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Book Reviews

Taking Constitutions Seriously: A Theory of Judicial Review

DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW. By John Hart Ely.[†] Cambridge: Harvard University Press, 1980. Pp. viii, 268. \$15.00.

Reviewed by Douglas Laycock*

*Democracy and Distrust*¹ is a puzzling book. John Hart Ely more than fulfills the promise of his subtitle: he offers not one, but two theories of judicial review. The first three chapters argue convincingly for an approach to constitutional interpretation more firmly anchored in the text than any other theory proposed in a long time. The last three chapters purport to develop this textual theory, but in fact develop a quite different theory, based on two explicitly normative principles that have no textual basis. Chapter five, on the political process, can easily coexist with the important contribution in the book's first half. But chapter four, on the Constitution generally, and chapter six, primarily on equal protection, seem written by someone else. Only Ely's extraordinarily explicit acknowledgement that he considers some values sufficiently important to override the Constitution can even arguably reconcile the two halves of the book. This Review examines both theories and the tenuous link between them, and then tries to work out the implications of the textual theory outlined in Ely's first three chapters.

I. Ely's Theories

A. *Interpretivism—Chapters 1-3*

Ely poses an alternative to the false dichotomy between the two

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1. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) [hereinafter cited by page number only].

prevailing approaches to constitutional adjudication—approaches that he initially labels “interpretivist” and “noninterpretivist.”² Noninterpretivists are correctly labeled; they believe that the Supreme Court is free to identify fundamental societal values and accord them constitutional protection without regard to constitutional text.³

Interpretivists claim to believe that the Supreme Court should simply interpret the text.⁴ But the label is often inaccurate, for most interpretivists honor only a part of the text. Lawyers attracted to interpretivism by its tendency to constrain judicial discretion are reluctant to take literally constitutional clauses that seem to confer broad discretion. Thus, many interpretivists would limit general language to the specific problems that most concerned the Framers, as illustrated by recurring efforts to limit the equal protection clause to a ban of racial discrimination and little more,⁵ or even less.⁶ Most interpretivists believe that the Constitution’s two most open-ended provisions, the ninth amendment and the privileges and immunities clause of the fourteenth amendment, should be ignored or given meanings much narrower than their text suggests.⁷ Ely calls this approach “clause-bound interpretivism.”⁸ I would call it something else, for in its own way it is as faithless to the constitutional text as noninterpretivism.

Whatever the labels, Ely takes an initially firm stand against both noninterpretivism and clause-bound interpretivism. He says that constitutional values must be found in constitutional language.⁹ But he also says that general language and open-ended provisions were included deliberately and should be given effect.¹⁰ In short, Ely takes the constitutional text seriously in these chapters, and he takes all of it seriously.

One who does so risks ridicule. The very obviousness of relying on constitutional text has been turned against it; there is a notion that emphasis on the text is too unsophisticated to be taken seriously.¹¹

2. P. 1.

3. Pp. 1-9.

4. Pp. 1-13.

5. *See, e.g.*, *Trimble v. Gordon*, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting).

6. *See* R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

7. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 511-27 (1965) (Black, J., dissenting); R. BERGER, *supra* note 6, at 138-39, 389-90.

8. Pp. 12-13.

9. Pp. 16-18, 25, 27-28, 192 n.28, 199 n.66, 236 n.36.

10. Pp. 87-88, 199 n.66.

11. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 86-97 (1962); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 452 (1978). *See* Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 705 (1975) (approving signs of a change in attitude).

Thus, opinions based on text are sometimes denounced as "literalist,"¹² and in conversation—although not so far in print—I have heard text-based arguments dismissed as "trite" and "dull." The ninth amendment is in such disrepute that judges shun it even when it would suit their purposes; no Supreme Court majority has applied it to anything.¹³ The fourteenth amendment privileges and immunities clause has been applied once¹⁴ in a case that was promptly overruled,¹⁵ and arguably one other time.¹⁶

Once these clauses were effectively eliminated from the Constitution, many Justices and commentators were forced to apply the remaining clauses well beyond their literal terms. Thus, the Supreme Court has vigorously enforced a right to travel but refused to explain its constitutional source.¹⁷ The Court has found substantive rights to *laissez faire* capitalism,¹⁸ racial desegregation,¹⁹ and abortion²⁰ in the due process clause, badly distorting a specifically procedural and textually inapplicable clause rather than relying on open-ended substantive clauses that might have been more helpful. Not only "judicial activists," but "conservative" Justices such as Frankfurter,²¹ Harlan,²² and Powell²³ have found substantive rights in the due process clause. To one who believes that the Constitution consists only of its text, these opinions are absurd. Ely rejects them. It is refreshing to see a major constitutional scholar reminding readers that "substantive due process" is a contradiction in terms and that "procedural due process" is redundant.²⁴

When noninterpretivists seriously defend the free importation of

12. See, e.g., *Nevada v. Hall*, 440 U.S. 410, 434, 439 (1979) (Rehnquist, J., dissenting); *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 294 n.10 (1973) (Marshall, J., concurring). See also Grey, *supra* note 11, at 706 n.9.

13. See *Griswold v. Connecticut*, 381 U.S. 479, 520 (1965) (Black, J., dissenting); R. BERGER, *supra* note 6, at 389-90; B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 27 (1955); *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATIONS*, S. DOC. NO. 92-82, 92d Cong., 2d Sess. 1257-59 (1972) [hereinafter cited as S. DOC. NO. 92-82]. But see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 559 n.15 (1980) (plurality opinion).

14. *Colgate v. Harvey*, 296 U.S. 404 (1935).

15. *Madden v. Kentucky*, 309 U.S. 83, 93 (1940).

16. *Oyama v. California*, 332 U.S. 633, 640 (1948) (alternate holding) (semble). The apparent holding that the clause protects the right to own property is irreconcilable with the Court's usual explanation of what the clause means. See note 48 *infra*.

17. *Jones v. Helms*, 101 S. Ct. 2434, 2439-40 (1981); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969); *United States v. Guest*, 383 U.S. 745, 759 (1966).

18. *Lochner v. New York*, 198 U.S. 45 (1905).

19. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

20. *Roe v. Wade*, 410 U.S. 113 (1972).

21. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

22. *Poe v. Ullman*, 367 U.S. 497, 539-55 (1961) (Harlan, J., dissenting).

23. *Roe v. Wade*, 410 U.S. 113 (1972).

24. P. 18.

new values into the Constitution, they are unconvincing. They rely heavily on the claim that the Constitution is too ambiguous and un-specific to support adjudication based solely on the text.²⁵ But this sometimes seems to be mere rationalization: noninterpretivism has infected statutory construction as well. The defiance of statutory language in *United Steelworkers v. Weber*²⁶ has been widely noted.²⁷ And the Court outdid itself in *Whalen v. United States*:²⁸ it substituted "if and only if" for "whether or not," construing a statute to mean exactly the opposite of what the statute said, without acknowledging that it had done anything unusual. In any event, the Constitution's failure to provide specific textual answers to every question is hardly an excuse to ignore the textual answers it does provide; uncertainty as to how much process is due is not a basis for substantive due process.

