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Russell L. Caplan

United States Department of Justice

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THE PARADOXES OF JUDICIAL REVIEW IN A CONSTITUTIONAL DEMOCRACY

RUSSELL L. CAPLAN*

INTRODUCTION

It has become fashionable in some quarters to suppose that the Constitution does not set out the principles which ensure a just society, but instead merely describes the procedures by which these governing principles are to be hammered out. At bottom is a disquiet about the proper role of a "basically undemocratic"¹ and "imperial"² judiciary in a representative democracy. In a true democracy, runs the complaint, only politically responsible, that is, elected, officials should have the power to effect major policy initiatives. The courts, an anomaly in this system, should only act so as to allow the crucial political decisions to be made in the more "democratic" forums.

Two major statements of this position, by Professor John Hart Ely³ and Professor Jesse H. Choper,⁴ offer blueprints of the Constitution which are sometimes parallel and sometimes at right angles. Yet both Ely and Choper agree that the best method of safeguarding rights is through a "passive" judiciary, because judicial review in constitutional matters is fundamentally incompatible with

* Attorney, Civil Division, United States Department of Justice. A.B. Dartmouth, 1972; B.A. Oxford, 1974; J.D. Yale, 1977. For their ideas and encouragement, the author and reader are indebted to Charles Chehebar, Robert L. Goodman, and W. Michael Reisman. While assistance is collective, responsibility is individual, and the conclusions reached herein should not necessarily be ascribed to any of these teachers, friends, or employer.

1. Rehnquist, *Dedicatory Address—Act Well Your Part: Therein All Honor Lies*, 7 PEPPERDINE L. REV. 227, 232 (1980); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 606 (1980)(Rehnquist, J., dissenting). Cf. P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 204 (1970)(the Court is and must remain undemocratic, and should frustrate the will of the majority only when it is essential to the protection of minority rights).

2. Glazer, *Towards an Imperial Judiciary?*, 41 THE PUBLIC INTEREST 104 (1975); R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); *Have the Judges Done Too Much?*, TIME, Jan. 22, 1979, at 91; Winter, *The Growth of Judicial Power*, in THE JUDICIARY IN A DEMOCRATIC SOCIETY 29 (L. Theberge ed. 1979).

3. J. ELY, *DEMOCRACY AND DISTRUST* (1980).

4. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

American democratic, or majority, rule. Only in the narrowly defined role of protecting individual rights should the courts assume an activist stance. How the courts are to know precisely when this role is being thrust upon them forms the tension underlying this increasingly influential school of constitutional interpretation.

I. OLD DILEMMAS AND THE NEW PROCESS

The paradoxes, or dilemmas of justification, of judicial review in a democratic society were presented most succinctly by Justice Frankfurter:

The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace. Judges appointed for life whose decisions run counter to prevailing opinion cannot be voted out of office and supplanted by men of views more consonant with it. They are even farther removed from democratic pressures by the fact that their deliberations are in secret and remain beyond disclosure either by periodic reports or by such a modern device for securing responsibility to the electorate as the "press conference."⁵

Distillable from this passage is the following syllogism: the courts can (1) frustrate the majority by striking down legislative enactments, (2) do so on the basis of their "own," possibly idiosyncratic, interpretation of the Constitution, (3) while remaining insulated from the "democratic," *i.e.*, electoral, process. Hence the judiciary's review power, not being genuinely democratic, should be severely limited. Yet, this non-democratic institution, in important ways, does serve to further our democratic system.

The ways in which the paradoxes represented by this syllogism have been faced or ignored since Chief Justice Marshall's day define the various critical schools of jurisprudence. Thus, a century ago the dominant approach was the naturalist reductionism of Dean Christopher Columbus Langdell, for whom the principles of law were discoverable, finite in number, and uncomplicated: the fundamental things applied.⁶ Such an approach denies the exis-

5. *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 555-56 (1949)(Frankfurter, J., concurring)(footnote omitted).

6. A. SUTHERLAND, *THE LAW AT HARVARD* 174-78 (1967); Hurst, *Legal Elements in United States History*, in *LAW IN AMERICAN HISTORY* 3, 60-61 (D. Fleming & B. Bailyn eds.

tence of any paradox, for it considers the legitimacy of judicial review to lie in the nonarbitrary exercise of power that is thought to be extrajudicially ordained.

By the turn of the century a pragmatic skepticism of the Holmesian variety⁷ had substantially repudiated the idea of universally valid principles, evidently for good. Out of this basic skepticism came theories designed more or less explicitly to reconcile authoritative determination of non-absolute values with the principles of majority rule: Sociological Jurisprudence, Legal Realism, and Process Jurisprudence.⁸ American Sociological Jurisprudence, which is mainly associated with Roscoe Pound,⁹ was in part a reaction to Langdellian scientific reductionism, as was the cluster of writers generally known as "legal realists." Legal Realism¹⁰ rejected the reliance on black-letter rules as the sole determinants of legal outcomes and stressed instead the kaleidoscopic factors affecting decision, in an attempt to increase awareness of the subtle political implications of the judicial function.¹¹

Process Jurisprudence, characterized chiefly by advocacy of "reasoned elaboration,"¹² concentrated on the need for articulation

1971); Stevens, *Two Cheers for 1870: The American Law School*, in *id.* at 403, 435-41, 467-68.

7. See, e.g., O. HOLMES, *THE COMMON LAW* (1881); Note, *Holmes, Peirce and Legal Pragmatism*, 84 *YALE L.J.* 1123 (1975). John Chipman Gray was also of this persuasion. J. GRAY, *THE NATURE AND SOURCES OF THE LAW* (1909).

8. See generally G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 230-31, 251-52 (1976).

9. See, e.g., Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 *HARV. L. REV.* 591 (1911); Pound, *The Theory of Judicial Decision*, 36 *HARV. L. REV.* 641, 802, 940 (1923). Pound's method was endorsed by Benjamin Cardozo in *THE NATURE OF THE JUDICIAL PROCESS* 65-141 (1921). See generally White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 *VA. L. REV.* 999 (1972).

10. The leading tracts include: J. FRANK, *LAW AND THE MODERN MIND* (1930); Cook, *Scientific Method and the Law*, 13 *A.B.A.J.* 303 (1927); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 *COLUM. L. REV.* 431 (1930). See W. RUMBLE, *AMERICAN LEGAL REALISM* (1968); W. TWING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973). A thorough history of realism at Yale, the hub of the movement in its heyday during the 1930's, is Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFFALO L. REV.* 459 (1979). A useful general summary is contained in E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* 74-94 (1973).

11. Of course, the notion of rules passed by the legislature and interpreted by the courts as the only source of constitutional law has become obsolete in an administrative state which assigns major policy functions to many and assorted bureaucracies. See generally P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (1975); see also J. CHOPER, *supra* note 4, at 371-76; J. ELY, *supra* note 3, at 131-34.

12. The phrase comes from H. HART & A. SACKS, *THE LEGAL PROCESS* 161 (tent. ed.

of the means and reasons by which judges arrived at their decisions.¹³ To the proponents of reasoned elaboration, judges did not find law in the "scientific" sense nor did they create it in the realist sense. Instead, they reasoned toward a result and articulated the process which led them to it.¹⁴ In a famous phrase, Henry Hart stipulated that the Court should reach its decisions through the "maturity of collective thought."¹⁵

In part, Process Jurisprudence was a response to the skepticism often associated with realism concerning the existence of articulable standards for decision. The requirement of detailed expli-

1958). Aside from this preeminent process jurisprudence text, and virtually every Supreme Court *Foreword* in the HARVARD LAW REVIEW written during the 1950's, other exemplars of the early process school are: L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953), revised and reprinted in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 330-60 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

13. Among the more refined expositions of early process doctrine, Wechsler's theory of "neutral principles" was specifically designed to counter the charge, made by Judge Learned Hand, that judicial review should be curtailed since it is not based on the constitutional text and therefore lacks the standards to check bold discretion wielded in the manner of a third legislative chamber. L. HAND, *THE BILL OF RIGHTS* (1958). Wechsler responded that courts can legitimately exercise their power through reasoning which employs neutral principles in order to generate an impartial and logically consistent pattern of decision. Wechsler, *supra* note 12, at 19.

Professor Wechsler's article itself has spawned a considerable literature. The best discussions include: Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35 (1963); Mueller & Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A. L. REV. 571 (1960); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). A most sensitive discussion of Wechsler's theory and its ramifications is Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968). The appraisal by Professor Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978), appears in an issue of the COLUMBIA LAW REVIEW devoted to Professor Wechsler's work.

14. White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 289 (1973). See HART & WECHSLER, *supra* note 12, at 67 (legal propositions "formulated by a process of reasoned development of authoritative premises").

15. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959). See *Cooper v. Aaron*, 358 U.S. 1, 24 (1958) (Frankfurter, J., concurring) (Court's decision is the "unanimous conclusion of a long-matured deliberative process"). The idea is vigorously disparaged in Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

cation would also render judges more publicly accountable for their decisions and hence more integrally a part of the democratic system. Process Jurisprudence in its early phase was the jurisprudence of a resurgent post-war America committed to democratic values whose central if not absolute status had been recently and dramatically vindicated.¹⁶ These values and traditions were to be implemented by a correspondingly enlightened and competent judiciary. Importantly, members of the Process school

had highly developed and sophisticated views about the proper relationship of the Supreme Court to other governing institutions. They were anxious to preserve the Court's prestige by ensuring that it did not overstep the limits of its function and thereby take itself into areas of decision-making in which it was not equipped to deal, and in which it was sure to clash with other branches of government. The proper way to prevent such quixotic forays was to impress upon the Court's members a sense of the kinds of controversies which were justiciable and which sorts of analytical processes were likely to produce respected opinions.¹⁷

This remains the program of the Process school. What distinguishes the school's late phase (beginning in the late 1960's) from the early phase is the advent of the Warren Court, which confounded the Process scholars' requirement of principled articulation¹⁸ even as it took great strides in accomplishing these scholars' "progressive" agenda in the field of civil liberties.¹⁹ While early Process writers sought to justify or bring into theoretical line such decisions as *Brown v. Board of Education*²⁰ and establish the idea

16. E. PURCELL, *supra* note 10, at 270-72; G. WHITE, *supra* note 8, at 231. See Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

17. White, *supra* note 14, at 290.

18. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 774-75 (1971). As one of the Warren Court's warmest supporters reflected:

Nearly all the rules of constitutional law written by the Warren Court . . . impress me as wiser and fairer than the rules they replace. I would support nearly all as important reforms if proposed in a legislative chamber or a constitutional convention. In appraising them as judicial rulings, however, I find it necessary to ask whether an excessive price was paid by enlarging the sphere and changing the nature of constitutional adjudication.

A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 102 (1976). See also Bickel & Wellington, *supra* note 12, at 3-6; Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 144-45 (1964).

19. See, e.g., Horwitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599 (1979); Wechsler, *supra* note 12, at 27-34.

20. 347 U.S. 483 (1954).

of process theory in general, later Process scholarship aims to consolidate the recognized gains in civil liberties made under Earl Warren's stewardship by declaring that Court's opinions to be the paradigm against which subsequent decisions are to be evaluated. No longer is the Warren corpus an embarrassment to Process purists; rather, the Warren Court is appreciated for having truly understood the nature and function of the judicial process, and it is to this understanding that constitutional theory must henceforth address itself.

Professors Ely and Choper adhere to the basic tenets of what may be called post-Warren, or New Process, Jurisprudence. Like others of their cloth,²¹ they see the achievement of the Warren Court, that judicial Camelot,²² as establishing the elevation of certain rights (such as voting) as "too fundamental to be . . . burdened or conditioned."²³ This ideal, as one critic noted, could pro-

21. Other examples of writing classifiable as New Process scholarship are: C. BLACK, *DECISION ACCORDING TO LAW* (1981); P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (1975); L. LUSKY, *BY WHAT RIGHT?* (1975); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978); Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970) [hereinafter cited as Black, *Unfinished Business*]; Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); Wright, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R.-C.L. L. REV. 1 (1980).

22. Professor Tribe's nostalgia is typical:

I believe that the course of the Burger Court, at least in its first years, will eventually be marked not as the end of an era of exaggerated activism on behalf of individuals and minorities, but as a sad period of often opposite activism, cloaked in the worn-out if well-meant disguise of judicial restraint.

L. TRIBE, *supra* note 21, at v. Cf. Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155 (1978): "Surely there is little danger of the present Court's overreacting on the side of liberty or equality." Professor Choper, however, while acknowledging the unequal record of the Warren Court in the protection of individual freedoms, sees some continuity. J. CHOPER, *supra* note 4, at 103-22; Choper, *The Burger Court: Misperceptions Regarding Judicial Restraint and Insensitivity to Individual Rights*, 30 SYRACUSE L. REV. 767 (1979).

23. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). Professor Ely, who clerked for Chief Justice Warren, dedicated the book to him. J. ELY, *supra* note 3, at v. For literature supporting the work of the Warren Court, see, e.g., A. COX, *THE WARREN COURT* (1968); A. GOLDBERG, *EQUAL JUSTICE* (1971); Black, *Unfinished Business*, *supra* note 21; Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39; Wright, *The Role of the Supreme Court in a Democratic Soci-*

duce a result orientation which avoided use and articulation of principle, precedent, and original intent in the service of "current egalitarian notions of how a modern democracy should be organized."²⁴ The New Process writers are, however, like the early Process scholars, concerned with restoring both an appropriate methodology to the Supreme Court's opinions and a cautiously defined legitimate role for the courts in the democratic process. The appropriate methodology is naturally influenced by the special mission of New Process scholars, which is to restore the Warren Court's preoccupation with those individual rights thought to be necessarily entailed by a just social order. Both Ely and Choper begin, therefore, with a primary (if not exclusive) commitment to individual rights²⁵ and the premise that the judiciary is undemocratic because it is antimajoritarian²⁶ and, hence, must be restricted, when deciding constitutional cases, to those cases where individual rights and liberties are at issue, in order to maintain a plausible democratic posture.²⁷

Though the arguments for New Process are couched literally in terms of the Warren Court's approach, versus that of its predecessors or successor, there is always significant overlap in personnel from one historical "Court" to another. The quarrel is really between two styles of adjudication, one predicated on protecting "basic" or "fundamental" values against government interference,²⁸ the other focusing "not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by

ety—*Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968).

24. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 686 (1966)(Harlan, J., dissenting). See also *Shapiro v. Thompson*, 394 U.S. 618, 662 (1969)(Harlan, J., dissenting).

25. J. CHOPER, *supra* note 4, at 60-128; J. ELY, *supra* note 3, at 73-75.

26. J. CHOPER, *supra* note 4, at 6, 60; J. ELY, *supra* note 3, at 4-5.

27. J. CHOPER, *supra* note 4, at 64-65; J. ELY, *supra* note 3, at 73-179.

28. The pedigree extends back to *Trop v. Dulles*, 356 U.S. 86, 101 (1958)("evolving standards of decency that mark the progress of a maturing society"); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)(rights which are "of the very essence of a scheme of ordered liberty"); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Protection of fundamental rights may also be accomplished by negative implication, as by the discovery of "conduct that shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), though not simply, as one hornbook has it, that which "shocks the conscious." The approach is, of course, traceable to Chief Justice Marshall's vision of a perdurable charter affording guidance throughout an infinite and unknowable future. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 387 (1821); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). See also B. CARDOZO, *supra* note 9, at 76-85.

which values are approximately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted."²⁹ This latter approach, influenced to a greater or lesser extent by Justice Stone's famous footnote four in *United States v. Carolene Products Co.*,³⁰ is the one adopted by New Process writers. For New Process scholarship, the answers to the paradoxes of judicial review are: first, the popular will, as demonstrated by legislative actions, is not threatened, since the judiciary's task is to facilitate, not hinder, that process; second, judges do not inject their own preferences in the guise of "fundamental values," since they are simply custodians of an open system in which such values meet and do combat elsewhere; and, finally, the Court's removal from the hurly-burly of the political arena buttresses the integrity of the Court's policing, and only proper democratic, function.

What New Process advocates have not to date completely understood is that in practice as well as in theory there is no necessary gap between the two approaches. By misunderstanding the legitimate and essential function of the courts in a constitutional democracy, by apologizing for judicial review as an interloper, in Alexander Bickel's phrase a "deviant institution,"³¹ Choper is led to withdraw the Court's jurisdiction from areas where it might prove helpful, and Ely is forced to weave a logically inconsistent theory aspiring to judicial modesty that in the end sanctions more intervention than the doctrine it is meant to replace.

29. J. ELY, *supra* note 3, at 77. Notable examples of the process approach include: *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973)(Marshall, J., dissenting); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 628 (1969)(Warren, C.J.); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)("speech concerning public affairs is more than self-expression; it is the essence of self-government"); *Reynolds v. Sims*, 377 U.S. 533 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)(First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *Weasberry v. Sanders*, 376 U.S. 1, 17 (1964); *Hobson v. Hansen*, 269 F. Supp. 401, 507-08 (D.D.C. 1967)(Wright, J.), *aff'd as modified sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir.), *appeal dismissed*, 393 U.S. 801 (1969). See also Z. CHAFEE, *FREEDOM OF SPEECH* 30 (1920)(fundamental policy of First Amendment is "the open discussion of public affairs"); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 39 (1948)(First Amendment represents an "unlimited guarantee of the freedom of public discussion").

30. 304 U.S. 144, 152-53 n. 4 (1938). An opinion by Justice Stone antecedent to *Carolene Products* likewise intimates a two-tiered standard of judicial review: *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 184-85 n. 2 (1938).

31. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 18 (1962).

II. THE LEAST DEMOCRATIC BRANCH

A. *Footnote Omitted: The New Process Criticisms of Prevailing Doctrine*

To assert, as Ely and Choper do, that judicial review is inherently undemocratic requires a working definition of what "democratic" is. Yet democracy is one of those grand concepts, like justice, that is as evocative as it is amorphous: it is much easier to say what is not democratic than to say what is.³² One well-accepted definition describes democracy as a political system "in which public policies are made, on a majority basis, by representatives subject to effective popular control at periodic elections which are conducted on the principle of political equality and under conditions of political freedom."³³

The practical definitions and assumptions concerning democracy offered by Choper and Ely agree on and recognize the importance of political (voting) equality and freedom of expression as part of the "core"³⁴ or "keystone"³⁵ of our democratic system. Where judicial review runs afoul of the democratic process, according to Ely and Choper, is with respect to the representative and majoritarian aspects which purportedly inhere in democratic forms of government. For Choper, majority rule has historically been the critical sign of a democratic system both in theory and practice.³⁶ It is, in fact, because effective majority rule depends on the right to vote and the right to freely express and exchange ideas, that Choper considers these rights as essential to democracy.³⁷ Representative government is only a second-best alternative. "In theory, the majoritarian ideal would be most faithfully fulfilled by having all governmental regulations enacted by plebiscite or, better yet, at national 'town meetings' in which all electors could participate by framing the issues as well as by casting their ballots."³⁸ Given

32. E. CAHN, *THE SENSE OF INJUSTICE* (1949). See B. CRICK, *IN DEFENCE OF POLITICS* 56-73 (1964).

33. H. MAYO, *AN INTRODUCTION TO DEMOCRATIC THEORY* 79 (1960), *quoted in* McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 *HOUSTON L. REV.* 354, 357 (1966). See also J. CHOPER, *supra* note 4, at 5; Wright, *supra* note 23, at 9.

34. J. ELY, *supra* note 3, at 7, 122.

35. J. CHOPER, *supra* note 4, at 4.

36. *Id.*

37. *Id.*

38. *Id.* at 5. Cf. J. ELY, *supra* note 3, at 77 (a representative government is well suited

Choper's view of democracy, as premised on direct popular control of policymakers, judicial review falls short of the democratic ideal (or minimum) because the judiciary is not politically sensitive to the majority will, freely arrived at and expressed.³⁹ A typical comment of Choper's is that "irrespective of the *content* of its decisions, the *process* of judicial review is not democratic because the Court is not a politically responsible institution."⁴⁰

Ely's view of democracy is similar, though less systematic, in the exposition of what he understands by "democracy." For Ely, it is well established that our democracy is a representative one⁴¹ whose central commitment is to government by consent of a majority of the governed.⁴² Ely thus parallels Choper's emphasis on popular control and political accountability.⁴³ Accordingly, this is for Ely the central function and problem of judicial review: "a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like."⁴⁴

The picture of democratic government that materializes is that of an "open" and self-governing society⁴⁵ in which the substantive laws are effected by political coalitions through fair procedures and methods. These methods do not permit excessive influence on the substantive outcome of the legislative process, for that process is to remain receptive to each vying faction regardless of its political popularity. The Constitution, as Justice Holmes remarked, "is made for people of fundamentally differing views."⁴⁶ In so "viewing the Constitution as a framework independent of any immutable catalog of allowable and forbidden ends,"⁴⁷ the primary

to providing self rule without requiring personal participation in legislation by the general populace).

39. J. CHOPER, *supra* note 4, at 6, 10, 48.

40. *Id.* at 10 (emphasis in original).

41. J. ELY, *supra* note 3, at 5. *See also id.* at 77-88.

42. *Id.* at 7.

43. *Id.* at 4 & n*.

44. *Id.* at 4-5.

45. L. LUSKY, *supra* note 21, at 11. *Cf.* J. ELY, *supra* note 3, at 105 ("virtually everyone agrees that the courts should be heavily involved in reviewing impediments to free speech, publication, and political association.").

46. *Lochner v. New York*, 198 U.S. 45, 76 (1905)(Holmes, J., dissenting). *See also Uphaus v. Wyman*, 364 U.S. 388, 406 (1960)(Douglas, J., dissenting); *Otis v. Parker*, 187 U.S. 606, 609 (1903)(Holmes, J.).

47. Tribe, *Foreword*, *supra* note 21, at 13.

task of a theory of judicial review becomes the identification of those rights which are procedural, structural rather than substantive, and which yield unfair advantage to no particular social or economic view.⁴⁸

It is unsurprising, then, that at the core of Ely's theory of constitutional adjudication is the notion that "the original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values."⁴⁹ This is necessary to Ely's argument that the judiciary, which is charged with upholding the Constitution, is relegated to process upkeep, thereby leaving the value selection to the legislature.⁵⁰ Close judicial scrutiny is justified only when these special procedural rights are implicated, because they regulate the use and consequences of governmental power. Such rights are fundamental "because [they are] preservative of all rights."⁵¹

Ely finds the justification for this distinction between types of rights, and hence between corresponding intensities of judicial review, in *Carolene Products* footnote four which, for him, prefigured and embodied the Warren Court's version of representative democracy:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial

48. Goodpaster, *supra* note 21, at 482.

49. J. ELY, *supra* note 3, at 92. "The Constitution is . . . a sort of checklist, enumerating in a general way those things the central government may do and by implication denying it power to do anything else." Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 701 (1974)(footnote omitted). For the view that the Constitution and Bill of Rights possess definite underlying ethical content, see R. MacIver, *The Philosophical Background of the Constitution*, in *POLITICS AND SOCIETY* 357 (D. Spitz ed. 1969); Griswold, *The Right to be Let Alone*, 55 NW. U.L. REV. 216 (1960).

50. J. ELY, *supra* note 3, at 87. See generally Williamson, *Political Process or Judicial Process: The Bill of Rights and the Framers of the Constitution*, 23 J. POL. 199 (1961); Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1144-46 (1981); Note, *A Process-Oriented Approach to the Contract Clause*, 89 YALE L.J. 1623 (1980).

51. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). *Accord*, *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religions . . . or national . . . or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . . .⁵²

This is what the "deep structure"⁵³ of the Constitution, embraced by the Warren Court⁵⁴ and putatively shunned by its successor, requires: a "participation-oriented, representation-reinforcing approach to judicial review"⁵⁵ which leaves the selection and accommodation of substantive values to the political branches and the fine-tuning of the democratic process to the judiciary, the institution best equipped to accomplish that task.⁵⁶

Footnote four has, of course, been used to justify judicial activism in the area of civil liberties coupled with restraint in other, mostly "economic," matters. Thus, for Ely it is something which mediates between the text of a Constitution largely given over to matters of democratic process and a countermajoritarian judiciary. Unlike some Courts, which impose their personal preferences without pausing to justify their decisions by reference to constitutional authority,⁵⁷ the Warren Court "by and large . . . attempted to defend its decisions in terms of inferences from values the Constitution marks as special."⁵⁸ In his insistence on careful reasoning from legitimate premises, Ely reflects the debt owed by the New Process to the Old.⁵⁹ For Ely, the values the Constitution marks as special,

52. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938)(Stone, J.), quoted in J. ELY, *supra* note 3, at 75-76 (citations omitted). The political history which resulted in footnote 4 and related judicial pronouncements is examined in Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741 (1981).

53. J. ELY, *supra* note 3, at 73.

54. *Id.* at 74-75.

55. *Id.* at 87.

56. *Id.*

57. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947-49 (1973).

58. *Id.* at 943 (emphasis deleted).

59. See Ely & Dershowitz, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1199 (1971)("there is little room for disagreement about the desirability in Supreme Court adjudication of reasoned argument as opposed to arrogant *pronunciamento* or . . . gross negligence concerning the state of the record and the controlling precedents")(footnote omitted). See also A. COX,

those which the New Process is concerned with elaborating, are the values which are in some way grounded in footnote four.⁶⁰

Distinguishing permissible types of judicial activism from non-permissible types, the soon-to-be Justice Jackson anticipated Ely's credo and imagery:

The presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences with free speech and free assembly, and for a perfectly cogent reason. Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them.⁶¹

Thus, the rationale for Ely's process orientation is not new. What is new is the central pride of place given to it as explanatory of all facets of judicial operations, and its supposed incompatibility with

supra note 18 at 28, 113-14 (Court's inability to articulate principles of sufficient abstractness accounts for its failure satisfactorily to resolve such issues as the constitutional status of abortion, executive privilege, and the Vietnam War); A. GOLDBERG, *supra* note 23, at 73 (distinctive feature of the Warren Court is that "its members acknowledged and pursued, with considerable success, the ideal of principled adjudication").

60. Ely, *supra* note 57, at 933-34. It is because adjudication is "principled" and based on footnote 4 that Ely can steer between what he calls, after Thomas Grey, "interpretivism," a method of constitutional interpretation stressing fidelity to the constitutional text or inferences fairly derivable therefrom, and "non-interpretivism," which holds that the text's specific meaning must be filled in from extraconstitutional sources, e.g., fundamental values. J. ELY, *supra* note 3, at 1-72. Cf. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 729 (1974)(footnote 4 "may indeed point the way toward an acceptable mean between crabbed literalism in constitutional interpretation and a roving commission to correct social ills"). See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1168-77 (1980). As Ely notes, "[c]onstitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured." J. ELY, *supra* note 3, at 13. Provisions like the Ninth Amendment and the Fourteenth Amendment—its due process, equal protection, and privileges and immunities clauses—are "invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it." J. ELY, *supra* note 3, at 14. See Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 63 (1955); L. TRIBE, *supra* note 21, at iii ("the Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices").

61. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 285 (1941). See also F. FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* 50-51 (1938); *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949)(Frankfurter, J., concurring).

the ascertainment of fundamental values. Accordingly, Ely, much more concerned with the methodology of legal reasoning than Choper,⁶² devotes the first half of his work⁶³ to explaining why the various theories, slogans and catchwords of differing vintage and vogue—substantive due process, fundamental values, natural law, neutral principles, reason (*i.e.*, reasoned elaboration), tradition, consensus, and predicting what posterity will regard as progress—are logically incoherent, undemocratic, or both. The Court is, therefore, restricted to policing the channels of political communication and accommodation, and is necessarily centered on the vindication of individual rights: a constitutional traffic officer.

B. *Streamlining the Judiciary*

As an apostle of judicial restraint, Choper is a descendant of James Bradley Thayer, who at the turn of the century taught the virtues of judicial circumspection. It was up to the legislature, said Thayer, as the political arm of the government, to engage in social experimentation. Courts were not to hold legislation unconstitutional unless "those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."⁶⁴ Thayer consequently maintained that, as the judiciary siphoned power from the legislatures by enhancing their scope of review over legislative actions, public confidence in legislatures would decrease because of their diminished importance. Yet, confidence in the judiciary would also dwindle, since its enhanced power would spark doubts concerning judicial integrity and impartiality.⁶⁵ Steeped in the traditions of

62. "It is [the] impact of the Supreme Court's . . . decisions, rather than the question of whether as a matter of substantive constitutional doctrine the Court overstepped its proper bounds, that is the critical issue here." J. CHOPER, *supra* note 4, at 122. *See also id.* at 79. *But see id.* at 2: "The purposes of this book is to . . . advance a principled, functional, and desirable role for judicial review in our democratic political system."

63. J. ELY, *supra* note 3, at 1-72.

64. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). Thayer by no means originated the rule of clear mistake, but rather drew upon the preceding century's scholarly and judicial authorities. *See id.* at 138-49. Thayer's rule survives as the mainspring of the "rational basis" test for cases involving non-fundamental rights. *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

65. In his essays on the life of Chief Justice Marshall, Thayer wrote:

The people, all this while, become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish

Dean Thayer's Harvard, Felix Frankfurter, over his long career, developed a sophisticated theory of judicial restraint which, like Justice Brandeis's techniques,⁶⁶ depended on procedural mechanisms to avoid judicial review of constitutional matters whenever possible.⁶⁷ These devices of avoidance—such as standing, ripeness, the case-or-controversy requirement—were called the “passive virtues” by Frankfurter's foremost disciple, Alexander Bickel.

Professor Bickel's major trilogy of constitutional meditations⁶⁸ span and chronicle an attempt to wed a Frankfurterian circumscribed judiciary to a court entrusted with defining and defending enduring moral values.⁶⁹ Though the Supreme Court was limited to deciding constitutional issues “only on the basis of general princi-

and bad laws, and the courts step in and disregard them, the people are glad that these wiser gentlemen on the bench are so ready to protect them against their more immediate representatives. . . .

. . . .
The tendency of a common and easy resort to [judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

J. THAYER, JOHN MARSHALL 104, 107 (1901). This hypothesis, yet to be empirically proved, is taken as well from earlier writing, notably Judge Gibson's dissent in *Eakin v. Raub*, 12 Serg. & Rawl. 330, 343, 355 (Pa. 1825). See also *United States v. Richardson*, 418 U.S. 166, 188 (1974)(Powell, J., concurring); *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1314 (1973); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 27 (1978). Derived from the same premises is Frankfurter's insistence that “[i]n a democratic society like ours, relief must come through an aroused public conscience that sears the conscience of the people's representatives.” *Baker v. Carr*, 369 U.S. 186, 270 (1962)(Frankfurter, J., dissenting).

66. See *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936)(Brandeis, J., concurring).

67. See generally Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978). Holmes, Thayer's friend and colleague on the Harvard faculty, employed Thayeresque reticence in declining to invalidate statutes challenged on substantive due process grounds, unless they lacked any reasonable justification—a variation of the clear mistake rule. See, e.g., *Adkins v. Children's Hospital*, 261 U.S. 525, 567 (1923)(Holmes, J., dissenting); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915)(Holmes, J., dissenting).

68. A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962)[hereinafter cited as A. BICKEL, *LEAST DANGEROUS BRANCH*](for a discussion of the passive virtues, see *id.* at 111-98, a revision of Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961)); A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (2d ed. 1978)[hereinafter cited as A. BICKEL, *IDEA OF PROGRESS*]; A. BICKEL, *THE MORALITY OF CONSENT* (1975)[hereinafter cited as A. BICKEL, *MORALITY OF CONSENT*].

69. A. BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 68, at 24, 26, 68, 236, 239. See generally Holland, *American Liberals and Judicial Activism: Alexander Bickel's Appeal from the New to the Old*, 51 IND. L.J. 1025 (1976); Purcell, *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521 (1976).

ple,"⁷⁰ the Court may, when it is not necessary to decide on constitutional principles, invoke the passive virtues and avoid supporting or invalidating a principle. The passive virtues, explained Bickel, "are the techniques that allow leeway to expediency without abandoning principle."⁷¹ Bickel came to realize that decisions to use or avoid principle, themselves lacked a guiding principle, which meant the Court largely indulged in unprincipled, pragmatic discretion.⁷² By the time he wrote *The Morality of Consent*, Bickel had taken refuge in a self-contained morality of procedure founded on the necessity of protecting the integrity of the judicial process, and, by extension, the political process as a whole. This was a morality practically divorced from any moral imperatives.⁷³ Expedience itself was enshrined in the Burkean "computing principle," the balancing of entrenched social norms against the demands of current political pressures.⁷⁴

Professor Choper's view of the judiciary is similarly informed by the tension between principle and expedience. Choper's solution is to restrict the Court's presumably principled decisionmaking to discrete areas which pragmatic considerations indicate are the most appropriate. For Choper, the Court's function—to remain activist in protecting individual rights and passive in all other controversies—derives from both theoretical and practical considerations. On the theoretical side, the Court is, simply, countermajoritarian. "In the main, the effect of judicial review in ruling legislation unconstitutional is to nullify the finished product of the lawmaking process."⁷⁵ On the practical front, the Court risks expending its limited institutional capital and hence its effective-

70. A. BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 68, at 247. Bickel's conception of general principles that are neutral and broadly applicable is taken from Wechsler's formulation. See note 13 *supra*.

71. A. BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 68, at 71.

72. Gerald Gunther pithily summarized Bickel's thesis as "100% insistence on principle, 20% of the time." Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

73. "[L]egal technicalities are the stuff of law, and piercing through a particular substance to get to procedure suitable to many substances is in fact what the task of law most often is." A. BICKEL, *MORALITY OF CONSENT*, *supra* note 68, at 121. See *id.* at 127-42.

74. *Id.* at 24. "Better to recognize from the first that the computing principle is all there is, ought to be, or can be." *Id.* at 88. In so saying, Bickel confessed the same failure he had imputed to Frankfurter: "[h]e never achieved a rigorous general accord between judicial supremacy and democratic theory." A. BICKEL, *IDEA OF PROGRESS*, *supra* note 68, at 34.

75. J. CHOPER, *supra* note 4, at 25.

ness unless it concentrates on the vindication of individual constitutional rights.⁷⁶

Choper is aligned with Ely on all key doctrinal points, though he arrives at Ely's position by a different route. Ely would rewrite constitutional decisions on the merits; Choper would curtail the Court's jurisdiction. Yet, while Choper's diagnosis and prescription are more radical, his emphasis on individual rights and the withering away of other functions actually represents the logical extension of Ely's analysis. The Court, for Choper, is not the sturdy institution capable of thwarting or at least postponing the popular will that it is for Ely,⁷⁷ but rather a more fragile body which must be careful to husband its exhaustible capital of goodwill and respect so as to preserve its prestige and concomitant effectiveness.⁷⁸ The Court must, therefore, devote itself exclusively to its most approved and successful role: protecting the individual rights guaranteed by the Constitution.⁷⁹

This conclusion is the substance of the first of Choper's Four Proposals, the Individual Rights Proposal.⁸⁰ To this end, following as corollary, Choper's Court would not decide constitutional disputes concerning the power of the federal government over the states nor between coordinate branches of the federal govern-

76. *Id.* at 139-40, 167.

77. J. ELY, *supra* note 3, at 45-48.

78. "It is precisely to conserve its power and prestige in those cases in which it cannot do otherwise that the Supreme Court should be made aware that each and every bold policy decision will bring it into the political arena." Jaffe, *Impromptu Remarks*, 76 HARV. L. REV. 1111, 1112 (1963). On the whole, however, it is more realistic to view the Court as Ely does: an institution with sufficient power to forestall popular initiatives, at least temporarily. Choper's case for the "fragility" of judicial review rests on a historical record that is necessarily so complex and multifaceted that opposite conclusions can be drawn from the same evidence. See, e.g., Kessel, *Public Perceptions of the Supreme Court*, in THE IMPACT OF SUPREME COURT DECISIONS 193 (1969) (T. Becker, ed.) (survey of Seattle residents shows attitude of majority favorable to the Court, rebutting J. CHOPER, *supra* note 4, at 129-70). It is a matter of historical fact that only four Supreme Court decisions have been reversed by constitutional amendment, and "the resort to a constitutional amendment rather than a simpler form of legislative action indicated the very great authority which was accorded a Supreme Court construction of the Constitution." W. MURPHY, CONGRESS AND THE COURT 262 n.* (1962).

79. J. CHOPER, *supra* note 4, at 164-68. Ely finds precedent for this protective task in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); J. ELY, *supra* note 3, at 85-86, but Choper goes to the wellspring; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), J. CHOPER, *supra* note 4, at 66-67.

80. J. CHOPER, *supra* note 4, at 67-68.

ment.⁸¹ Such disputes would be in the traditional sense nonjusticiable for lack of articulable standards⁸² and the Court's congenital inability to deal with the rough-and-tumble of realpolitik.⁸³ More importantly, from the viewpoint of democratic process, all interested parties retain by design an adequate say in the final distribution. No legitimate interest is or can be shut out.

These principles are embodied in the second and third proposals, called respectively the Federalism and Separation Proposals. The Federalism Proposal relegates constitutional issues of federal power vis-à-vis the states⁸⁴ to the political branches, *i.e.*, Congress and the President. The Separation (as in Powers) Proposal states that the federal judiciary ought not to determine constitutional questions turning on the prerogatives of the Legislature vis-à-vis the Executive, and vice versa.⁸⁵ Hence, from the central perspective of individual rights, it is immaterial whether the state or federal government violated established rights or whether the Congress or the Executive trespassed constitutionally protected rights. Choper is, however, careful to leave the Court the ultimate judge of its own bailiwick. This is the burden of the fourth and final principle, the Judicial Proposal, which leaves the Court the final arbiter of the bounds of its Article III "judicial power."⁸⁶

While the Federalism and Separation Proposals appear to be a startling departure from the Court's tasks, Choper's thesis is that these proposals are consistent with the history of the Court's demonstrated effectiveness. Choper's Court simply avoids forays into those areas in which the Court would add little or have little influence, those areas being where the relevant parties can adequately negotiate and protect their interests without detriment to the individual rights guaranteed each citizen by the Constitution.

The heart of Choper's book is comprised of the two middle proposals, which would, roughly, enact Bickel's passive virtues by removing the Court from almost all cases, save those where indi-

81. *Id.* at 2-3.

82. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

83. J. CHOPER, *supra* note 4, at 305-08.

84. *Id.* at 175 (footnote omitted). The Federalism Proposal and the Individual Rights Proposal are presented embryonically in Choper, *On the Warren Court and Judicial Review*, 17 CATH. U.L. REV. 20, 39-40 (1967).

85. J. CHOPER, *supra* note 4, at 263.

86. *Id.* at 382-84.

vidual constitutional liberties were at stake.⁸⁷ The net effect of Choper's key proposals is to extend the political question doctrine⁸⁸ to all cases but those unmistakably involving individual rights, and also to resolve the incorporation controversy⁸⁹ at a stroke.

The controversy involving the incorporation of specific provisions of the Bill of Rights into the Fourteenth Amendment's due process clause is cut like a Gordian knot because, under Choper's plan, it is irrelevant whether the state or federal government invaded the constitutional right at issue. If a right has been abridged, the Court should intervene, but deciding which level of government has the power is nonjusticiable.⁹⁰ Similarly, for Choper it is irrelevant whether the Congress or the Executive violates individual constitutional rights. If the conduct "allegedly violates individual constitutional rights—that is, those personal liberties that are secured against *all* governmental abridgments, presidential or congressional—then, in accord with the Individual Rights Proposal, the Court should intervene."⁹¹ The Separation Proposal renders nonjusticiable "only the constitutional validity of presidential action that affects individual 'freedom' in a way identical to what Congress could have done pursuant to its constitutionally dele-

87. See A. BICKEL, *MORALITY OF CONSENT*, *supra* note 68, at 62-63 (Court should be activist in protecting First Amendment rights); Wright, *supra* note 21, at 4.

88. As definitively set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962), a case will be found to present a "political question" when (1) the issue involves resolution of questions committed by the constitutional text to a coordinate branch of government; (2) when the question is not susceptible to resolution by judicially discoverable and manageable standards; or (3) when prudential considerations militate against judicial intervention. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 210-16 (1972); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517 (1966).

