legislatures, capable though they may be of *blocking* legislation, are not well

205. *See* Wasserstrom, *Lawyers and Professionals: Some Moral Issues*, 5 HUMAN RIGHTS L. REV. 1, 3 (1975).

206. M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 5-45 (1966).

> situated to get legislation passed in the face of majority opposition. That makes all the more untenable the suggestion . . . that courts should invalidate legislation in the name of a supposed contrary consensus. Beyond that, however, we may grant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures.[207]

Ely's point is that, because the Court can only strike down legislation, not enact it, substantive judicial review is not responsive to antimajoritarian defects in the legislative process. He qualifies the assertion somewhat, but only in a note at the back of the book: "There may of course exist situations in which a majority cannot pass a law repealing old legislation because of minority resistance. But surely antiquity alone does not suggest the existence of a disapproving majority . . . ."[208] The tone and placement of the passage leave no doubt about what Ely believes to be the main truth and what a minor qualification of it. Yet he offers little to persuade the reader who does not already share his intuition. The question, I suppose, is not whether legislatures are *generally* representative, but how their processes function on the particular kinds of issues that come before courts in individual rights litigation.[209]

While the critics' analysis of the "countermajoritarian difficulty" of judicial review seems incomplete, the proponents of fundamental rights adjudication scarcely address the issue. Tribe adopts what Choper and Ely label as the "sophisticated" position—that we have "an imperfectly antidemocratic judicial process and an imperfectly democratic political process."[210] Perry asserts that "[i]t simply will not do to assume that the character of our national commitment to majoritarianism is clear and admits only of a severely restricted judicial function."[211]

207. J. ELY, *supra* note 7, at 67 (citing Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 830-32 (1974)) (footnote omitted).

208. *Id.* at 219 n.118. Choper makes the same point, offers the same qualifications, and then similarly abandons the systemic perspective to focus on the isolated institution-actor. *See* J. CHOPER, *supra* note 147, at 27.

209. Many of the laws challenged in fundamental rights litigation *are* old. And the abortion funding laws, upheld in Maher v. Roe, 432 U.S. 464 (1977) (nontherapeutic), and Harris v. McRae, 100 S. Ct. 2671 (1980) (therapeutic), suggest that an intense interest group may exercise powers to carve exceptions out of even new legislation.

210. L. TRIBE, *supra* note 21, at 51.

211. Perry, *Ethical Function*, *supra* note 20, at 712.

B. *The Justification for Democracy*

The critics' shifts of focus between the system and individual actor, and their use of "majoritarianism" and "democracy" sometimes as synonyms and sometimes in contradistinction, manifest the dilemma of Madisonian democracy. Any hope for resolution lies in understanding how the scholars justify their commitment to democracy. As it turns out, the very justifications create and sustain both horns of the dilemma.

1. *Consent*

Professor Bork asserts that the Madisonian dilemma is resolved

> by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests. . . . Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.[212]

His allusions to consent imply a justification for democracy: In the words of the Declaration of Independence, democracy is the means by which governments derive "their just powers from the consent of the governed."

"Consent" refers either to the actual consent of members of the American polity or the "hypothetical consent" invoked by political philosophers such as Locke and Rawls.[213] Neither concept helps resolve the Madisonian dilemma. If actual consent means mere acquiescence, then the tradition of fundamental rights adjudication, however picaresque, establishes our consent to the practice. If consent must be informed and knowingly and freely given, then it is doubtful that any particular institutional practice can claim consent.[214] And if consent is a heuristic metaphor that allows theorists to speculate about what people under certain circumstances *might* have consented to, one faces the problem that different philosophers have found hypothetical consent for schemes ranging from Hobbes's monarchy to Locke's democratic minimal state to Rawls's welfare state. Consent

212. Bork, *supra* note 27, at 2-3.

213. *See generally* Pitkin, *Obligation and Consent* (pt. 1), 59 AM. POL. SCI. REV. 990 (1965); Pitkin, *Obligation and Consent* (pt. 2), 60 AM. POL. SCI. REV. 39 (1966) (analyzing consent theories).