Ambiguity is no answer at all to the fundamental problem of democratic theory: how can appointed life-tenured judges be permitted to define values other than by reference to positive law, either constitutional or statutory?²⁹ Certainly the justifications for judicial review given by *The Federalist*³⁰ and by *Marbury v. Madison*³¹ permit invalidation only for inconsistency with the Constitution itself, and not for inconsistency with judicial notions of fundamental fairness.³² The noninterpretivists have no convincing answer to these objections. In a chapter on "Discovering Fundamental Values,"³³ Ely demonstrates that all the extraconstitutional sources of values that have been proposed are illusory and ultimately incapable of solving the problem of political legitimacy in a democratic state.

The most serious argument for a noninterpretivist approach to the Constitution is that the Framers so intended. Professor Grey has laid the basis for such an argument by reviewing the importance of natural law theory in colonial and revolutionary thought.³⁴ But other scholars

25. See A. BICKEL, *supra* note 11, at 85-90; L. TRIBE, *supra* note 11, at 12, 13, 14; Grey, *supra* note 11, at 708; Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1165-66, 1172-73 (1977).

26. 443 U.S. 193 (1979).

27. *Id.* at 201; *id.* at 220-22, 226-30 (Rehnquist, J., dissenting); Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 439-41 (1980).

28. 445 U.S. 684, 690-95 (1980).

29. See R. BERGER, *supra* note 6, at 1, 407; pp. 8-9; L. HAND, *THE BILL OF RIGHTS* 39, 73 (1958).

30. *THE FEDERALIST* No. 78 (A. Hamilton) at 492 (B. Wright ed. 1961).

31. 5 U.S. (1 Cranch) 137 (1803).

32. Grey, *supra* note 11, at 706-08.

33. Pp. 43-72.

34. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); cf. Lynch, Book Review, 80 COLUM. L. REV. 857, 862-63

find much less commitment to natural law among the Framers.³⁵ And Grey himself concedes that unwritten natural law may not have been thought judicially enforceable in the face of contrary positive law,³⁶ and that further research is required to determine if enforceable natural law was thought to survive a written constitution.³⁷ Further research is justified, but it seems unlikely that such research will uncover a commitment to judicially enforceable natural law sufficiently clear to legitimate noninterpretivist review, especially in light of the purely interpretivist theory of Hamilton and Marshall.³⁸

Even so, the influence of natural law theories may help explain the inclusion of such open-ended clauses as the ninth amendment and the privileges and immunities clause of the fourteenth amendment.³⁹ Indeed, it is precisely the fear of unrestrained noninterpretivism and imposition of judges' personal values that makes clause-bound interpretivists reluctant to enforce these clauses.⁴⁰ But as Ely notes, ignoring a constitutional clause because one dislikes its institutional implications is no more legitimate than ignoring a constitutional clause because one dislikes its substantive implications.⁴¹ Certainly no one can delete clauses from the Constitution and call himself an interpretivist.

Of course, the clause-bound interpretivists deny that they delete the open-ended clauses; a welter of theories and explanations argue that apparently open-ended provisions really have quite narrow meanings. Ely offers a convincing general refutation of these theories and deals with most of them individually.⁴² To a great extent, the clause-bound interpretivists refute each other; they offer enough different versions of the specifically intended meaning of "privileges and immunities" to demonstrate that there was no such specific intent.⁴³ There is

(1980) (American political tradition may provide basis for judicial role in substantive policy choices). See also Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 3-9 (1954).

35. R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 26-27 (1975); p. 39; C. ROSSITER, *SEEDTIME OF THE REPUBLIC* 270 (1953). See also text accompanying notes 208-11 *infra*.

36. Grey, *supra* note 34, at 871-72.

37. *Id.* at 893.

38. See text accompanying notes 30-32 *supra*.

39. On the fourteenth amendment, see Graham, *supra* note 34, at 3-9.

40. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 519-20 (1965) (Black, J., dissenting); p. 28.

41. P. 38; see p. 28.

42. Pp. 22-41, 118-19.

43. Ely collects the views of Justice Black ("privileges and immunities" was term of art for Bill of Rights), Raoul Berger ("privileges and immunities" was term of art for Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (current version in scattered sections of 42 U.S.C. (1976)), and Howard

no reason not to construe section 1 of the fourteenth amendment in accord with its language: as a sweeping guarantee of equal treatment, adequate procedure, and additional privileges and immunities. These privileges and immunities are unspecified, but they must be substantive entitlements because they are distinct from the rights of procedure and equality guaranteed by the other two clauses.⁴⁴

The most obvious privileges and immunities of citizens of the United States are those expressly granted elsewhere in the Constitution.⁴⁵ Thus, any textually plausible interpretation of the clause must at least incorporate the substantive provisions of the Bill of Rights: the first, second, third, and ninth amendments; the just compensation⁴⁶ and cruel and unusual punishment⁴⁷ clauses; and freedom from unreasonable searches and seizures.⁴⁸ The procedural rights also seem to be privileges and immunities, but it is at least a reasonable inference that the clause is exclusively substantive. If it incorporated the fifth amendment due process clause, the fourteenth amendment due process clause would be redundant.⁴⁹ Ely plausibly suggests that still other privileges

Graham ("privileges and immunities" was term of art for racial equality). Pp. 199-200 n.66. None of these views is the Court's. See note 48 *infra*.

44. Pp. 23-24.

45. See *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1873); *id.* at 118-19 (Bradley, J., dissenting); Conant, Book Review, 34 VAND. L. REV. 233, 239-40 (1981); Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 5-6 (1954). *Contra*, *Twining v. New Jersey*, 211 U.S. 78, 96-99 (1908) (conceding the force of the argument but rejecting it on authority of cases there collected), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964). See also *Oyama v. California*, 332 U.S. 633, 640 (1948); p.27.

46. U.S. CONST. amend. V.

47. *Id.* amend. VIII.

48. *Id.* amend. IV. The Court's apparent view is that the privileges and immunities clause forbids only state interference with relationships between a citizen and the federal government. *Madden v. Kentucky*, 309 U.S. 83, 90-92 (1940); *Twining v. New Jersey*, 211 U.S. 78, 97-98 (1908), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964). This construction makes the clause meaningless, because those rights were protected before its adoption. See *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867) (protecting right to travel as essential to citizen's right to petition and do business with the federal government). The Court did not specify the constitutional source of this right. The only textual basis for *Crandall* is the ninth amendment; for the argument that that amendment applies to the states, see note 86 *infra*. One less concerned about the text might base *Crandall* on the supremacy clause, see *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 95 (1873) (Field, J., dissenting), or on the theory that the Court may imply what is necessary to enable the federal government to function, see *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 23-28 (1969); G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 474 (10th ed. 1980). Either way, the privileges and immunities clause was not needed to enact the only rule the Court attributes to it. See S. DOC. NO. 92-82, *supra* note 13, at 1306-09. For a convincing attack on the reasoning of the *Slaughter-House Cases*, the earliest case to eviscerate the clause, see Graham, *supra* note 34, at 23-38.