89. See *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Gideon v. Wainwright*, 372 U.S. 335, 345-47 (1963) (opinion of Douglas, J.); *Adamson v. California*, 332 U.S. 46, 51-54 (1947); *id.* at 61-67 (Frankfurter, J., concurring); *id.* at 71-75 (Black, J., dissenting); R. BERGER, *supra* note 2, at 134-65; A. BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 68, at 100-02; 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 1083-158 (1953); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STAN. L. REV.* 5 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, *id.* at 140.

90. J. CHOPER, *supra* note 4, at 175-76 (emphasis in original).

91. *Id.* at 272. Professor Tribe went a step further in his draft constitution for the newly-independent Marshall Islands, where he gave citizens the right to sue not only the government but also each other for such constitutional violations as infringement of speech. Brill, *The Founding Father*, *ESQUIRE*, Feb. 27, 1979, at 10, 12.

gated authority."⁹² Underlying the Federalism and Separation Proposals is the idea that the Court, as a non-majoritarian institution, is no more able than the political branches to determine areas of competence. As Choper explains the Federalism Proposal:

Whatever the judiciary's purported or self-professed special competence in articulating the values and defining the scope of those constitutional clashes that declare individual rights, when the fundamental issue turns in large measure on the relative competence of different levels of government to deal with societal problems, the Court is no more inherently capable of correct judgment than its companion federal branches. Indeed, the judiciary may well be less capable, given both the highly pragmatic nature of federal-state questions and the forceful representation of the states (which are directly affected by their resolution) in the national process of political decisionmaking.⁹³

Judicial review is also unnecessary, says Choper, to settle separation of powers issues: "the checks on legislative autocracy that [the founders] contemplated exist independently of judicial supervision of the constitutionally mandated separation of powers between the President and Congress."⁹⁴ What remains is a judiciary that fits hand in glove with Ely's renovated model: an abstentious institution in all matters save the protection of individual liberties broadly deduced from the Bill of Rights.

III. THE LIMITS OF PROCESS ANALYSIS

A. *To Have Neither Force nor Will*

Unlike its English counterpart, the American judiciary, at least since 1803, is called upon to evaluate enacted legislation against a more basic framework of legal principles, the Constitution.⁹⁵ Thus the institution of judicial review⁹⁶ is a logical conse-

92. J. CHOPER, *supra* note 4, at 272.

93. *Id.* at 202-03.

94. *Id.* at 269.

95. In the words of a British lawyer whose surname is a rhetorical favorite of Ely's: "We make no distinction between laws that are not fundamental or constitutional and laws that are fundamental or constitutional, and there is no supreme law against which to test the validity of other laws." Lester, *Fundamental Rights in the United Kingdom: The Law and the British Constitution*, 125 U. PA. L. REV. 337, 338 (1976). Blackstone wrote in 1765, "if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it." 1 W. BLACKSTONE, COMMENTARIES 91.

96. Judicial review may be defined for present purposes as the power of the federal courts to determine the constitutionality of actions of the legislative and executive branches. See, e.g., McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L.

quence, though not the only conceivable one, of the fact that the Constitution circumscribes the rule of the majority in setting certain courses of action beyond the reach of the populace. It is the "fear of popular majorities," Professor Corwin wrote, "which lies at the very basis of the whole system of judicial review, and indeed of our entire constitutional system."⁹⁷ As Justice Jackson put it:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.⁹⁸

If there are irreducible areas of our system in which the majority is not to hold sway, some agency is required to interpret the rules and declare in which specific instances this result will obtain. "[J]udicial review, almost by definition, operates in precisely the area where democratic theory suggests that the majority ought not to have discretion."⁹⁹ Indeed, constitutional adjudication is, in essence, the adjusting or balancing of areas of majority vis-à-vis minority discretion. That the Supreme Court is not itself a

REV. 354, 355 (1966); W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 8 (4th ed. 1975); J. ELY, *supra* note 3, at 4 n.*, 240 n. 77.

97. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 670 (1909).

98. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). *See also* *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Recognizing the occasional tyrannies of governing majorities, [the framers] amended the Constitution so that free speech and assembly should be guaranteed."); *Lucas v. 44th Gen. Assembly*, 377 U.S. 713, 736-37 (1964). Eventually accepting Jefferson's arguments for a Bill of Rights, Madison said:

We ought . . . to . . . declare the great rights of mankind secured under this constitution . . .

. . . .

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

1 ANNALS OF CONG. 449, 457 (Gales & Seaton eds. 1834) (Address by Rep. Madison, June 8, 1789), *quoted in* Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385, 401 (1969).

99. Bishin, *Judicial Review in Democratic Theory*, 50 SO. CAL. L. REV. 1099, 1118 (1977). For further comment on the "contradictions of Madisonian Democracy," *see* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1096-1109 (1981).

majoritarian or representative institution is, therefore, not harmful to its position. It follows that where the courts properly determine whether or not the popular will, as translated into legislation, has overrun its bounds, the courts do not, contrary to Frankfurter's suggestion, illegitimately thwart that popular will. What appeared to be a disadvantage to the Court's claim to democratic membership, namely its political insulation and disinterestedness, now bolsters the Court's claim to be the appropriate agency for settling constitutional disputes.¹⁰⁰ It is from this position of impartiality and fairness, of dispensing equal justice under law, that the Court has earned its place as a forum of last resort for the powerless.¹⁰¹

An occasional unpalatable decision does not mean judicial review is incompatible with democracy, only that the proper balance of majority rule and majority constraint is a sensitive task requiring expertise and interaction with other constituent elements of a democracy, not least the lay public.¹⁰² The proper balance will additionally depend upon the social cohesion and consensus that obtains at each historical moment: the degree of trust among the segments of society coupled with traditions of respect for law and legal institutions. It follows that this balance will vary from nation to nation.¹⁰³ To return to the transatlantic comparison, American political institutions leave more scope to minorities than British

100. Even Justice Frankfurter, despite his fear of judges' importing their "private notions" into the Constitution, admitted that this is a realistic appraisal of the judicial role in practice:

There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted.

Public Utilities Comm'n v. Pollak, 343 U.S. 451, 466 (1952)(statement of Frankfurter, J.).

101. J. PENNOCK, *DEMOCRATIC POLITICAL THEORY* 426 (1979); M. SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 36-37 (1966); Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 667 (1969). For Ely, the Court's removal from the political arena argues against its fitness for resolving constitutional disputes: "our moral sensors function *best* under the pressure of experience." J. ELY, *supra* note 3, at 57 (emphasis in original). *But see id.* at 75 n.*. He seems to confuse *uninterested* with *disinterested*; the Court's insulation is only from pressure, not the perception of it.

102. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980)(inviting the Court to "police the dialogue" among citizens); Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1229-30 (1978).

103. Bishin, *supra* note 99, at 1120.

institutions which are "simplified and streamlined for majority rule," a fact due to Britain's "political homogeneity as a people."¹⁰⁴ Excessive deference to legislative enactments, then, may be less appropriate to contemporary America than to Victorian England; Justice Frankfurter's Anglomania¹⁰⁵ was no coincidence.

But it is an American constitution we are expounding, one designed for a nation increasingly characterized by a welter of interests and factions,¹⁰⁶ resulting in what has been called "minorities rule."¹⁰⁷ In the vision of the framers, the freedoms associated with democracy were to be realized by a separation or diffusion¹⁰⁸ of power so that no majority in whatever guise, whether the King in Parliament or the House of Burgesses assembled, could tyrannize minority interests and rights. Hence, Madison's great theory of "factions" (today we should say "interest groups") in *Federalist No. 10*:

Extend the sphere [assume, that is, a large and heterogeneous democratic society] and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.¹⁰⁹

This may be difficult but it is not impossible; and it is why a judi-

104. L. LIPSON, *THE DEMOCRATIC CIVILIZATION* 579 (1964). See also Lester, *supra* note 95, at 339, 343.

105. See J. ELY, *supra* note 3, at 60; Mason, *supra* note 98, at 402-03. Though Frankfurter was occasionally chided for his Anglifying tendencies, e.g., in *Perez v. Brownell*, 356 U.S. 44, 79 (1958) (Douglas, J., dissenting from majority opinion of Frankfurter, J.), Isaiah Berlin has wisely observed that Frankfurter's passion for things English was not snobbery but instead reflected an admiration "for all that was sane, refined, not shoddy, civilized, moderate, peaceful, the opposite of brutal, decent,—for the liberal and constitutional traditions that before 1914 were so dear to the hearts and imaginations especially of those brought up in eastern or central Europe . . ." I. BERLIN, *PERSONAL IMPRESSIONS* 89 (1980).

106. See G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1712 (1975).

107. R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 132 (1956).

108. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 55 (1967); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* at 453 (1969).

109. *THE FEDERALIST* No. 10, at 64 (J. Madison) (J. Cooke ed. 1961). Cf. *THE FEDERALIST* No. 51, at 350-53 (J. Madison) (J. Cooke ed. 1961) (a diverse national citizenship will serve to protect a minority group from repression by a combined majority). See also M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 1-175 (1967); Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U.L. REV. 911, 912-19 (1979); Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 386 (1935).

cially enforceable Bill of Rights became part of the constitutional plan. The judiciary, therefore, belongs to a scheme of institutions able to counteract one another¹¹⁰ and, hence, acts as a bulwark against excessive legislative or executive actions.¹¹¹ It is these two aspects of the judicial function which Choper threatens and which therefore constitute the two major reasons why Choper's proposals should be more carefully considered before Congress adopts them.

1. *Horizontal and Vertical Differences.* First, it is arguable that any compromise struck in the federal-state, Congressional-Executive arena affects individual rights, either obviously, by violating due process of law, or subtly, by some gradual and unforeseeable restructuring of institutional powers. Choper's rejoinder is that it is irrelevant which level or branch had the power at issue, hence this criticism is not ultimately "based on any direct governmental infringement of personal constitutional liberties as conventionally defined."¹¹² Choper's indifference to the particular level or organ of government taking the contested action, however, crucially assumes that the quality of constitutional protection is neutral as to tier and branch. In a certain percentage of cases, this may be true enough. In other instances, however, enormously different consequences may flow from the different natures of the institutions involved. The importance of different institutions as particular sources of rights and obligations was underscored by Justice Jackson's concurrence in the *Steel Seizure Case*,¹¹³ which involved President Truman's unilateral decision to take over the nation's steel mills in the midst of what he deemed a national emergency during the Korean War. Concerned with the possibility of an autocratic executive usurping legislative functions and powers, Justice Jackson wrote:

No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on

110. B. BAILYN, *supra* note 108, at 273-80; G. WOOD, *supra* note 108, at 152-61, 452-63; THE FEDERALIST No. 51 (J. Madison).

111. B. BAILYN, *supra* note 108, at 43, 56; Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B.F. RES. J. 521.

112. J. CHOPER, *supra* note 4, at 273.

113. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), discussed in J. CHOPER, *supra* note 4, at 316-27.

what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.¹¹⁴

Many important governmental powers and relationships are now defined by statute rather than by an unadorned constitutional provision, somewhat blunting the edge of Choper's theory. Still, Choper relies heavily on the distinction between constitutional and statutory adjudication, applying his Proposals only to the first type.¹¹⁵ However, it is more than likely that the general public—after all, the source of judicial legitimacy, or conversely “fragility”—does not, as a rule, make this technical distinction.¹¹⁶ Most of the juicy separation of powers cases turn on statutory and not purely constitutional interpretation, so that cases which might have been grist for Choper's mill—like *Youngstown*,¹¹⁷ the *Pentagon Papers Case*,¹¹⁸ *United States v. Nixon*¹¹⁹—are justiciable and

114. 343 U.S. at 655.

115. J. CHOPER, *supra* note 4, at 70. There are, of course, intrinsically important differences. Thus *stare decisis* has more force in statutory than in constitutional analysis, since in the former Congress can easily correct the Court. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

116. See, e.g., H. SPIRO, *GOVERNMENT BY CONSTITUTION* 217-19 (1959) (esoteric nature of English case system contrasted with accessibility of continental codes); Greenhouse, *Supreme Court, in Lull: No Murders, No Marriages*, N.Y. Times, Sept. 16, 1980, §A, at 16, col. 1 (public confusion about the Court's work and workings). More than the general public can be perplexed as to whether a decision rests on statutory or purely constitutional grounds. In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), four Justices concluded that Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000 d-2000 d-6 (1976), which forbids racially-based exclusions from federally-funded programs, applies to a state medical school which reserved a percentage of its admissions for disadvantaged or minority applicants. 438 U.S. at 408-21 (opinion of Stevens, J., joined by Burger, C.J., Stewart, J., and Rehnquist, J.). Five Justices concluded that Title VI did *not* apply to the instant facts, but only to racial classifications employed by a state or its agencies. 438 U.S. at 281-87 (opinion of Powell, J.); *id.* at 328-55 (opinion of Brennan, White, Marshall and Blackmun, JJ.). See J. ELY, *supra* note 3, at 170.

117. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), explores the extent of presidential power exercisable without congressional authorization. Had the support of Congress been sought and obtained, the seizure in all probability would have been upheld. See E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 154-58 (4th ed. 1957).

118. *New York Times Co. v. United States*, 403 U.S. 713 (1971), discussed in J. CHOPER, *supra* note 4, at 328-29. The *Pentagon Papers Case* upheld the right of newspapers to publish certain classified government documents in the face of a presidential injunction. The various opinions of the Court spotlighted the absence of congressional statutory enactments authorizing the President to enjoin such publication. 403 U.S. at 718 (Black, J., concurring); *id.* at 720 (Douglas, J., concurring); *id.* at 730 (Stewart, J., concurring); *id.* at 731-32 (White, J., concurring); *id.* at 742, 746-47 (Marshall, J., concurring).