214. *See* J. TUSSMAN, OBLIGATION AND THE BODY POLITIC (1960). *See also* D. HUME, *Of the Original Contract*, in PHILOSOPHICAL WORKS 443 (T. Green & T. Grose eds. 1964).

cannot ultimately resolve the Madisonian dilemma because the institutional arrangements involved—what kind of judicial review under what circumstances, or indeed, whether there should be *any* judicial review at all—are too detailed to be derived from any general theory. Consent may get you in the right ballpark, but once there it cannot distinguish among blades of grass. As Owen Fiss has written:

> Consent goes to the system, not the particular institution; it operates on the whole rather than each part. The legitimacy of particular institutions, such as courts, depends not on the consent —implied or otherwise—of the people, but rather on their *competence,* on the special contribution they make to the quality of our social life.[215]

Consent theories simply cannot resolve questions of institutional authority and competence.

2. *Utilitarianism*

Bork alternatively suggests a utilitarian rationale for democracy and for rejecting fundamental rights adjudication. He observes that every action individuals take to gratify themselves potentially impinges on the gratifications of others—there are no wholly "private" gratifications: "Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups."[216] And he implies that majority rule, subject to constitutional limitations imposed by the majority itself, maximizes the net gratifications of society. John Ely makes this utilitarian justification even more explicit:

> The way [utilitarianism] connects with democracy is fairly obvious. It is possible to assert, I suppose, that the best way to find out what makes the most people happy is to appoint someone to make an estimate, but no one could really buy this idea. The more sensible way, quite obviously, is to let everyone register her own preference . . . . Thus democracy is a sort of applied utilitarianism . . . .[217]

215. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice,* 93 HARV. L. REV. 1, 38 (1979) (footnote omitted). Of course, one can still argue that judicial review is likely to do more harm than good—for example, that courts will "overprotect" some individual rights at a cost to the majority's right to govern as it sees fit. But this position—or, for that matter, its opposite—calls, not merely for empirical study, but for criteria that determine the content of individual rights. And that is just what the critics argue cannot be done.

216. Bork, *supra* note 27, at 9.

217. Ely, *supra* note 182, at 407. Although this article became a chapter of *Democracy and Distrust,* the article's brief discussion of utilitarianism is not included. Early in the

Ely goes on to argue that the political process emulates an economic market by reflecting intensities of preference.[218]

Leaving aside problems of intensity and other complexities suggested by social-choice theorists,[219] a utilitarian justification for democracy faces the liminal problem that utilitarianism is a highly controversial ethical theory.[220] One source of controversy arises because, as Ely notes, "[m]any, perhaps most, of us will feel so strongly about certain things that we will at some point be moved to qualify the utilitarian balance with a set of Thou Simply Shall Not's called 'rights,' 'side constraints,' or perhaps something else."[221] To qualify utilitarianism in this way, however, makes the Madisonian dilemma manifestly intractable, and Ely treats the qualification with obvious distaste. He does, however, wish to modify utilitarianism to deal with the following concern:

> An ethical system that was serious in demanding only the greatest good for the greatest number would have to count as moral a world in which 75% of the people systematically promoted their own happiness at the expense of the other 25% in circumstances where no one could say there was a relevant difference between the two classes. Now this is more than a little troubling, in fact if uncorrected it is fatal . . . .[222]

To remedy this defect, he proposes the equitable constraint of "representation-reinforcing" judicial review—the strict scrutiny of laws that are likely to reflect prejudice against minority groups.

Recall that Ely's Court must count as legitimate such goals as promoting morality and protecting the family, while discounting prejudice and dislike.[223] He implicitly defends the distinction in terms of an individual's right to "equal concern and respect"—the same impulse that presumably leads him both to adopt utilitarianism and to qualify it with the equitable constraint. This concern for the individual, however, ultimately renders indefensible a preference for a rep-

book Ely remarks that "nothing in the ensuing analysis depends on it." J. ELY, *supra* note 7, at 187 n.14.

218. Ely, *supra* note 182, at 408.

219. *See, e.g.*, J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962); A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970); Barry, *Is Democracy Special?* in 5 PHILOSOPHY, POLITICS AND SOCIETY 155 (P. Laslett & J. Fishkin eds. 1979); Feldman, *A Very Unsubtle Version of Arrow's Impossibility Theorem*, 12 ECON. INQUIRY 534 (1974).