49. P. 27. I would not want to be understood as endorsing Justice Black's incorporationist view of the due process clause, see *In re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting); *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring). The language seems to

and immunities exist, not elsewhere enumerated.⁵⁰ But little should turn on the argument, because incorporation of the ninth amendment is a sufficient basis for protecting unenumerated rights against the states.

There are fewer competing explanations of the ninth amendment, but the prevailing one is singularly inconsistent with the amendment's language. The conventional wisdom is that the ninth amendment was inserted solely to make clear that the federal government has no powers beyond those specifically delegated.⁵¹ But that reading renders the amendment superfluous, because the tenth amendment makes that very point in unmistakably clear language. Nor can the conventional wisdom explain the widespread adoption of "little ninth amendments" in nineteenth century state constitutions.⁵² These constitutions had no federalism problem to solve, and their framers must have understood the language they copied to mean what it said—the people retain certain unenumerated rights. The language of the ninth amendment is not much help in identifying these unenumerated rights, but it unmistakably says that some exist.

Professor Berger, who originally adhered to the conventional federalism explanation of the ninth amendment,⁵³ now concedes that there are unenumerated rights.⁵⁴ But, he says, these rights are not judicially enforceable, because a suit to enforce them does not arise under the Constitution,⁵⁵ and because the amendment limits federal power and thus cannot be enforced by any branch of the federal government.⁵⁶ This is less obviously inconsistent with the text than his earlier position, but it is still inconsistent. Berger's unenforceable rights are plainly "disparaged" in comparison to the enumerated rights; as Berger notes, "without protection, a 'right' is empty."⁵⁷ Indeed, Berger's unenforceable, extraconstitutional unenumerated rights would exist to exactly the same extent without the ninth amendment; he virtually concedes that under his reading the amendment adds nothing to the Constitution.⁵⁸

require whatever process is necessary to a determination sufficiently reliable to justify any deprivation based thereon. And the inclusion of a due process clause in the fifth amendment suggests strongly that it means something different from the other procedural rights in that amendment. *But see* p. 194 n.52.

50. P. 28.

51. *Griswold v. Connecticut*, 381 U.S. 479, 520 (1965) (Black, J., dissenting); R. BERGER, *supra* note 6, at 390; S. Doc. No. 92-82, *supra* note 13, at 1257-58. Professor Berger has now shifted his position. *See* text accompanying notes 53-60 *infra*.

52. *See* pp. 203-04 n.87.

53. R. BERGER, *supra* note 6, at 390.

54. Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 9, 20 (1980).

55. *Id.*

56. *Id.* at 7-8, 10, 16.

57. *Id.* at 20.

58. *Id.* at 14.

And he offers no response to Ely's demonstration that the ninth amendment cannot plausibly refer to nonconstitutional rights.⁵⁹ Fairly read, a constitutional guarantee against disparaging unenumerated rights makes such rights constitutional rights, enforceable in the same way as other constitutional rights. A suit to enforce unenumerated rights arises under the ninth amendment. The argument that clauses limiting federal power cannot be enforced by federal courts is frivolous; it applies equally to the first amendment.⁶⁰

Professor Conant concedes that the ninth amendment actually protects unenumerated rights, but argues that it includes only rights already recognized by 1791.⁶¹ This is a far more plausible interpretation than the conventional federalism account, and one that Ely did not anticipate,⁶² but it is not the most convincing reading of the amendment's language. The primary reason to choose this interpretation is to trivialize the amendment for our time and thus to eliminate its unsettling delegation of power to the judiciary.

The ninth amendment does not refer to preexisting rights—the great royal concessions of English history, the colonial charters, the common law, the “rights of Englishmen”⁶³—or even to “rights heretofore enjoyed.” Some such expression would have been the obvious way to express a nonretrogression principle if that had been intended. In the seventh amendment the Framers apparently intended an historical standard, explicitly incorporating “the rules of the common law” and directing that the right of trial by jury be “preserved.” The ninth amendment contains nothing comparable. The reference to rights “retained” by the people gives just a hint of the missing reference to the past, but in the context of a Constitution and political theory that place sovereignty in the people and limit government to delegated powers, “retained” appears to mean “withheld from government control”—the opposite of “delegated” or “surrendered.”⁶⁴ The enumerated rights

59. Pp. 36-37.

60. He does attempt to support this argument with legislative history that applies only to the ninth amendment. For an analysis of that history, see note 85 *infra*.

61. Conant, *supra* note 45, at 240-41.

62. *But see* p. 1.

63. *Cf.* Grey, *supra* note 34, at 865-66 (reviewing colonial charters guaranteeing rights of Englishmen and colonial rhetoric invoking those rights).

64. *Cf.* U.S. CONST. amend. X (referring to power “reserved to” the states or the people). The slight difference between “retained” and “reserved” does not suggest that the use of “retained” limits the ninth amendment to preexisting rights. “Retain” is always reflexive; one retains things for oneself. “Reserve” is only sometimes reflexive; one may reserve for oneself or another. These usages predate the Constitution. *See* II OXFORD ENGLISH DICTIONARY 2507, 2519 (compact ed. 1971) (collecting examples from the eighteenth century and before). Thus, the difference between “retained” and “reserved” emphasizes that the Constitution is an act of the people and

were retained in the same sense, and many of them go far beyond corresponding preexisting rights.⁶⁵

Of course, one could argue that nearly all the cases are wrong and that the rest of the Bill of Rights had the same narrow purpose as the ninth amendment: to ensure that the new government would be no worse than that under George III.⁶⁶ But this is implausible with respect to rights, such as freedom of speech, that were narrowly defined before the Constitution but then stated in sweeping terms in the Constitution.⁶⁷ And it is incontestably wrong with respect to rights not recognized at all before the Constitution, such as freedom from bills of attainder⁶⁸ and religious establishment.⁶⁹ Indeed, every constitutional right was new to the extent it bound the Congress; English rights were wrested from the Crown but not protected against an act of Parliament.⁷⁰ The enumeration of these new rights should not be construed to deny or disparage other new rights retained by the people in the same fundamental reformation of their government—this is the apparent meaning of the ninth amendment.