119. 418 U.S. 683 (1974), discussed in J. CHOPER, *supra* note 4, at 336-42. In this case,

fall outside the scope of the Separation Proposal, dissipating much of its shock value. Additionally, anything colorably implicating individual liberties under the Bill of Rights by letter, spirit, penumbra or emanation is likewise justiciable. All that remains are cases like *Myers v. United States*,¹²⁰ involving issues of congressional competency to limit the President's ability to remove the officers he appoints to the Executive Branch (at least in the lower echelons). This is an administrative law question; not whether a power or duty is to be exercised by one branch or another, but how best to carry out that power or duty. Choper is right to suggest that a case like *Myers* presents a question of efficiency and political expediency, questions of political judgment that, when unsupported by acts of Congress, should not be justiciable.¹²¹

A more formidable challenge to the Separation Proposal is offered by *Nixon v. Administrator of General Services*,¹²² in which the Court upheld a statute directing the Administrator to take custody of the materials former President Nixon had accumulated while in office and have archivists screen the materials for documents of historical, as opposed to personal, value. That the Justices reached the question of congressional encroachment upon executive autonomy is facially contrary to the Separation Proposal, but in reality, says Choper, the case involved not two colliding branches of government, but Congress versus a particular Chief Executive no longer in office. Therefore, the full give and take possible between Congress and an incumbent President, which ensures

the Watergate Special Prosecutor had a subpoena issued against the President which required specified tapes and documents the Special Prosecutor wanted in preparation for the criminal trial of several presidential staff members and political supporters. Answering the contention made by the President's counsel that jurisdiction was lacking because the matter was an intra-branch dispute between a subordinate and a superior officer of the Executive Branch, the Court ruled that the Attorney General was congressionally authorized to conduct the government's criminal litigation, and the Special Prosecutor, acting pursuant to a valid regulation promulgated by the Attorney General, was vested with "explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties." 418 U.S. at 695 (footnote omitted).

120. 272 U.S. 52 (1926), discussed in J. CHOPER, *supra* note 4, at 330-34.

121. See Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROB. 102, 113-17 (1976) (similarly concluding that *Myers* called for political rather than judicial resolution).

122. 433 U.S. 425 (1977), discussed in J. CHOPER, *supra* note 4, at 342-43.

trustworthy resolution, is missing.¹²³ Nevertheless, Choper holds that the Court should not have decided the separation of powers question because "President Carter [the then incumbent] . . . could have directed Mr. Nixon . . . to assert executive privilege and then defend this position as the Separation Proposal contemplates."¹²⁴ Even if President Carter were to take up Mr. Nixon's fight because the former anticipated the impairment of his own ability to discharge his duties, Choper's rationale would be susceptible to an overbroad use, subject to curtailment solely at the hands of a potentially jealous and vindictive Congress. It allows the President to determine what may be harmful to the Chief Executive as an institution, a branch of government, thereby snatching it from the Court's jurisdiction—which is what the claim of "executive privilege" is all about in the first place.

Choper eventually undercuts the premises of his treatise when he says that "whether . . . the Court's *substantive interpretation of the scope of constitutionally guaranteed personal liberties* should be influenced by whichever political branch has undertaken to affect them is . . . beyond the scope of this book."¹²⁵ The inquiry, however, "is a legitimate one under the Individual Rights Proposal."¹²⁶ So Choper is hedging his bet, and quite a hedge it is. The imposition of these four novel Proposals is designed solely to better allow the federal judiciary to protect individual liberties secured by the Constitution,¹²⁷ but whether they actually do so is "beyond the scope of this book" or left for further adjudication, under the Individual Rights Proposal, of a more traditional (if more fragmented) sort. The litigation under the Individual Rights Proposal that would ensue after every certiorari denial in all major (and probably most minor) decisions involving separation of powers or federalism to ascertain whether individual liberties had been abridged would require the courts to issue an unending stream of constitutional environmental impact statements. This procedure would hardly improve the current practice of considering the effect on all constitutional rights at the time the case is litigated and decided.

123. J. CHOPER, *supra* note 4, at 342.

124. *Id.* at 343.

125. *Id.* at 329 (emphasis added). *See also id.* at 79, 167.

126. *Id.* at 329.

127. *Id.* at 2, 64, 123, 253-54.

Just as the actions of different branches of government can affect protected rights, so can the actions of different levels of government. Choper's fundamental assumption that nonjusticiability should obtain because the interests of the states are adequately represented in Congress¹²⁸ is particularly vulnerable because, unlike inter-branch conflicts, where integral institutions represent themselves in direct conflict, the various states are "represented" in Congress, subject to distorting political pressures and the necessity of compromise within the states' own flanks.¹²⁹ Differing states will have differing interests,¹³⁰ and a state's interests may not be accurately depicted because of local or collegial pressures. It may not be accurate to assume that a state's interest is monolithic and indivisible; interest groups often transcend boundaries, clustering around social and economic common denominators. Moreover, state and local governments may be less sensitive to the interests of minorities than the national government.¹³¹

Consequently, Choper embraces Justice Brennan's dissent in *National League of Cities v. Usery*,¹³² in which the Supreme Court held that a federal statute giving minimum-wage protection to state and municipal employees exceeded the authority of Congress under the Commerce Clause. Contrary to Choper's Federalism Proposal, the *Usery* Court adjudicated an issue touching on the proper bounds of federal, as opposed to state, powers. Justice

128. The Federalism Proposal does not preclude judicial inquiry into state action allegedly encroaching upon federal prerogatives, on the theory that Congress is not as well represented at the state level as is the state level in Congress. J. CHOPER, *supra* note 4, at 175. "A local spirit will infallibly prevail much more in the members of the Congress, than a national spirit will prevail in the Legislatures of the particular States." THE FEDERALIST No. 46, at 318 (J. Madison)(J. Cooke ed. 1961). The central function originally envisioned for judicial review in connection with federalism "was the maintenance of national supremacy against nullification or usurpation by the individual states, the national government having no part in their composition or their councils." Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954)(footnote omitted).

129. See Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1071-72 (1977). Choper considers the problem, J. CHOPER, *supra* note 4, at 181-84, but concludes that "the judgment of the states' congressional representatives, politically responsible to the electorate of the entire state or to districted groups therein, may fairly be relied upon." *Id.* at 184.

130. Wechsler, *supra* note 128, at 545.

131. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637-38 (1943)(Jackson, J.); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1192 (1977).

132. 426 U.S. 833 (1976), discussed in J. CHOPER, *supra* note 4, at 217-22, 254-59.

Brennan concluded, like Choper, that the case was nonjusticiable because any "restraints upon exercise by Congress of its [acknowledged] plenary commerce power lie in the political process and not in the judicial process."¹³³ But this was not the reasoning of the majority, which, unlike Justice Brennan, found the case justiciable. Choper handles this by pointing out that *Usery* is a rare departure from the proposed norm, being the first Supreme Court decision in forty years to invalidate on constitutional grounds a congressional regulation of commerce as impinging on the sovereignty of state and local governments.¹³⁴ Choper also confines the *Usery* deviation to the context in which it arose, the Commerce Clause.¹³⁵ As with the Separation Proposal, Choper recognizes the possibility that some constitutional contours may be modified. There could be congressional regulations of "the States qua States" that "may transgress the constitutional principle of federalism, just as they may be found to offend against constitutionally secured personal rights."¹³⁶

133. 426 U.S. at 857; similarly *id.* at 876-78, *discussed in J. CHOPER, supra note 4, at 221.*

134. J. CHOPER, *supra note 4, at 254.* The last invalidation under the clause was *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

135. "[T]he *Usery* decision is specifically limited to the reach of national power under the commerce clause and then only in connection with direct federal regulation of 'the States qua States.'" J. CHOPER, *supra note 4, at 217* (footnote omitted). Giving away the commerce clause is nonetheless a generous concession, considering the expansive judicial readings it has received, in *e.g.*, *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). The standard of "the States as States," 426 U.S. at 837 (emphasis in original), is likely to prove a flexible and fact-sensitive one. The *Usery* Court may well have adopted a "balancing approach" that "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.* at 856 (Blackmun, J., concurring).

136. J. CHOPER, *supra note 4, at 221* (footnote omitted). Here Choper parts company with Justice Brennan, who in his *Usery* dissent noted that "laws within the commerce power may not infringe individual liberties protected by the First Amendment, . . . the Fifth Amendment, . . . or the Sixth Amendment. . . ." 426 U.S. at 858 (citations omitted). Given the types of cases Choper says should not have been adjudicated had the Federalism Proposal been in effect, troublesome results would be almost sure to happen. Choper's Court would have avoided deciding the constitutional issues in: *Civil Rights Cases*, 109 U.S. 3 (1883)(congressional power to forbid racial discrimination in public accommodations under the equal protection clause of the Fourteenth Amendment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)(congressional power to forbid racial discrimination in housing under the Thirteenth Amendment); *Hammer v. Dagenhart*, 247 U.S. 251 (1918)(congressional power under the commerce clause to prohibit interstate transportation of goods produced in factories employing child labor). J. CHOPER, *supra note 4, at 193-94.* Small wonder that Holmes felt the Court's power to invalidate state laws far more important than its power to strike down acts of Congress. O.W. HOLMES, *COLLECTED LEGAL PAPERS* 295-96 (1920).

The Federalism Proposal does not guarantee constitutional results, only reasonable and fair ones:¹³⁷ "[T]he position is that judicial review is not the steadfast brake to be relied on to prevent the destruction of state sovereignty."¹³⁸ Serious infringements of individual rights are in any event subject to inquiry under the Individual Rights Proposal,¹³⁹ in accordance with Choper's Great Hedge.¹⁴⁰ More distressing and pernicious is the artificial, air-tight distinction made between states' rights and individual rights,¹⁴¹ for judicial delineation of the rights of the states as against the national government can affect individual rights. This, in any event, seems the most persuasive reading of *Usery*, for the protected activities of "the States as States"¹⁴² in the exercise of "traditional aspects of state sovereignty,"¹⁴³ such as police protection and fire prevention, public sanitation and recreational facilities,¹⁴⁴ suggest that "state sovereignty" in *Usery* stands for "nothing more nor less than the state's role of providing for the interests of its citizens in receiving important social services."¹⁴⁵ Accordingly, a restriction on congressional power to override state sovereignty is construable as a fostering, not curtailing, of individual rights.

2. *A Constitution Among Friends.* Second, the different natures of the different organs of government, coupled with the knowledge that they have equal powers vis-à-vis the individual, may mean that elected officials can safely indulge in logrolling, or trading their votes for expedient purposes. Choper's Separation Proposal, which would in effect allow an exchange of powers between Congress and the President, permits the exchange of responsibility from one branch to the other, so that some actions might be less openly debated in, for instance, the Executive branch. In exchange for assuming the onus, the Executive might exact the performance of a politically unpleasant chore—*e.g.*, manipulation

137. J. CHOPER, *supra* note 4, at 222.

138. *Id.* at 221.

139. *Id.*

140. See text accompanying notes 125-27 *supra*.

141. J. CHOPER, *supra* note 4, at 193, 221.

142. 426 U.S. at 845.

143. *Id.* at 849.

144. *Id.* at 846-47, 851.

145. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1172 (1977). See also *id.* at 1180, 1184. "This language may be read to suggest the existence of protected expectations—of rights—to basic government services." Tribe, *supra* note 129, at 1076.

of defense expenditure increases—from Congress. This is, of course, a stake to the heart for the type of representative, majoritarian democracy which for Choper is threatened by the Court. What should certainly be avoided is the philosophy of George Washington Plunkitt, the Tammany boss who was fond of asking, "What's the Constitution among friends?"¹⁴⁶ (or in the Nixon corollary, among enemies).

A congressman and his legislative assistant¹⁴⁷ tracing the fate of major bills during a session of Congress found that the Constitution "is a sometimes thing."¹⁴⁸ By that they meant both chambers of Congress "contain members who cheerfully put off on the courts most if not all of the responsibility for squaring the statute with the Constitution."¹⁴⁹ This palming-off of responsibility can take the form of plain horse-trading¹⁵⁰ ("I kept my part of the bargain, but unfortunately the Court ruled the statute unconstitutional") or a high-minded desire to do what seems right and allow for possible setbacks at the hands of judges.¹⁵¹

The Court combines these two functions of scapegoat and umpire to become a mediator, buffer, or safety-valve. Constitutional debate in the legislative chambers, specifically, knowledge that there are rules circumscribing congressional authority, facilitates coordination among the branches and averts confrontation.¹⁵²

Choper appreciates this insight¹⁵³ but finds in the abdication of political responsibility by Congress an argument for the ineffectiveness of judicial review.¹⁵⁴ Since Congress passes the buck to the Court, which in turn sustains almost anything Congress enacts, says Choper, judicial rubberstamping by repeated validation will

146. Quoted in W. RIORDON, *PLUNKITT OF TAMMANY HALL* 13 (1963 ed.).

147. Mikva & Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449 (1971).

148. *Id.* at 449.

149. *Id.* at 497.

150. In yielding to pressure to vote for bills they had misgivings about, members of Congress most often expressed the view that "if it is unconstitutional, that is what we have a court for." *Id.* at 474. See also Ely & Tribe, *Let There Be Life*, N.Y. Times, Mar. 17, 1981, §A, at 17, col. 4 (idea behind scheme to statutorily overrule Court's abortion decision "is to score points with the [anti-abortion] constituency at the expense of the courts, which, as the [sponsoring] senator well knows, will have no choice but to strike the statute down").