220. *See, e.g.*, D. HODGSON, CONSEQUENCES OF UTILITARIANISM (1967); D. LYONS, FORMS AND LIMITS OF UTILITARIANISM (1965); J. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973).

221. J. ELY, *supra* note 7, at 406.

222. *Id.* at 406 (footnote omitted).

223. *See* pp. 1094-95 *supra*.

resentation-reinforcing rather than fundamental rights model of judicial review.

First, a relatively minor point: Imagine a judge who is skeptical about high-sounding justifications for legislation disadvantaging unpopular minorities (say, homosexuals), who believes that such justifications are often rationalizations for, or at least infected by, prejudice,[224] and who doubts that courts can readily distinguish between prejudice and "sincere" moral beliefs.[225] Assuming that the judge believes that courts should ever restrain the majority from imposing their prejudices on minorities, she would have to choose between erring on the majority's or the minority's side. If she doubted that she could successfully employ Ely's strategy (scrutinize the law and uphold it if the majority's moral beliefs are sincere), she might, prophylactically, just invalidate laws that she thought did not accord "equal concern and respect" to members of the minority group. The choice between Ely's approach and hers depends partly on one's intuitions about legislative psychology and judicial competence, and partly on the weight one gives the majority-gratification and individual-respect horns of the Madisonian dilemma. Utilitarian theory cannot determine the choice.

Ely's theory of democracy is much more fundamentally flawed, however. If utilitarian considerations determine the structure of constitutional government, the constitution must be blind to a *non*utilitarian public morality. Although a utilitarian-based constitution surely does not prohibit a legislature from promoting morality, it has no basis for according that objective *privileged* status over giving vent to dislike. Both are simply gratifications. Thus, by introducing the distinction between morality and dislike or prejudice—a distinction essential to any equitable constraint upon utilitarianism and certainly necessary for representation-reinforcing judicial review—Ely creates a self-contradictory political theory. The short of it is that Ely's *equitable* constraint is utterly meaningless in the absence of an extra-utilitarian theory of *rights*. But as he well recognizes, to admit such a theory is to admit of fundamental rights adjudication.[226]

* * *

Doubtless, much more can be said about democracy, majoritarian-

224. *See* G. ALLPORT, THE NATURE OF PREJUDICE 374-76 (1979 ed.).

225. *See* note 187 *supra*.

226. Faced with this reality, one might, of course, opt for a pure, unconstrained utilitarianism. But for the same reason that Ely rejects such a theory—it allows for intuitively horrible results—most readers would probably reject it as well. *See* note 220 *supra* (ethical problems of utilitarianism).

ism, and judicial review to pull us in one direction or another—toward the interests of the majority or of individuals oppressed by the majority. But there can be no point of equipoise. The Madisonian dilemma is intrinsic to the liberal state—it springs into existence at the moment the state is created to mediate among individuals pursuing their self-interest—and is not susceptible to resolution within its own terms.

V. Our World, and Welcome To It?

The world of the fundamental rights controversy is inhabited by various institutions and actors, including the "majority,"[227] state legislatures, the United States Supreme Court, individuals, and families.[228]

The fundamental rights controversy is concerned with constraining the majority acting through their legislatures. Yet the scholars address neither legislatures nor the citizenry. They address only the Court —and, of course, each other. This is so typical of the genre as hardly to seem worth mentioning. But I would like to pause to ask why constitutional scholarship is so court-centered.[229]

One explanation is that argument aimed at the people or legislatures is "political" and therefore not within the constitutional scholars' domain; but how does talk about sexual behavior, abortions, and the like become less political as it moves from public forums and

227. Some of the scholars acknowledge that "majority" is an oversimplification. *See, e.g.*, A. BICKEL, *supra* note 10, at 18-19; J. ELY, *supra* note 7, at 4. None treats the concept as seriously problematic, however. Some scholars outside the fundamental rights controversy are more skeptical. *See, e.g.*, note 219 *supra* (problems of social choice); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1647-48 (1967) (media domination of public discourse); H. Marcuse, *Repressive Tolerance*, in R. WOLFF, B. MOORE, & H. MARCUSE, A CRITIQUE OF PURE TOLERANCE 95 (1965) (domination).