It would take extraordinarily clear evidence of a different intent to overcome constitutional language that so clearly proclaims the existence of unenumerated rights. Indeed, no amount of legislative history can change the meaning of the text as extensively as some would wish. Professor Berger assures us that the intention of the Framers is “as good as written into the text,”⁷¹ by which he means “substituted for the text.” Had the fourteenth amendment said, “Never hurt black Southerners,” he would not let that bar an argument from legislative

not of the states. The people “retain” for themselves, but “reserve” to the states or themselves. See U.S. CONST. preamble (“We the people . . . establish this constitution . . .”).

65. See W. BEANY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8-26 (1955) (right to counsel); 4 W. BLACKSTONE, *COMMENTARIES* *151-53 (freedom of speech and press); R. MILLER & R. FLOWERS, *TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE AND THE SUPREME COURT* 2-4 (1977) (free exercise of religion); J. SIGLER, *DOUBLE JEOPARDY—THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 21-27 (1969) (double jeopardy); S. Doc. No. 92-82, *supra* note 13, at 1030-32 (freedom of assembly and petition); *id.* at 1215 (compulsory process); Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *THE ERA OF THE AMERICAN REVOLUTION* 40, 40-42 (R. Morris ed. 1939) (fourth amendment); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 14-24 (1949) (privilege against self-incrimination).

66. See Easterbrook, *Due Process and Parole Decisionmaking*, in *PAROLE IN THE 1980s* at 77, 82-83 (B. Borsage ed.) (forthcoming).

67. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 n.14 (1980) (plurality opinion); *Bridges v. California*, 314 U.S. 252, 263-65 (1941).

68. See *United States v. Brown*, 381 U.S. 437, 441-42 (1965).

69. See R. MILLER & R. FLOWERS, *supra* note 65, at 4.

70. 1 W. BLACKSTONE, *supra* note 65, at *90-91; L. HAND, *supra* note 29, at 35. See Grey, *supra* note 34, at 858-59, 866-67 (theory of Parliamentary supremacy came to dominate older natural law theory by mid-eighteenth century).

71. R. BERGER, *supra* note 6, at 7; see Berger, *supra* note 54, at 24-25.

history to show that it really meant "Always help white Northerners."⁷² Legislative history cannot perform such feats. It can clarify ambiguities, indicate central concerns, and cast light on whether cases near the limits of the language were meant to be included. But it cannot do what Berger requires of it; it cannot turn a clause about "rights retained by the people" into one allocating powers between the state and federal governments,⁷³ or limit a provision as general as the second sentence of the fourteenth amendment to the specific terms of an earlier statute from which the Framers did not borrow as much as three consecutive words.⁷⁴ Only the text is part of the Constitution, and in case of conflict the text must control.⁷⁵

With respect to the more limited functions that legislative history can perform, the legislative history of the Constitution presents special problems. The usual difficulties of determining collective intent are magnified many fold:⁷⁶ one federal and thirteen state conventions voted on the original Constitution;⁷⁷ Congress and eleven state legislatures voted on the ninth amendment;⁷⁸ Congress and thirty-seven state legislatures voted on the fourteenth amendment.⁷⁹ Moreover, many of these bodies deliberately chose to let the language of their enactments speak for itself. The federal convention and the first Senate met in secret and recorded little,⁸⁰ and most state legislatures did not record their debates.⁸¹ Finally, even if one believes that clear legislative history can fundamentally change text, the surviving legislative history of the Constitution is not that clear.⁸²

72. Cf. R. BERGER, *supra* note 6, at 10-19 (suggesting that primary intended beneficiaries of fourteenth amendment were racist white Republicans).

73. *Id.* at 390.

74. *Id.* at 36. In any event, the earlier statute—the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (current version in scattered sections of 42 U.S.C. (1976))—is not nearly as narrow as Berger claims. Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

75. See T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *55-60.

76. P. 17.

77. S. DOC. NO. 92-82, *supra* note 13, at XL-XLI.

78. *Id.* at 25 n.2.

79. *Id.* at 31 n.6.

80. C. VAN DOREN, THE GREAT REHEARSAL 26-30 (1948); 1 ANNALS OF CONG. 15-16 (Gales ed. 1789).

81. S. DOC. NO. 92-82, *supra* note 13, at 936 n.5; Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 82 (1949).

82. See A. BICKEL, *supra* note 11, at 99-110; T. COOLEY, *supra* note 75, at *66-67; pp. 16-18, 27-28, 198-200 n.66; G. GUNTHER, *supra* note 48, at 473; Fairman, *supra* note 81, at 138-39; Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); Chafee, Book Review, 62 HARV. L. REV. 891, 898 (1949). Professor Berger managed to portray legislative history as clear only by badly distorting it. See Soifer, *supra* note 74. Professor Berger's reply again shows that there is evidence for his view, but fails to show that the history is clear, as he claims. See Berger,

In the case of the ninth amendment, what little legislative history there is supports the view that the text means what it says. Madison drafted the amendment, and his comments concerning it clearly reflect a desire to protect unenumerated rights.⁸³ Ely seems to concede that Madison's fear of implying unenumerated powers lends some support to the federalism account, but argues that Madison distinctly made both arguments.⁸⁴ Ely's argument is sufficient to prove his point, but it concedes too much. Madison's only reference to the risk of implying unenumerated powers is to the power of infringing unenumerated rights;⁸⁵ his explanation of the amendment is fully consistent with the text.

This analysis of the ninth amendment and the privileges and immunities clause of the fourteenth amendment shows that a true interpretivism, one that gives natural scope to the language of open-ended constitutional provisions, does not narrowly constrain judicial discretion. I have focused on these two provisions because they are the most dramatically open-ended: each protects a set of unenumerated substantive rights whose identification is left to the judiciary in the process of judicial review. One binds the states, and the other binds at least the federal government and probably the states as well.⁸⁶ As Ely notes,

Soifer to the Rescue of History, 32 S. CAROLINA L. REV. 427 (1981). On the pitfalls of judicial reliance on history generally, see Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1032-33 (1977).

83. Pp. 35-36.

84. P. 36.

85. It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights that were not placed in that enumeration, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.

1 ANNALS OF CONG., *supra* note 80, at 439, *quoted at* pp. 35-36 (emphasis added). Professor Berger argues that Madison's intent that unenumerated rights not "be assigned into the hands of the General Government" precludes enforcement of such rights by federal courts. Berger, *supra* note 54, at 7-8. This argument completely ignores the context of the phrase on which he so desperately seizes. Madison said that the disclaimed intent to assign rights to the federal government might be inferred from the "disparagement" of those rights, and that if the rights were assigned to the general government, they would be "consequently insecure." The statement expresses fear that the rights will be violated, not that they will be enforced. Madison sought to render these rights secure by denying the general government power to violate them; Berger would render them insecure by denying any remedy for their violation.