151. See Mikva & Lundy, *supra* note 147, at 483.

152. *Id.* at 498.

153. J. CHOPER, *supra* note 4, at 224-27.

154. *Id.* at 227.

only encourage further curtailment of states' rights.¹⁵⁵ To Choper, this perversely justifies judicial abstention.

It may be, as sanguine Thayerites might say, that a pruned-down Court would not lead to greater legislative abuse of rights, but rather to a mature sense of legislative responsibility and restraint. Yet the national and international traumas since Thayer's time are, at best, mute on this point and frequently suggest the contrary, truly a return to a Constitution among friends. Perhaps in a real crisis—wholesale mutilation of constitutional rights amounting to revolution or coup d'etat—the courts will be little more than straws in the wind,¹⁵⁶ but that hardly justifies the placing in peacetime of altogether too much reliance on the Congress and the Executive to be fair—and not even fair, as it turns out, but merely fair enough.

B. *A Critique of Pure Process*

In the absence of further criteria, a process-oriented theory simply describes in broad outline *why* certain outcomes are unfair, without specifying what constitutes an unfair practice.¹⁵⁷ To some extent this is as it should be, to allow play at the joints in daily operation. When, however, Ely doubts whether "I'd know a discrete and insular minority if I saw one,"¹⁵⁸ the theory grows tenuous. A scheme recognizing only process rights ignores other equally well-established rights, or offers stilted justification for those rights.¹⁵⁹ Chief Justice Warren observed that if *Reynolds v. Sims*¹⁶⁰

155. *Id.*

156. See J. CHOPER, *supra* note 4, at 222. See also A. BICKEL, *MORALITY OF CONSENT*, *supra* note 68, at 60 ("law can never make us as secure as we are when we do not need it. Those freedoms which are neither challenged nor defined are the most secure"); Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 235-36 (1955); W. DOUGLAS, *WE THE JUDGES* 259 (1956); *THE FEDERALIST* No. 84, at 580 (A. Hamilton)(J. Cooke ed. 1961).

157. Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 655 (1975); Goodpaster, *supra* note 21, at 494. See *Tigner v. Texas*, 310 U.S. 141, 147 (1940)(equal protection clause guarantee does not represent "disembodied equality," and "does not require things which are different in fact or opinion to be treated in law as though they were the same").

158. Ely, *supra* note 57, at 935; cf. *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973)(Rehnquist, J., dissenting); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073-74 (1980).

159. J. ELY, *supra* note 3, at 178-79 (constitutional right to travel facilitates relocating in communities which may be more politically compatible). See note 205, *infra*.

160. 377 U.S. 533 (1964). In *Reynolds*, the Equal Protection Clause, which requires sub-

had been decided before 1954, *Brown v. Board of Education*¹⁶¹ would have been unnecessary, a claim Ely justifiably regarded as "oversimplified."¹⁶²

Pure process as a theory of the Constitution is either inadequate or disingenuous. It is inadequate because, taken on its face, it may command judges to enforce participatory rights, but does not say how to balance these against other, equally participatory individual rights.¹⁶³ It is disingenuous because, if taken for the results Ely and other New Process scholars desire, under the guise of neutral, process-not-substance adjudication, it is the expansive readings of the Warren era¹⁶⁴ that are surreptitiously favored.¹⁶⁵

stantially equal legislative representation for all citizens in a state, was found violated by an Alabama apportionment scheme that weighted votes differently according to where citizens happened to reside.

161. 347 U.S. 483 (1954).

162. Ely, *The Chief*, 88 HARV. L. REV. 11, 12 (1974).

163. See generally, Tribe, *supra* note 158. In a recent case, the Supreme Court upheld the constitutionality of 18 U.S.C. § 1725 (1976), which prohibits the deposit of unstamped "mailable matter" in a letter box designated for use by the postal service. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 101 S. Ct. 2676 (1981). When the appellee, which regularly placed unstamped notices in private letter boxes, was told it was violating the statute and subject to a fine, it brought suit charging violation of its rights to freedom of speech and press. Justice Rehnquist's opinion for the Court held that a letter box approved for mail delivery by the Postal Service is part of the Postal Service's nationwide system for distribution of mail. The customer in effect consents to the applicable regulations of the Postal Service, and "[t]here is neither historical nor constitutional support for the characterization of a letter box as a public forum" open to all comers. 101 S. Ct. at 2684. Justice Brennan, concurring in the judgment only, argued that a letter box was a public forum since it is used to communicate ideas, but concluded that the statute was constitutional "because it is a reasonable time, place, and manner regulation." *Id.* at 2688. Justice White, also concurring, reasoned that the statute was justified by the government's interest in defraying the operating expenses of the Postal Service. Hence it was unnecessary to decide the time-place-manner or public forum issues. *Id.* at 2691. Justice Marshall, in dissent, averred that the Postal Service is indeed a public forum, and that the statute did deny appellee's First Amendment rights. *Id.* at 2694-95. Justice Stevens, also dissenting, took the position that a "mailbox is private property; it is not a public forum to which the owner must grant access;" accordingly, the owner should be allowed to determine whether to permit unstamped mail to be placed in it. *Id.* at 2697.

164. "I shall be suggesting later in the book of which this is a part that the correction of . . . problems of inequitable distribution is what judicial review ought in large measure to be about." Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 406 n.29 (1978), revised and reprinted as chapters 1-2 of J. ELY, *supra* note 3. "The courts must stand ready to intervene when no other forum is available for the vindication of fundamental rights—this is the high mission of the American judiciary." Tribe, *Seven Pluralist Fallacies: In Defense of the Adversary Process—A Reply to Justice Rehnquist*, 33 U. MIAMI L. REV. 43, 56-57 (1978). Cf. *Bell v. Maryland*, 378 U.S. 226, 245 (1964) (opinion of Douglas, J.).

165. The process umbrella can therefore include a non-activist wing, the program of

Exclusive focus on procedural regularity is compatible with great injustice;¹⁶⁶ Kafka showed that. "In Hell," Grant Gilmore has noted—concluded—"there will be nothing but law, and due process will be meticulously observed."¹⁶⁷ Dean Auerbach has made this plain in his critique of Professor Bickel's attempt to salvage the integrity of law and lawyers from the morass of Watergate.¹⁶⁸ The legal order, Bickel argued, was susceptible to causes pursued with passionate intensity; activism was inherently destructive, whether it was activism in protest of Vietnam or propping up the Nixon presidency; extremism in defense of ideology, left or right, was a vice.¹⁶⁹ Legal morality, to survive, required support from another source, and the "highest morality," Bickel concluded, "almost always is the morality of process."¹⁷⁰ Auerbach sees the potential for recourse to process as an abdication of moral responsibility:

This was legalism with a vengeance Bickel rested his argument upon the ostensible separation of process from substance and the presumed independence of law from policy and power—precepts that defined professional thought in the twentieth century. But it was precisely the failure to relate process to purpose, or law to justice, that elicited serious doubts about Bickel's kind of legal authority. Critics understood, if Bickel did not, how tenaciously the legal order had aligned itself with certain moral imperatives (power and money) at the expense of others, all the while denying that it did so. The notion that process could be divorced from substance was a fiction proclaimed by the philosophers of legalism. The preference for process over purpose—and justice—was the problem, not the solution.

The authority of the legal order cannot exist independently of other moral values. Once function supersedes purpose, the legal order drifts rudderless on a sea of moral relativism, inevitably blown by the strongest winds of wealth, power, and politics. The morality of process can only be justified as

which is described in the title of an article by Philip Kurland, *The Court Should Decide Less and Explain More*, in *THE SUPREME COURT UNDER EARL WARREN* 228 (L. Levy ed. 1972). See also Bork, *supra* note 13; Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

166. L. TRIBE, *supra* note 21, at 915-16. See also Dickman, *An Outline of Nazi Civil Law*, 15 MISS. L.J. 127 (1943).

167. G. GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977). As one of Vince Lombardi's Green Bay Packers said of the coach, "He's fair. He treats us all the same—like dogs." Quoted in *N.Y. Times*, Sept. 4, 1970, at 24, col. 1.

168. Auerbach, *The Legal Profession After Watergate*, 22 WAYNE L. REV. 1287 (1976).

169. Bickel, *Watergate and the Legal Order*, 57 COMMENTARY 19 (1974), revised and reprinted in A. BICKEL, *MORALITY OF CONSENT*, *supra* note 18, at 91-123 (page citation to COMMENTARY).

170. Bickel, *supra* note 169, at 25, quoted in Auerbach, *supra* note 168, at 1291.

the highest morality if the citizenry is convinced that it is a fair process which produces substantively fair results. Too many events associated with Watergate destroyed that belief. Consequently, deprived of external nourishment to give credence to its claim of fairness, the stability of the legal order deteriorated.¹⁷¹

What is Ely's answer to all this? In a footnote¹⁷² he writes that if political participation is considered to be also a "value," it is still different because value imposition generally implies holding certain goods or outcomes to be so important that they must be preserved to withstand whatever happens in the political arena. Participational orientation, however, "denotes a form of review that concerns itself with how decisions effecting value choices and distributing the resultant costs and benefits are made"¹⁷³ If certain decisional procedures are conceded as not just another value judges can impose, but nonetheless can be "valued" for their own sake, the argument is that the Court should pursue these participational "values" because "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 situated to 'impose.'"¹⁷⁴

In other words, true process adjudication avoids value imposition by merely ensuring that the substantive choices made elsewhere are carried out. This theory assumes that in deciding what the intent and scope of the legislation, constitutional clause, or common-law rule was, and how best to carry it out, requires no choice; no extracting of implicit values to override other interpretations. "It is, then," as Judge Oakes has reminded us, "impossible in the process of constitutional adjudication not to apply certain basic principles that involve value choices."¹⁷⁵ The dichotomy between value imposition and mere procedural supervision is a false

171. Auerbach, *supra* note 168, at 1291. See also M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 266 (1977) ("the paramount social condition that is necessary for legal formalism to flourish in a society is for the powerful groups in that society to have a great interest in disguising and suppressing the inevitably political and redistributive functions of law"); Kennedy, *Legal Formality*, 2 J. LEG. STUD. 351, 378 (1973).

172. J. ELY, *supra* note 3, at 75 n.*.

173. *Id.*

174. *Id.*

175. Oakes, *supra* note 109, at 930.

one: to make a decision between competing alternatives is to define a value upheld and a value rejected.¹⁷⁶ Likewise, Ely's attempt to drive an entering wedge between garden-variety values that unenlightened judges impose every day and "valuing" procedure for its own sake is a dead end. Preference for a procedure of a special kind, or for procedural safeguards in general, most certainly does bespeak a value which can inform decisions as much as any other "value" Ely chooses to recognize, a commitment to a certain type of relationship between citizen and government.¹⁷⁷ More cynically, regulation of procedure can mean determination of outcome.¹⁷⁸ The indictments against the King in the Declaration of Independence are, after all, mostly "procedural"—charging maladministration of the laws, abuse of legislatures, and mistreatment of the judiciary—yet they were sufficient to justify a revolution.

The nature of the minority ostensibly to be protected may also be factually complex. Disputes such as those concerning racial

176. Wechsler, *supra* note 12, at 15. The interchangeability of process and value interpretations is illustrated by a couple of Ely's least favorite fundamental value cases, *Lochner v. New York*, 198 U.S. 45 (1905), and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857). See Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 Md. L. Rev. 451, 484 n. 116 (1978), revised and reprinted as chapter 4 of J. ELY, *supra* note 3. *Lochner*, it will be remembered, professed to offer greater individual liberty of contract as against a state police power found too intrusive. 198 U.S. at 56-57. (*Lochner* thus actually presents a problem of individual autonomy to which Ely's theory, strictly speaking, is not addressed.) Chief Justice Taney in *Dred Scott* did not even find the Constitution sufficiently open-ended to allow process theory to plug the gap, ruling against Scott on the ground that blacks were not recognized as citizens at the time the Constitution was ratified, i.e., as of the time the instrument is presumed to speak. 60 U.S. (19 How.) at 407. Process theory can hence accommodate, or account for, even the all-time heinous decisions.

177. This was Justice Frankfurter's point when he wrote:

the safeguards of "due process of law" and "the equal protection of the laws" summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people. The history of American freedom is, in no small measure, the history of procedure.

Malinski v. New York, 324 U.S. 401, 413-14 (1945)(Frankfurter, J., concurring). See also *Brinegar v. United States*, 338 U.S. 160, 180 (1949)(Jackson, J., dissenting); *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956)(Frank, J., dissenting in part), *rev'd on other grounds*, 353 U.S. 391 (1957)(procedural right of freedom from unreasonable search is part of "substantive" right of privacy); Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974).

178. See, e.g., Orren, *Standing to Sue: Interest Group Conflict in the Federal Courts*, 70 AM. POL. SCI. REV. 723 (1976)(Supreme Court's evolving standing doctrine instrumental in bestowing on private groups increasing power to determine public policy); Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & Soc'y Rev. 95 (1974)(social rules generally serve the interests of those elites most responsible for their enactment and administration).

preference policies rarely involve a monolithic majority versus a monolithic minority, but generally a coalition of minorities on both sides.¹⁷⁹ This weighs heavily against Ely's justification for judicial furtherance of affirmative action programs, which is simply that nothing prevents a majority from discriminating against itself.¹⁸⁰ On both the winning and losing sides interests will differ and diverge: not every component of the "winner" will equally win, nor will every segment of the other side equally lose. Ely, therefore, cannot blandly maintain that discrimination in favor of one group is not necessarily discrimination against another.¹⁸¹ Selection of the forum for resolution is also significant, if any consensus, based on fair representation, is to be claimed: a local school board will often not be as inclusive of vying factions as a state legislature, or—after some tentative national consensus has emerged—the Congress.¹⁸² "Extend the sphere,"¹⁸³ said Madison.