228. The absence of some other regulars from this world is easy enough to explain. Congress and administrative agencies seldom make policies in the areas challenged in fundamental rights cases. *But see* Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 100 S. Ct. 2671 (1980). And despite the increasing activism of some courts, the state judiciary remains at the periphery of the scholars' vision.

229. Because the scholars focus on the Supreme Court it is worth considering how they view that institution. The proponents' Court is essentially Bickel's, described at the beginning of this article. *See* pp. 1065-66 *supra*. Their faith in the Court's ability to discern fundamental rights, as well as the critics' belief that the Court can carry out *their* affirmative agendas, are based not on the qualities of the individual Justices—who are not presented as extraordinarily wise, insightful, or virtuous—but on the Court's structure and processes. Curiously, none of the scholars looks behind the eloquent descriptions of the Court's processes with the eye of a political scientist or sociologist to consider how the institution actually operates. Curiously also, because it seems difficult to reconcile with the proponents' apparent confidence in the process, almost no one seems interested in the Court's opinions—in its explanations for what it is doing and why—as distinguished from its results. (Dean Wellington's detailed examination of the opinions in *Griswold* and *Roe v. Wade* is unique among the works reviewed above.)

legislative lobbies to the courtroom? Another explanation is that the scholars' expertise lies in the *procedures* for deciding these issues; but then one might expect procedural advice to be offered to other decisionmakers as well. A more plausible explanation lies in our professionalization and profession. We learned and we teach the law from cases. Many of us were law clerks—demi-judges—who (we would like to believe) shared in the power of judicial decision and who (in our innermost fantasies) aspire to our adopted fathers'[230] seats. For the present, our exercise of public power rests in the hope that some Justice will follow our advice.

Beneath these phenomena lies a more basic fact, however: We simply do not believe that "majorities" and legislatures are willing or able to engage in serious, reflective moral discourse. To be sure, Bickel and Wellington speak only of the judiciary's *relative* competence to engage in moral discourse,[231] and other commentators refer to a moral "dialogue" between the Court and other political institutions.[232] But if Bickel actually believed that the Justices are "teachers in a vital national seminar,"[233] the contemporary literature evokes not a graduate symposium but an unruly classroom. The scholars' implicit message is that if the Supreme Court does not take rights seriously, no one will. This view of the legislative process as one of "public choice" rather than "social good"[234] is expressed most explicitly by Owen Fiss, a fundamental rights theorist:

> Legislatures . . . are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preference of the people—what they want and what they believe should be done. Indeed, the preferred status of legislatures under footnote four [of *Carolene Products*] is largely derived from this conception of their function. The theory of legislative failure, much like the theory of market failure, ultimately rests on a view that declares supreme the people's preferences.[235]

The critics do not disagree with this assessment of legislative and popular processes. Ely describes representation-reinforcing adjudica-

230. Who knows how our world might appear if one could honestly add "or mothers"?

231. *See* A. BICKEL, *supra* note 10, at 24-28; Wellington, *supra* note 19, at 246-49.

232. *See* Fiss, *supra* note 215, at 15-16; Perry, *Ethical Function*, *supra* note 20, at 718; Brest, Book Review, N.Y. Times, Dec. 11, 1977, § 7 (Book Review), at 10, 44.

233. A. BICKEL, *supra* note 10, at 26 (quoting Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952)).

234. *See* Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-57 (1977) (public choice and public interest models of legislative action).

235. Fiss, *supra* note 215, at 10.

tion as an "antitrust" model that "intervenes only when the 'market,' in our case the political market, is systematically malfunctioning."[236] For Bork, "[t]here is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another. . . . Legislation requires value choice and cannot be principled . . . ."[237]

In sum, the scholars on both sides of the fundamental rights controversy share a profound skepticism about the possibility of public discourse about issues of principle, and ultimately, therefore, about the possibility of shared, reflectively held public values.[238]

For a citizen of this world, "participation"—Ely's central and only acknowledged fundamental value[239]—is not participation in public discourse or community. It is, to use Bork's stark utilitarian language, the opportunity to vote to maximize one's gratifications. The citizens of this world lack the power—perhaps the only power that *citizens,* as distinguished from *constituents,* can exercise—of participating in meaningful debate over public values.[240] The proponents of fundamental rights adjudication relegate that function to the exclusive jurisdiction of the Court. The critics either deny the very existence of public values or at most allow them on those rare occasions—1787, 1866—of constitutional revolution.