86. The ninth amendment is a privilege or immunity of citizens of the United States and therefore applies against the states as well. See text accompanying notes 44-48 *supra*. But the constitutional text implies that the ninth amendment also applies against the states directly. The original Constitution protects certain rights against the states. U.S. CONST. art. I, § 9, cl. 6 (free navigation clause); *id.* art. I, § 10, cl. 1 (legal tender, bill of attainder, ex post facto, and impairment of contract clauses); *id.* art. I, § 10, cl. 2 (import and export clause); *id.* art. I, § 10, cl. 3 (duty of tonnage clause); *id.* art. IV, § 1 (full faith and credit clause); *id.* art. IV, § 2, cl. 1 (privileges and immunities clause). These rights were the textual basis for the holding in *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 248-49 (1833), that the just compensation clause does not bind the

other constitutional provisions are also open-ended: the equal protection⁸⁷ and cruel and unusual punishment⁸⁸ clauses are prime examples.⁸⁹ But at least the main thrust of these clauses is clear, although the language leaves considerable discretion in individual cases. For example, the equal protection clause rather clearly requires equal treatment of persons similarly situated, although the language itself says very little about what factors are relevant to determining who is similarly situated.⁹⁰ In contrast, the language of the ninth amendment and the privileges and immunities clause of the fourteenth amendment does not even point to such broad themes as equality or cruelty.

The question thus arises whether an interpretivism that gives full scope to the open-ended clauses is any different from a noninterpretivism that ignores the rest of the Constitution. Is there any restraint on judges' power to enforce their own values as they make up unenumerated rights under the Constitution's two most open-ended clauses? Ely thinks there is. He suggests that the Constitution implicitly identifies its own fundamental values in its more specific provisions, and that these values give content to the more open-ended provisions, which are to be construed as *ejusdem generis* with the rest of the document.⁹¹

No idea is entirely new. Dean Redlich made a somewhat similar suggestion with respect to the ninth and tenth amendments many years ago.⁹² But Ely has reinvented it, generalized it to all the Constitution's open-ended provisions, and elaborated it in a far more forceful way. The idea that Redlich partly anticipated is Ely's capstone to a larger

states. The separate enumeration of rights protected against the states implies that, if the states are not mentioned in the enumeration of a right, that right is protected only against the federal government. This inference is sound, but it cannot be applied to the ninth amendment. To do so would be to do precisely what the ninth amendment forbids: to use the enumeration of certain rights—those separately enumerated as protected against the states—to disparage others. The contrast between the ninth and tenth amendments is also instructive. The tenth amendment protects the states and the people from the federal government; the ninth amendment protects only the people. The contrast at least suggests that the people are protected from both of the other two actors in the triad.

Under the *ejusdem generis* construction of the ninth amendment proposed by Ely and explored in this Review, see text accompanying note 91 *infra*, the original content of the ninth amendment as against the states might have been considerably narrower than as against the federal government. But the fourteenth amendment eliminates any discrepancy, both because it expands the base of specific rights that inform construction of the open-ended clauses and because the privileges and immunities clause incorporates the ninth amendment.

87. U.S. CONST. amend. XIV, § 1.

88. *Id.* amend. VIII.

89. Pp. 13-14, 30-32, 41 n.*, 173-76.

90. *Trimble v. Gordon*, 430 U.S. 762, 779-80 (1977) (Rehnquist, J., dissenting). For an analysis of what the language does say on this question, see text accompanying notes 269-80 *infra*.

91. P. 87.

92. Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787, 810-12 (1962).

argument: judges must adhere to constitutional text; the text includes open-ended provisions that cannot be ignored; and there is a legitimate way to interpret those provisions.

Ely freely concedes that construing open-ended provisions in light of constitutional values deduced from more specific provisions does not yield unambiguous answers.⁹³ I shall soon reinforce that point by disagreeing with the answers that he claims it yields.⁹⁴ It has already been suggested that the Redlich-Ely proposal is just another disguise for importing the judges' own values,⁹⁵ and Ely himself seems to have similar concerns.⁹⁶

Ely and I have quite different answers to such objections. My answer, which I explore below,⁹⁷ emphasizes very close attention to the text in identifying constitutional values and in identifying internal limits on the pursuit of those values. These requirements would not be a perfect safeguard, but they would structure debate in an important way and inhibit grand generalizations about high-sounding values that could have been put in the Constitution but were not. An example from a state constitutional context is Chief Justice Burger's claim that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools"⁹⁸ He announced this without citing the state constitution or any state cases,⁹⁹ and then announced a rule of federal deference to this supposed state policy. State law indicated the opposite policy—that for generations public education had been a state responsibility and subject to state control.¹⁰⁰ Perhaps few cases of mistaken constitutional values would be this easy to expose, but a renewed emphasis on constitutional text would restrain

93. See pp. 156, 181.

94. See text accompanying notes 145-364 *infra*.

95. Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1041 (1980); Steinberg, Book Review, 66 A.B.A.J. 1244, 1244 (1980).

96. See pp. 41, 156, 157.

97. See text accompanying notes 159-364 *infra*.

98. *Milliken v. Bradley*, 418 U.S. 717, 741 (1974).

99. He did cite 32 sections of the state School Code, showing that the legislature had directed local school board elections and given local school boards permission to conduct certain of their day-to-day affairs. *Id.* at 742 n.20. In context, these sections were part of pervasive state regulation of local schools; the current annotated version of the 1955 School Code that he cited is more than 800 pages long. MICH. COMP. LAWS ANN. §§ 340.1-.984 (1976). Contrary to his claim, none of the cited sections say that local school boards are autonomous.

100. *Milliken v. Bradley*, 418 U.S. 717, 768-70 (1974) (White, J., dissenting); *id.* at 793-98 (Marshall, J., dissenting); *School Dist. v. State Bd. of Educ.*, 367 Mich. 591, 595, 116 N.W.2d 866, 868 (1962); *In re School Dist. No. 6*, 284 Mich. 132, 145-46, 278 N.W. 792, 797 (1938); MICH. CONST. art. 8, §§ 1-3.

such usurpations by requiring every constitutional argument to build from specific constitutional provisions.

Of course, there could be bad faith. But bad faith can only be aggravated by adopting first principles of construction that deemphasize the text; such principles remove an important restraint from judges who are inclined to substitute their values for the Constitution's. The Redlich-Ely principle is rooted in the text and capable of faithful application.

But Ely does not stop here; there are additional elements to his theory, barely reconcilable with what has come thus far. These additional elements are his answer to the objection that judges will find their own values in the constitutional text. Ironically, they depend on the explicit injection of Ely's values.

B. A Procedural Constitution

Ely argues that procedural values dominate the Constitution,¹⁰¹ but he uses "procedural" in a special sense. The term refers to the political process as well as the judicial process.¹⁰² More surprisingly, it also refers to special protection for minorities who are systematically excluded from successful participation in the political process; such exclusion is said to be a defect in the process,¹⁰³ although the only remedy is to invalidate resulting legislation.