So Ely's new, improved constitutional theory involves—*horribile dictu*—substantive values and, hence, policy choices.¹⁸⁴ That it was inevitable does not tell against Ely's doctrine; that it was not squarely faced does. Even if the basic premises of a "participation-oriented" democracy could be completely set out,¹⁸⁵ judges could and would still disagree about how and

179. J. ELY, *supra* note 3, at 170-71; Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974).

180. See sources cited notes 106-07 *supra*.

181. J. ELY, *supra* note 3, at 171-72.

182. Sandalow, *supra* note 157, at 700-02; see Ely, *supra* note 179, at 741 ("Measures that favor racial minorities pose a difficult moral question that should . . . be left to the states"). See generally Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 195, 219-20 (1976).

183. THE FEDERALIST. No. 10, at 64 (J. Madison)(J. Cooke ed. 1961).

184. Ralph Waldo Emerson meant something similar when he wrote that "[L]aw is only a memorandum." R. EMERSON, *Politics*, in THE COMPLETE ESSAYS AND OTHER WRITINGS OF RALPH WALDO EMERSON 422, 423 (B. Atkinson ed. 1940). See also E. GOFFMAN, ASYLUMS 174 (1961)("behind each contract there are non-contractual assumptions about the character of the participants")(citing E. DURKHEIM, PROFESSIONAL ETHICS AND CIVIL MORALS 171-220 (Cornelia Brookfield trans. 1957); G. TULLOCK, THE LOGIC OF THE LAW 47 (1971). See generally R. COVER & O. FISS, THE STRUCTURE OF PROCEDURE 47-104 (1979)(on independence and interdependence of substance and process); Grey, *Procedural Fairness and Substantive Rights*, in NOMOS XVIII: DUE PROCESS 182 (J. Pennock & J. Chapman eds. 1977)(degree of procedural formality an evaluative measure of the importance of the entitlement contested); Michelman, *Formal and Associational Aims in Procedural Due Process*, in *id.* at 126 (requirements of due process based on intrinsically procedural values of revelation and participation).

185. See Wofford, *The Blinding Light: The Uses of History in Constitutional Inter-*

when to apply them in specific cases.¹⁸⁶ Weighing competing values is what a judge does in, say, the "sound truck" cases,¹⁸⁷ where the right to free expression is pitted against the right to privacy.¹⁸⁸ Hierarchies and priorities inevitably emerge. No longer would the question be what rights are "fundamental," perhaps, but its equivalent would be asked: what rights are essential to the full and free operation of "the process by which the laws that govern society are made."¹⁸⁹ Whenever a judge—or anybody—applies rules to specific situations, choices inescapably are made. "We do not always agree," said Chief Justice Warren on his departure from the Court. "It is not likely ever, with human nature as it is, for nine men to agree always on the most important and controversial things of life."¹⁹⁰ In a collegial tribunal there will be different members reasoning from different world views based upon necessarily incompatible starting axioms. Hence, Ely's jape that decisions will be based on the relative popularity of various social and eco-

pretation, 31 U. CHI. L. REV. 502, 515-18 (1964)(judges can dispute the degree of open-endedness of particular constitutional clauses); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1050-51 (1977)(elasticity of constitutional provisions); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1050 (1981)(similar).

186. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 97-117 (1973)(Marshall, J., dissenting)(on problem of assigning definite weight to various potential "fundamental interests"); Oakes, *supra* note 109, at 930; Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 999 (1967)("even among the rights specified in the Bill of Rights the judge . . . must choose first whether the right is fundamental").

187. J. ELY, *supra* note 3, at 110. The cases include: *Kovacs v. Cooper*, 336 U.S. 77 (1949), and *Saia v. New York*, 334 U.S. 558 (1948).

188. Ely tacitly concedes this in sketching the impermissible reasons for disadvantaging a group, *i.e.*, what values are not favored. J. ELY, *supra* note 3, at 136-45. See generally Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1048 (1980); Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 140-41 (1981); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). The language of impermissible disadvantaging, *i.e.*, of prejudice, is inherent in the language of footnote 4 itself.

189. J. ELY, *supra* note 3, at 74. The extending of participatory rights alone is not necessarily more "democratic." Granting the vote to an entire community on issues such as property taxes or school subsidies dilutes the voice of those most directly affected by the outcome of the election. Ely fails to show when and why the franchise should be expanded or withheld. Estreicher, *Book Review*, 56 N.Y.U. L. REV. 547, 572-73 (1981).

190. Retirement of Mr. Chief Justice Warren, 395 U.S. xi (1969). "Disagreement on the complex issues that come before the Court is the norm," the present Chief Justice has written, eulogizing a colleague of whom this would particularly have been the case. Burger, *Tribute to William O. Douglas*, 93 HARV. L. REV. 1401, 1401 (1980).

conomic theories—"we like Rawls, you like Nozick. We win, 6-3"¹⁹¹—expresses a truth and is not quite as damaging as he thinks.¹⁹² By the same token, those critics who argue that Ely's theory of judicial review is faulty because it would permit *Lochner v. New York*¹⁹³ or some other discredited decision,¹⁹⁴ similarly fail to realize that an overarching theory can provide a general orientation, but need not supply specific results for specific times and conditions.¹⁹⁵ As Ely knows, "the implications of any non-trivial theory will be open to debate."¹⁹⁶

Ely recognizes the possibility of controversy, that "[t]he elaboration of a representation-reinforcing theory of judicial review could go many ways,"¹⁹⁷ and, therefore, that some kind of pivotal value judgments exist. He even compares his theory of judicial review to antitrust concepts, meaning that intervention is justified only when the relevant market, "in our case the political market, is systemically malfunctioning."¹⁹⁸ The history of antitrust law in this country should be sufficient proof of the fluctuating, disputable nature of the standards involved.

So to firm up rights as important as the freedom of expression,¹⁹⁹ Ely would do away with tests like "clear and present dan-

191. J. ELY, *supra* note 3, at 58. The references are to J. RAWLS, A THEORY OF JUSTICE (1971)(defending interventionist welfare state); and R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974)(advocating limited "night watchman" state).

192. As Ely's book went to press, someone suggested almost exactly that. Nowak, *Foreword: Evaluating the Work of New Libertarian Supreme Court*, 7 HASTINGS CONST. L.Q. 263 (1980)(contending that the differences between the Warren and Burger Courts may be understood in terms of the Warren Court's adherence to Rawlsian principles and the Burger Court's following the axioms of Nozick).

193. 198 U.S. 45 (1905).

194. Taylor, *Due Process Under Review*, N.Y. Times, Mar. 16, 1980, § 7, at 11, col. 2; Grodin, (Book Review), NAT'L L.J., Aug. 4, 1980, at 67, col. 1; Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1055 n.74 (1980). Cf. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L. Q. 695, 700 (courts are neither equipped nor authorized to make political or sociological decisions).

195. R. CRAWSHAY-WILLIAMS, METHODS AND CRITERIA OF REASONING 195 (1957)(decisions may be logically arbitrary but sociologically unarbitrary); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 129 (1978).

196. J. ELY, *supra* note 3, at 62 (emphasis in original). See *id.* at 186 n.10.

197. *Id.* at 181.

198. *Id.* at 102-03.

199. Ely apparently includes all speech, not just the explicitly political kind most compatible with his theory.

ger"²⁰⁰ and varieties thereof (when content alone and not conduct is at issue) because they, in effect, weigh the facts of an individual case against the current political climate.²⁰¹ Ely's modified absolutist First Amendment theory "immunizes all expression save that which falls within a few clearly and narrowly defined categories."²⁰² What Ely is really doing is setting up a Wechslerian scheme of principled enforcement of First Amendment rights, in hopes of shielding expression during parlous times to come. Ely's categories afford protection by supplying "reasons that in their generality and their neutrality transcend any immediate result that is involved."²⁰³ The categories will be blurred around the edges, as Ely realizes,²⁰⁴ but such categories "build protective barriers around free expression as secure as words can make them."²⁰⁵

Workable neutral principles must nevertheless have some content and be derivable from a source specific enough to focus and delimit judicial authority. This is the role footnote four plays for Ely when the Constitution is too open-textured (or open-textured enough). It is Ely's argument against the troubleshooting use to which substantive due process has been put,²⁰⁶ but it is forsaken when Ely sanctions a thoroughly activist judicial role in the areas of voting rights and malapportionment.²⁰⁷ In these cases, Ely would discourage exclusive reliance on the Equal Protection Clause

200. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

201. J. ELY, *supra* note 3, at 112.

202. *Id.* at 110 (emphasis deleted).

203. Wechsler, *supra* note 12, at 19. Ely faulted neutral principles for lacking substance; in effect, something to be neutral *about*. J. ELY, *supra* note 3, at 55, 59; cf. L. TRIBE, *supra* note 21, at 1137 (neutral principles valuable only when they result in beneficial human realities). Ely's mature process thinking fulfills that theory by furnishing it content inspired by footnote 4. Ely, *Democracy and the Right to be Different*, 56 N.Y.U. L. REV. 397, 398-99 n.4 (1981).

204. J. ELY, *supra* note 3, at 112, 231 n.14.

205. *Id.* at 116. See Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229 (on tension between desire for unambiguous, transcendent propositions of right and wrong and need for freely decided rules of law). Ironically, the effect of Ely's theory would be to abridge First Amendment freedoms since protection would extend only to explicitly political expression, only along the lines advocated by Bork, *supra* note 13, at 20. See *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 288 n.2 (1974) (Douglas, J., concurring) (rejecting the "emasculative reading of the First Amendment" that only political speech is protected); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (freedom of expression must embrace all issues); Goodpaster, *supra* note 21, at 490.

206. J. ELY, *supra* note 3, at 18.

207. *Id.* at 124-25.

in favor of the Republican Form, or Guarantee, Clause.²⁰⁸ There are two reasons for this reliance: justifications tendered and accepted under the Equal Protection Clause have been too weak,²⁰⁹ and the integration of minorities in the governing process under the one-person-one-vote doctrine is most comfortably assigned to the Republican Form Clause, perhaps in tandem with the Equal Protection Clause.²¹⁰

Yet the Republican Form Clause is even more open-ended than the Equal Protection Clause, which at least describes an intelligible formal relationship. The Republican Form Clause may possibly have had some clearly-defined and hence justiciable meaning in the 18th century,²¹¹ but surely today it is opaque.²¹² Thus loosed from principled moorings, the Court is free to create the political arrangements it finds satisfactory.²¹³

Ely provides a similarly literalist reading of the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."²¹⁴ Ely concludes that "the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution,"²¹⁵ and his argument is that the Court should more vigorously invoke this Amendment as a source of individual rights rather than

208. U.S. CONST. art. IV, §4, cl. 1, provides: "The United States shall guarantee to every State in this Union a republican form of government . . ." See C. BLACK, *supra* note 21, at 64.

209. J. ELY, *supra* note 3, at 121-22.

210. *Id.* at 122.

211. Ely admits that to some of the framers the Republican Form Clause may have meant only that the government will not be a monarchy. *Id.* at 123. See W. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION*, 42-49 (1979); Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694, 1711 (1981).

212. "[T]he Supreme Court has wisely regarded as beyond its competence the enforcement of the constitutional provision guaranteeing to the states a republican form of government. A court acting as such can neither write a constitution nor undertake a general managerial supervision of its administration." L. FULLER, *THE MORALITY OF LAW* 178 (rev. ed. 1969). See *Reynolds v. Sims*, 377 U.S. 533, 582 (1964); *Baker v. Carr*, 369 U.S. 186, 217-32 (1962) (rejecting the Guarantee Clause as a basis for adjudicating malapportionment claims).

213. See generally Kurland, *supra* note 18, at 149-57; Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1422-25, 1427-29, 1435-37 (1979); Note, *United Jewish Organizations v. Carey and the Need to Recognize Aggregate Voting Rights*, 87 YALE L.J. 571 (1978).

214. U.S. CONST. Amend. IX.

215. J. ELY, *supra* note 3, at 68.

pulling the camel of substantive rights through the needle's eye of the Due Process clauses.²¹⁶ Ely's reading of the Amendment is designed to provide principled judicial enforcement of constitutional rights,²¹⁷ as opposed to "textually untethered substantive review"²¹⁸ which transforms the courts into legislatures-cum-over-sight committees.

Yet, while inveighing against the conventional wisdom that the Ninth Amendment is to the body politic what the appendix is to the body physical, Ely fails to come to terms with the different, eighteenth century world of the Ninth Amendment,²¹⁹ a relatively socially homogeneous world of a common English heritage where rights did not have to be enumerated just *because* everyone more or less knew what they were.²²⁰ After two centuries of immigration, urbanization, and secularization, this consensus has disintegrated.²²¹ when the Justices of the Supreme Court cannot agree on when and whether the Ninth Amendment applies,²²² and one Justice has confessed outright that the rights contained or preserved in the Ninth Amendment "are still a mystery to me,"²²³ then it is safe to say that the communal values which sustained

216. *Id.* at 33. See also C. BLACK, *supra* note 21, at 43.

217. J. ELY, *supra* note 3, at 39. "Perhaps the ninth amendment argument gives some satisfaction to Justices who have a sense of uneasiness about going outside the Constitution in protecting certain kinds of rights and helps to support further the illusion of objectivity." Kauper, *Penumbra, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 254 (1965).