In this world—*our* world—the proponents of fundamental values adjudication seek to protect individuals against the force of an alien majority by cordoning off areas of personal privacy and autonomy, while in the absence of any principles that demand otherwise, the critics let the majority have its head. Wilkinson's and White's almost frantic concern to protect the family against threats from both sides[241] becomes comprehensible as an attempt to salvage the only extant intermediate association of any significance—that "haven in a heartless world"[242]—while other proponents see the traditional family as an institution readily available to the state as an instrument of social control.[243]

These are not competing political stances. They reflect the con-

236. J. Ely, *supra* note 7, at 103.
237. Bork, *supra* note 27, at 10.
238. To be sure, Wellington's and Perry's methodologies depend on consensus; but they treat conventional morality as a sociological datum, making no warrant for its reflectiveness, let alone its validity.
239. *See* pp. 1093-94 *supra.*
240. *See* Aristotle, The Politics 2-8 (E. Barker trans. 1946); H. Arendt, On Revolution (1965); Frug, *The City as a Legal Concept,* 93 Harv. L. Rev. 1059, 1067-73 (1980).
241. *See* pp. 1077-79 *supra.*
242. C. Lasch, Haven in a Heartless World (1977).
243. *See* Karst, *supra* note 22 (*passim*).

tradiction embraced by any one of us—what Duncan Kennedy has described as the "fundamental contradiction—that relations with others are both necessary to and incompatible with our freedom":

> [I]ndividual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others (family, friends, bureaucrats, cultural figures, the state) are necessary if we are to become persons at all —they provide us the stuff of our selves and protect us in crucial ways against destruction. . . .
>
> But at the same time that it forms and protects us, the universe of others . . . threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. A friend can reduce me to misery with a single look. Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. And the price is a high one. Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate . . . .
>
> The kicker is that the abolition of these illegitimate structures, the fashioning of an unalienated collective existence, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose. Only collective force seems capable of destroying the attitudes and institutions that collective force has itself imposed. Coercion of the individual by the group appears to be inextricably bound up with the liberation of that same individual. . . .
>
> Even this understates the difficulty. It is not just that the world of others is intractable. The very structures against which we rebel are necessary within us as well as outside of us. We are implicated in what we would transform, and it in us.[244]

This is the world within which the fundamental rights controversy takes place. The Madisonian tension—between majority and minority, legislature and court—is just a partial image of the essential and irreconcilable tension between self and other, between self and *self*. This world is not entirely of our own making. In the broadest sense, Kennedy's description is of the human predicament; more narrowly, of a society we have inherited and over which we exercise little control. But if it would be arrogant to think that we could change the world, it would be even more irresponsible to act as if we couldn't. To continue the controversy over judicial review and democracy in

244. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-12 (1979). *See also* L. TRIBE, *supra* note 21, at 987-88 (quoted in note 80 *supra*).

the terms in which it has been framed is, in effect, to deny the contradiction and thus to limit both our vision and the possibilities for social change.

For those who share this sense, what then? I do not have an agenda, but I would like to mention several alternative strategies. One, which requires the least dislocation, is simply to acknowledge that most of our writings are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good. In one or another form this has been the staple of legal scholarship and at least has the claims of tradition. Alternatively, we might turn to history and a broader sort of legal theory to understand where we are and how we got here.[245] That is also a respected academic tradition, though somewhat less familiar in legal scholarship.

Finally, the truly courageous—or the most foolhardy—among us might go the next step and, grasping what we understand of our situation, work toward a genuine reconstitution of society—perhaps one in which the concept of freedom includes citizen participation in the community's public discourse and responsibility to shape its values and structure.[246] Those who explore this route may discover that in escaping one set of contradictions they have just found themselves in another. But we will not know, until despair or hope impels us to explore alternatives to the world we currently inhabit.

245. *See, e.g.*, E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY (1973); Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

246. *See, e.g.*, H. ARENDT, *supra* note 240; J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1980); C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970); Frug, *supra* note 240.