Ely offers three principal reasons for his procedural view of the Constitution. The first is an application of the interpretivist principles set forth in the preceding section. He reviews the Constitution and concludes that it primarily creates a governmental structure and sets the rules of the judicial and political process, leaving most substantive issues to be resolved politically.¹⁰⁴

His second and third reasons are not interpretivist at all. The second is that judicial review must be confined to procedural matters because no broader judicial role is consistent with his conception of democratic theory.¹⁰⁵ He finds it just as offensive to bind today's political majority by the substantive views of the Framers as to bind that majority by the substantive views of five Supreme Court Justices.¹⁰⁶ He therefore believes that substantive provisions do not belong in con-

101. Pp. 87, 90, 92, 100-01.

102. P. 87.

103. Pp. 82-87, 101, 103.

104. Pp. 88-101.

105. Pp. 88, 101-02.

106. Pp. 11-12.

stitutions.¹⁰⁷ He concedes that the Framers included substantive provisions in the Constitution of the United States, but he argues that many of the provisions also served procedural purposes¹⁰⁸ (the treason,¹⁰⁹ titles of nobility,¹¹⁰ ex post facto,¹¹¹ bill of attainder,¹¹² and religion¹¹³ clauses), that some were disastrous failures¹¹⁴ (the fugitive slave¹¹⁵ and prohibition¹¹⁶ clauses), that others have been innocuous¹¹⁷ (the corruption of blood¹¹⁸ and quartering of troops¹¹⁹ clauses), and that still others have been generally unenforced¹²⁰ (the right to bear arms¹²¹ and impairment of contract¹²² clauses). His third reason is that the task of policing the political process to ensure that it is really representative is the only possible function of judicial review for which the judiciary is better suited than the political branches.¹²³

Ely admits that these last two arguments are “overtly normative.”¹²⁴ They reflect his views of what the Constitution ought to provide; they are quite independent of his first argument about what the Constitution does provide. He characterizes them as “more important” than the first argument,¹²⁵ and he admits to a willingness to abandon any part of the constitutional text that is not consistent with “our nation’s commitment to representative democracy.”¹²⁶ This risk of inconsistency between democracy and the Constitution is not remote or hypothetical; for Ely, the proposition “that the government created by the Constitution is a democracy”¹²⁷ is “problematic.”¹²⁸

Here is the critical premise that links the noninterpretivist second half of the book to the interpretivist first half. In Ely’s view, the Con-

107. P. 99.

108. Pp. 90, 100.

109. U.S. CONST. art. III, § 3, cl. 2.

110. *Id.* art. I, § 9, cl. 8; *id.* § 10, cl. 1.

111. *Id.* art. I, § 9, cl. 3; *id.* § 10, cl. 1.

112. *Id.* art. I, § 9, cl. 3; *id.* § 10, cl. 1.

113. *Id.* amend. I.

114. Pp. 99-100.

115. U.S. CONST. art. IV, § 2, cl. 3.

116. *Id.* amend. XVIII.

117. P. 99.

118. U.S. CONST. art. III, § 3, cl. 2.

119. *Id.* amend. III.

120. P. 100.

121. U.S. CONST. amend. II.

122. *Id.* art. I, § 10, cl. 1.

123. Pp. 88, 102-04.

124. P. 101. See Lynch, *supra* note 34, at 863-64.

125. P. 101.

126. P. 41.

127. P. 189, n.6 (quoting Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099, 1112 (1977)).

128. P. 189 n.6.

stitution is like a statute: in general it must be enforced according to its terms, but a higher law can override it. For a statute, the higher law is the Constitution; for the Constitution, the higher law is Ely's definition of democracy. He does not explain how our democracy can require something inconsistent with the fundamental law that created it,¹²⁹ or to put it the other way, how he knows we are committed to his idea of democracy if our Constitution provides for something else.¹³⁰

This explicit elevation of his personal conception of democracy above the Constitution is the fundamental flaw in the book, from which all subsequent problems follow. In the manner of a court distorting a statute to avoid a constitutional question, Ely allows his view of what our democracy requires to distort his reading of the Constitution: he minimizes and denigrates constitutional protection of substantive values.

He has no comparable need to exaggerate procedural values, for they receive clear constitutional protection. The constitutional concern with fair judicial procedure is apparent in the two due process clauses;¹³¹ the three jury trial provisions;¹³² the two venue provisions;¹³³ the rights to indictment by grand jury,¹³⁴ notice of charges,¹³⁵ confrontation of witnesses,¹³⁶ compulsory process,¹³⁷ and assistance of counsel;¹³⁸ and the freedom from double jeopardy¹³⁹ and compelled self-incrimination.¹⁴⁰ Ely persuasively finds a similar concern with open political process, reflected in the republican form clause;¹⁴¹ the protection of speech, press, assembly, petition, and religion;¹⁴² and the voting provisions of article I¹⁴³ and the fourteenth, fifteenth, seventeenth, nineteenth, twenty-third, twenty-fourth, and twenty-sixth amendments.

129. Cf. p. 64 (criticizing noninterpretivists for the "virtually self-contradictory" assumption that "there is a consensus lurking out there that contradicts the judgment of our elected representatives" expressed in a statute).

130. See Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 303-04 (1979) (noting that a written constitution means that "some measure of counter-majoritarianism is positively desirable").

131. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

132. *Id.* art. III, § 3; *id.* amend. VI; *id.* amend. VII.

133. *Id.* art. III, § 3; *id.* amend. VI.

134. *Id.* amend. V.

135. *Id.* amend. VI.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* amend. V.

140. *Id.*

141. *Id.* art. IV, § 4.

142. *Id.* amend. I.

143. *Id.* art. I, § 2, cl. 1.

The fifth chapter, "Clearing the Channels of Political Change,"¹⁴⁴ works out some of the implications of this value in a creative and persuasive way.

But when Ely tries to construe away the Constitution's substantive provisions, his interpretivism becomes distorted.¹⁴⁵ Least convincing is his strained effort to limit the equal protection clause to procedural applications. He first argues that the equal protection clause is too open-ended to be construed directly and must take its content from elsewhere in the Constitution.¹⁴⁶ His equal protection analysis is informed by an earlier clause that provides for equal rights,¹⁴⁷ the privileges and immunities clause of article IV.¹⁴⁸ That clause protects persons excluded from the state political process—residents of other states. It does so by a form of virtual representation: foreigners must be governed by the same laws enacted for citizens, to whom the political process is open.¹⁴⁹

Ely would read the equal protection clause the same way. Discrete and insular minorities who are the victims of societal prejudice may be unable to join in coalitions to influence outcomes in the political process. Thus, like foreigners, they must be accorded virtual representation: the legislature cannot be allowed to discriminate deliberately against them or to underestimate the costs to them of proposed legislation.¹⁵⁰ This focus on legislative motivation and knowledge is the key to Ely's claim that his version of the equal protection clause allows the courts to review only defects in the legislative process and not the legislature's substantive decisions.¹⁵¹

He elaborately explains suspect category analysis as an indirect means of assessing legislative state of mind—of identifying those cases in which the legislature was likely to have been motivated by prejudice or unequal concern and respect for minorities.¹⁵² Consequently, he concludes, suspect category analysis is a one-way street; it protects blacks but not whites, aliens but not citizens, gays but not straights.¹⁵³

144. Pp. 105-34.

145. See Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065-67 (1980); Lynch, *supra* note 34, at 859-62. See also O'Fallon, Book Review, 68 CALIF. L. REV. 1070, 1088-89 (1980).