218. J. ELY, *supra* note 3, at 189 n.13.

219. The Ninth Amendment, like the Declaration of Independence, "is written in the lost language of the Enlightenment." G. WILLS, *INVENTING AMERICA* xiv (1978). See *id.* at 259; G. WOOD, *supra* note 108, at viii.

220. See B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 7, 19-20 (1955); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 154-55. See also *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (Bill of Rights was "not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors"); *Weimer v. Bunbury*, 30 Mich. 201, 214 (1874) (*similar*).

221. R. WEIBE, *THE SEARCH FOR ORDER* (1967); C. DEGLER, *OUT OF OUR PAST* 238-337 (1959); F. ALLEN, *THE BIG CHANGE* (1952); R. MORGAN, *THE POLITICS OF RELIGIOUS CONFLICT* 20-21 (2d ed. 1980).

222. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (striking down state statute forbidding use of contraceptives as violative of constitutional right to marital privacy; majority opinion based result on the "penumbra" of specific guarantees of the Bill of Rights, while the concurrence of Goldberg, J., joined by Warren, C.J., and Brennan, J., found support in the language and history of the Ninth Amendment).

223. R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 75 (1955).

unwritten rights have vanished simultaneously with the possibility of principled adjudication thereunder.²²⁴ Indeed, a leading contemporary apologist for the Ninth Amendment contends that it is functionally a presumption for limited governmental powers and not a direct source of rights.²²⁵ It is, nonetheless, important in the Constitution's scheme as a declaration of principle or statement of policy, but this status does not rise to Ely's argued role as generative source of rights.²²⁶ Justice Joseph Story, barely a generation removed from the framers and appointed to the Supreme Court by President Madison, subscribed to this presumptive, or declaratory, view. The Ninth Amendment, he wrote in his commentary on the

224. Ely points out that the state constitutions drafted over the next century included replicas of the Ninth Amendment. J. ELY, *supra* note 3, at 203-04 n.87. This does not, however, gainsay the observation as to the federal Constitution. Smaller communities, being more homogeneous, would have shared practices and understandings difficult to reproduce across a continent. This is why the states have been allowed to experiment with their social and economic problems. *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *Young v. American Mini-Theatres*, 427 U.S. 50, 71 (1976). In this light the problem of federalism is that of finding the best compromise between the efficiency (but conformity) of relatively homogeneous communities and the freedom (but unwieldiness) of the larger, more diverse entity. R. DAHL & E. TUFTE, *SIZE AND DEMOCRACY* (1973).

225. Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787, 812 (1962). "The Ninth Amendment obviously does not create federally enforceable rights." *Doe v. Bolton*, 410 U.S. 179, 210 (1973) (Douglas, J., concurring). See also Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980).

226. The importance of specific written constitutional guarantees to a system of judicial review is discussed in a paper by Edmond Cahn, *The Parchment Barriers*, 32 AM. SCHOLAR 21 (Winter 1962-63), reprinted in *CONFRONTING INJUSTICE* 104 (L. Cahn ed. 1962). A text, says Cahn, anchors a judge's decision to a standard whereby all can ascertain whether the judge has decided aright. *Id.* at 34-35. "Without an authoritative text the modern democratic judge may or may not be willing to overrule an earlier *judicial* decision; he will certainly decline to overrule or annul a *legislative* decision." *Id.* at 34 (emphasis in original). See also Lester, *supra* note 95, at 343-45 (contending that as Britain becomes less homogeneous it increasingly needs a justiciable Bill of Rights). See generally Shapira, *The Status of Fundamental Individual Rights in the Absence of a Written Constitution*, 9 ISRAEL L. REV. 497 (1974); Denenberg, *British Are Once Again Talking Up a Bill of Rights*, N.Y. Times, Mar. 20, 1977, § 4, at 2, col. 3.

This is why the competition to the Ninth Amendment as a source of individual rights is a specific clause of the Constitution, no matter how wrested from its original signification. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (citing parallel reliance for the right of privacy by the Court on Fourteenth Amendment's Due Process Clause and that of the district court below on the Ninth Amendment); *Palmer v. Thompson*, 403 U.S. 217, 239 (1971) (Douglas, J., dissenting) (citing penumbra of specific amendments as source of rights alternative to the Ninth Amendment). See generally Gifford, *Decisions, Decisional Referents, and Administrative Justice*, 37 LAW & CONTEMP. PROB. 3, 7-8 (1972) (on "core" and "penumbra" meanings). *Littera scripta manet*, wrote Horace, the written word remains.

Constitution, "was manifestly introduced to prevent any perverse or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others; and, *é converso*, that a negation in particular cases implies an affirmation in all others."²²⁷

More fundamentally, the Ninth Amendment's scope is symptomatic of a more profound and uncomfortable problem for constitutional theorists. Rules can change not only in meaning but also in function, as circumstances change:²²⁸ an unambiguous rule is an untested rule. As new priorities emerge in American society, it is understandable that they find their way into the Constitution. To a nation leaving behind *laissez-faire* notions of limited government and embracing an affirmative, interventionist government,²²⁹ the Constitution, which at its inception may have served to limit governmental powers for the preservation of individual rights which everyone could identify, by the twentieth century could legitimately be seen as a grant of rights and hence a mandate for the government to act.²³⁰ "Indeed," said a state court in the hour of the New Deal's triumph, "the inalienable rights of the individual are not what they used to be."²³¹ In this way any function the Ninth Amendment may have had was taken up by expansive readings of a specific constitutional text. At the turn of the century the first Justice Harlan wrote: "The Constitution which enumerates

227. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 751-52 (1st ed. Cambridge 1833).

228. As one study notes:

[W]e need to be aware that rules may have *latent* as well as *manifest* functions, that they often have unforeseen consequences, that a rule may be serving a different function from that which was originally intended when it was created, and that some rules are, as judged by the standards of the moment, pointless or positively dysfunctional or counter-productive. Moreover, there may be no clear consensus about one or more of these matters and this too may be a source of perplexity.

W. TWining & D. MIERS, HOW TO DO THINGS WITH RULES 65-66 (1976) (emphasis in original, footnote omitted). See also R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURES (1967).

229. See, e.g., Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government*, 39 IND. L.J. 183 (1964); Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 419 (1979).

230. See, e.g., Miller, *Toward a Concept of the Constitutional Duty*, 1968 SUP. CT. REV. 199; Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Karst & Horowitz, *supra* note 23, at 65-78; Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

231. *West Brothers Brick Co. v. Alexandria*, 169 Va. 271, 283, 192 S.E. 881, 886 (1937).

the powers committed to the nation for objects of interest to the people of all the States should not . . . be subjected to an interpretation so rigid, technical, and narrow, that those objects cannot be accomplished."²³²

The dynamic nature of the Constitution as illustrated by the rise and fall of the Ninth Amendment contrasts sharply with the artificial and unhelpful dichotomy between process and value which Ely is at such pains to impose, even to the extent of denying that judges have important choices to make. A clue to this penchant for antiseptic adjudication lurks in the first eleven pages of the *Foreword*²³³ which Ely all but jettisoned for the book.²³⁴ There, Ely repeatedly associates the unpalatable tenor of the Burger Court with the sin of imposing values:

One can . . . identify a strong strain in the jurisprudence of the Burger Court, one that did not so importantly influence the work of its predecessor. That is the view that the Court should give content to the Constitution, in particular to its more open-ended provisions, not by following the *Carolene Products* approach of identifying the points at which our political process is undeserving of trust, but rather by identifying and enforcing upon the political branches those values that are, according to one formula or another, truly important or fundamental.²³⁵

The value-imposition methodology of the Burger Court is inexorably linked, in Ely's mind, with the record of that Court in protecting minorities,²³⁶ which according to Ely "is not good."²³⁷ Even the current Court's better decisions, such as those involving freedom of expression, derive, says Ely, not from the process approach of *Carolene Products*, "but rather from a jurisprudence that defines the Court's role as one of protecting those values the Court regards

232. *United States v. E.C. Knight Co.*, 156 U.S. 1, 19 (1895) (Harlan, J., dissenting). See generally W. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY 1889-1932*, at 25-26 (1969).

233. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978), revised and reprinted as chapter 3 of J. ELY, *supra* note 3.

234. Emulating Justice Stone, Ely squirreled away an important part of his analysis in a footnote. J. ELY, *supra* note 3, at 247-49 n.52.

235. J. ELY, *supra* note 3, at 248 n.52 (Although in general the Burger Court's constitutional decisions appear to "lack a theme", the Court does, especially in the area of procreative and family rights, utilize a "value-imposition methodology," protecting what it believes to be important).

236. Ely, *supra* note 233, at 8, 12-14.

237. *Id.* at 8.

as truly fundamental."²³⁸ The problem, as Ely sees it, with basing decisions on values and not process is that the results of such decisions are contingent on a particular Court's "rendition of America's constellation of values,"²³⁹ making principled adjudication impossible. This balancing of values, Ely continues, "is not by any means an orientation original to the Burger Court. It plainly marked the work of the Court that decided *Lochner v. New York* and its 200-case progeny."²⁴⁰ By now it should be obvious that a term like "producing *Lochner*" or "Lochnering" is a Gabriel-horn phrase²⁴¹ which, when sounded, is meant to stop a line of analysis in its tracks.²⁴² Ely's complaint is an example of what is aptly called the fallacy of institutionalism,²⁴³ the false notion that an ill-conceived decision demonstrates the unsuitability of courts for a major role in the political process. Nothing has been adduced to show that *Lochner* could not happen in a legislative or administrative context.

The distinction Ely wants and needs to make to sustain his process analysis as something more securely grounded than value imposition simply will not work. Ely chooses not to lock horns with the Burger Court on questions of values and priorities, but seeks an unassailable high ground from which to impose his own preferences. This, then, is the heart of darkness, the Rosebud sled for the process jurisprude: the reluctance to come out and articulate a scheme of democratic values in favor of a misconceived straitjacket or hyperthyroid role for the judiciary. "You can say a bunch of words, but a constitutional connection . . . should require something more than this."²⁴⁴

238. *Id.* at 15.

239. *Id.* Cf. J. ELY, *supra* note 3, at 249 n.52 (the Burger Court protects those rights which it believes to be fundamental).

240. Ely, *supra* note 233, at 15 (footnote omitted).

241. Stigler, *Imperfections in the Capital Market*, 75 J. POL. ECON. 287, 290 (1967), quoted in R. BORK, *THE ANTITRUST PARADOX* 147 (1978).

242. Certainly the Court itself has encouraged the denunciation of *Lochner* and its line as an "era long ago passed into history." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). See also *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 182 (1972) (Rehnquist, J., dissenting); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949).

243. Tribe, *supra* note 164, at 54-55. See also L. TRIBE, *supra* note 21, at 452-55, 564-67; Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 15 (1979).

244. Ely, *supra* note 233, at 11 n.40.

IV. A FINAL WORD ON THE JUDICIAL POWER

Democratic theory and practice suppose no absolutely "right" social or economic viewpoint. Different perspectives are to be thrashed out, tailored, compromised. Yet the judiciary is often required to arrive at some objectively correct answer in arbitrating among those views. Process theory, in seeking to align judicial review with democracy by denying substantive intervention, denies not only the historic task of the American judiciary but also the way rules work in social governance.

All theories possess the element of selection, *i.e.*, of distortion. A theory of judicial review will necessarily contain a certain degree of simplification, but it should not be at the cost of coherence. Accordingly, the task of constitutional theory is to suggest only the most important guiding concerns culled from the nation's political tradition. Specifically, the paradoxes of judicial review are the touchstone with which any such theory must deal.

As for the first paradox, keeping open the channels of political change and response is surely a judicial task, but not the sole task. The courts must ensure that the consensus which percolates through one institution or another—a school board, an agency, state legislature or Congress—does indeed fairly and authentically represent the popular will. Inevitably judges reconcile conflicting popular mandates by legislating interstitially. Interstitial legislation does not mean that only unimportant matters are involved: interstices can connect vital organs. Consensus, moreover, is not an undifferentiated mass waiting to be identified; a minority's ability to pass legislation will be different from its ability to block legislation. This ability can be a function of wealth, access and organization, not necessarily widespread or intense sentiment.

Concerning the second paradox, the literal words of a text cannot serve as a governing constitution without discretion, statecraft, and understanding. Footnote four teaches that there is a time to act and a time to abstain. When and how much remains controversial. Another *Lochner* is always possible, for discretion logically entails the possibility of its abuse. What Langdell denied, what the Realists reveled in, and what the Process school sought to curb or at least render accountable, are, *pace* Ely, the value choices a judge must make in applying a general charter to particular facts. Set against such discretion are institutional checks: an appellate hierarchy, professional and public opinion, even scholarly writing.

With regard to the last paradox, the insulation of the courts from direct political pressures does not mean monastic isolation from the world at large. That is why the concerns of Justice Frankfurter have figured so prominently in this essay: he witnessed the changing role of the judiciary beginning with the echoes of Langdell and Thayer, through the rise of twentieth-century First Amendment doctrine, the drive for racial equality, down to the increasing federalization of services now irrevocably interwoven with American life. It is his ultimate failure to justify a circumspect judiciary in times calling for strengthened constitutional guarantees that New Process scholars seek to rectify.

Process theory, therefore, has correctly committed itself to reconciling a non-representative judiciary with a society premised on making most of its important decisions through popularly-elected assemblies. While protection of individual liberties will always be a paramount judicial task, it should not be oversimplified at the expense of careful examination of the complete judicial function. Irksome it may be to endure rule by Platonic Guardians, but a judiciary articulating fundamental principles pursuant to a legitimate diffusion of power is not Platonic autocracy, and without such a safeguard the scheme of government likely to emerge would be more, much more, than irksome.