146. Pp. 32, 87.

147. Pp. 82-85.

148. U.S. CONST. art. IV, § 2.

149. Pp. 83-84.

150. Pp. 81-82, 137, 157.

151. Pp. 135-70.

152. Pp. 145-48.

153. Pp. 170-72.

He no longer considers women a suspect category,¹⁵⁴ although he believes they were until quite recently.¹⁵⁵ Laws discriminating against women and enacted when women were a suspect category remain suspect; recent laws discriminating against women, and laws discriminating against men, are not suspect.¹⁵⁶ Ely would allow explicit racial or sexual classifications if enacted for a good reason, and he would not allow courts to question an unbiased legislative judgment about what constitutes a good reason.¹⁵⁷ But Ely limits this deference by his rule that discrimination against a suspect category is presumptive evidence of legislative bias.¹⁵⁸

II. An Alternate Ending

What seems at the beginning to be a powerful argument for an interpretivist theory that would take all of the Constitution seriously ends in a disappointing mixed bag in which Ely's view of what a constitution ought to do overrides his interpretivism. Ely is not an interpretivist after all. But his contribution to interpretivism remains, waiting to be fully implemented. He builds a powerful interpretivist case for judicial enforcement of the Constitution's open-ended provisions, and plausibly suggests that those provisions be interpreted in light of the values protected by the Constitution's more specific provisions.

The rest of this Review explores how such an approach might work, and what constitutional values can give content to the open-ended provisions, once we abandon Ely's assumption that substantive values do not count. I try to derive as much meaning as possible from constitutional text, relying on legislative history only when it unmistakably clarifies a text that otherwise would be inscrutable. In part this is an exercise; I do not propose that courts be that reluctant even to look at legislative history. But as noted,¹⁵⁹ constitutional legislative history is often not very helpful; it is overused and the text is underused. By relying almost exclusively on the text, I hope to emphasize that it does provide answers to a great many constitutional questions. I do not pretend that my elaboration of the Redlich-Ely principle offers a perfect solution to all problems of constitutional interpretation, but I do hope to demonstrate that it offers a viable and attractive alternative, worthy

154. Pp. 166-70.

155. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933 (1973).

156. Pp. 169-71.

157. See pp. 148, 154, 157, 169-70.

158. Pp. 145-48. See also p. 136.

159. See text accompanying notes 70-82 *supra*.

of further exploration. Throughout the Review, I continue to contrast this interpretivism with the noninterpretivist second half of Ely's book.

A. *Federalism and the Limits of the Method*

Ely identifies two constitutional values—fair judicial procedure and open political process—by noting several constitutional clauses that unmistakably serve these values and mark them as important.¹⁶⁰ Such attention to specific clauses is an essential component of a truly interpretivist effort to identify constitutional values.

Another constitutional value that can be identified in this way is national unity. The privileges and immunities clause of article IV;¹⁶¹ the full faith and credit,¹⁶² extradition,¹⁶³ fugitive slave,¹⁶⁴ and free navigation¹⁶⁵ clauses; the Supreme Court's jurisdiction over suits between states;¹⁶⁶ and the prohibition of war and diplomacy by or between states¹⁶⁷ and of state taxes on imports and exports¹⁶⁸—all tend to create one nation out of separate states. With respect to all these matters, the states were forbidden to treat each other like foreign countries.

The commitment to the federal government of the powers to regulate commerce,¹⁶⁹ coin money,¹⁷⁰ and control foreign affairs¹⁷¹ has obvious unifying functions, as does the supremacy clause.¹⁷² The republican form clause¹⁷³ also serves a unifying function, in addition to its obvious role in protecting liberty: a nation could not long endure half republican and half totalitarian.¹⁷⁴ A related cluster of provisions guarantees equal protection to states and regions: taxation,¹⁷⁵ naturalization,¹⁷⁶ and bankruptcies¹⁷⁷ must be uniform; direct taxes must be

160. See text accompanying notes 131-44 *supra*.

161. U.S. CONST. art. IV, § 2, cl. 1.

162. *Id.* art. IV, § 1.

163. *Id.* art. IV, § 2, cl. 2.

164. *Id.* art. IV, § 2, cl. 3.

165. *Id.* art. I, § 9, cl. 6.

166. *Id.* art. III, § 2, cl. 1.

167. *Id.* art. I, § 10, cl. 3.

168. *Id.* art. I, § 10, cl. 2.

169. *Id.* art. I, § 8, cl. 3.

170. *Id.* art. I, § 8, cl. 5.

171. *Id.* art. I, § 8, cl. 3; *id.* art. I, § 8, cl. 11; *id.* art. I, § 10, cl. 1; *id.* art. II, § 2, cl. 1; *id.* art. II, § 2, cl. 2; *id.* art. II, § 2, cl. 3; *id.* art. III, § 2, cl. 1.

172. *Id.* art. VI, § 2.

173. *Id.* art. IV, § 4.

174. Cf. A. Lincoln, Speech to Illinois Republican Convention (June 16, 1858) ("I believe this government cannot permanently endure half slave and half free."), reprinted in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 372, 372 (R. Basler ed. 1946).

175. U.S. CONST. art. I, § 8, cl. 1.

176. *Id.* art. I, § 8, cl. 4.

177. *Id.*

apportioned;¹⁷⁸ and no port can be preferred over others.¹⁷⁹ These clauses require the federal government to treat the nation as a unified whole, at least with respect to certain matters.

Ely does not discuss the Constitution's emphasis on national unity. I doubt if he would disagree that national unity is a constitutional value; I suspect that these clauses were simply unimportant to his central interest. Probably he would say that these clauses allocate the powers of government, properly belong in a constitution, and are consistent with his thesis that the Constitution is and should be procedural. He would largely be right. But these clauses are important to an interpretivist view of the constitution for several reasons. They illustrate important characteristics of the process of giving content to open-ended provisions by identifying specifically protected values, and they provide the basis for three important constitutional rights not supported by any specific textual provision—the right to travel,¹⁸⁰ the right to engage in interstate commerce,¹⁸¹ and the equal footing doctrine.¹⁸²

Because they are more concerned with governments than with individuals, these clauses cast little direct light on the ninth and fourteenth amendments. For that reason I review them first; they can be used to explore the method of interpretation without implicating my sharp disagreements with Ely over the clauses he discussed.

The first point illustrated by this review of national unity provisions is fairly obvious: the same constitutional clause can serve more than one fundamental value. The dual functions of the republican form clause have already been mentioned.¹⁸³ Consider also the privileges and immunities clause of article IV. Ely analyzes this clause in terms of its protection of individual liberties and its correction of defects in the political process: it is an equal protection provision for out-of-staters, and out-of-staters need special protection because they cannot vote.¹⁸⁴ Those are important functions of the clause, and each provides a basis for identifying constitutional values. But protecting out-of-staters is also important because the nation would never be unified if out-of-staters were treated as foreigners rather than as citizens. This

178. *Id.* art. I, § 9, cl. 4.

179. *Id.* art. I, § 9, cl. 6.

180. *See, e.g.,* *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969); *United States v. Guest*, 383 U.S. 745, 757-58 (1966); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1867).

181. *See, e.g.,* *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 101 S. Ct. 2070, 2074 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440 (1978); *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534-35 (1949).

182. *Coyle v. Smith*, 221 U.S. 559, 567, 577 (1911).

183. *See* text accompanying notes 141, 173-74 *supra*.

184. Pp. 82-85.

function of the clause is also a basis for identifying constitutional values.

One can confidently attribute to these two clauses both the values they serve, because both national unity and open political process are also served by several other clauses. There is little doubt that both are constitutional values. There would be serious doubt only if a clause arguably served multiple values and one or more of those values were not served by any other constitutional clause.

The national unity example also illustrates a second point of general importance: the specific clauses that identify a constitutional value are not themselves broadened by its identification. The national unity value strongly suggests a right to travel, but none of the clauses that serve national unity explicitly creates such a right. The free navigation clause comes closest, but it protects only vessels, and protects them against only certain kinds of interference; it is designed to protect coastal and river trade from taxation or harassment by states along the route.¹⁸⁵ If that were all the Constitution contained on the subject, there would be no constitutional right to travel.¹⁸⁶ That the free navigation clause protects some travel, or that together with other clauses it serves national unity, does not warrant expanding the clause beyond its plain and specific meaning and turning it into a general right to travel. To do so confuses the content of the clause with its consequences, assumes that similar consequences were also intended, and assumes that omissions of related rights resulted from oversight rather than deliberate decision.

The role of the free navigation and other specific clauses in the identification of more general rights is to inform construction of the two clauses that do protect unenumerated rights—the ninth amendment and the privileges and immunities clause of the fourteenth amendment. These clauses provide the missing link in the argument

185. U.S. CONST. art. 1, § 9, cl. 6 ("nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another").

186. Discrimination against visitors to a state is explicitly forbidden by the privileges and immunities clause of article IV. But discrimination against new citizens of a state has been invalidated under the equal protection clause only because a right to travel had already been found. See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); text accompanying notes 354-56 *infra*. And a prohibition of interstate travel, equally applicable to citizens and noncitizens, is not explicitly forbidden by any clause of the Constitution. Such a pure right to travel was found in *United States v. Guest*, 383 U.S. 745, 757-60 (1966), which concerned a private conspiracy to prevent interstate travel, and *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1867), which concerned a tax on interstate travel. Ely contends that the right to travel is the right to move to another state where the majority's values are closer to one's own, and he calls this a procedural right. Pp. 177-79.

from specific clauses to a general right to travel. By indicating that the specific enumerations are not exhaustive, they provide the textual basis for going beyond the text of specific provisions. Whether the Framers specifically contemplated a general right to travel matters little, for they deliberately enacted a set of principles phrased in very general terms. When as a result of further reflection or changing circumstances the Court recognizes an additional situation that falls within one of the principles, it acts appropriately in considering whether to accord constitutional protection.

This does not mean that the ninth amendment is an unlimited warrant for doing anything that might protect a constitutional value. Some countervailing value might also be of constitutional dimension, and courts must give effect to specific constitutional provisions that state or imply limitations on the protection given a constitutional value. Resolving such constitutional tensions is part of the judicial power.

In the case of national unity, the countervailing value is state sovereignty. The repeated references to states,¹⁸⁷ state governments,¹⁸⁸ state legislatures,¹⁸⁹ state laws or legislation,¹⁹⁰ state executives,¹⁹¹ state judges,¹⁹² state citizens,¹⁹³ and state constitutions¹⁹⁴—even in the provisions that limit state power—plainly assume that states will continue to exist and function as governments. The omission from article I of any general power to regulate crime, torts, property rights, or inheritance carries the same implication. But most important is the tenth amendment's provision that powers not delegated to the United States are reserved to the states or to the people. This makes explicit what otherwise would have to be derived from negative implication or legislative history, and it limits the implications that otherwise might be drawn from the constitutional concern with national unity.

National unity and state sovereignty are so inseparably linked and so constantly in tension that they are often referred to as the single

187. See, e.g., U.S. CONST. art. I, § 2, cl. 1; *id.* art. I, § 3, cl. 1; *id.* art. I, § 3, cl. 2; *id.* art. I, § 3, cl. 3; *id.* art. I, § 8, cl. 16; *id.* art. I, § 8, cl. 17; *id.* art. I, § 10, cl. 1; *id.* art. I, § 10, cl. 2; *id.* art. I, § 10, cl. 3; *id.* art. II, § 1, cl. 2; *id.* art. III, § 2, cl. 1; *id.* art. IV, § 1; *id.* art. IV, § 2, cl. 1; *id.* art. IV, § 2, cl. 2; *id.* art. IV, § 4; *id.* art. V; *id.* art. VI, cl. 2; *id.* art. VI, cl. 3; *id.* amend. X; *id.* amend. XI; *id.* amend. XIV, § 1; *id.* amend. XIV, § 2; *id.* amend. XIV, § 3; *id.* amend. XV; *id.* amend. XVII; *id.* amend. XIX; *id.* amend. XXI, § 2; *id.* amend. XXIV; *id.* amend. XXVI.

188. *Id.* art. IV, § 4.

189. See, e.g., *id.* art. I, § 2, cl. 1; *id.*, § 4, cl. 1; *id.* art. IV, § 1; *id.* § 3, cl. 1; *id.* art. V; *id.* art. VI, cl. 3; *id.* amend. XIV, § 2; *id.* § 3; *id.* amend. XVII; *id.* amend. XX, § 6; *id.* amend. XXII, § 2.

190. *Id.* art. VI, § 2; *id.* amend. XVIII, § 2; *id.* amend. XXI, § 2.

191. *Id.* art. IV, § 2, cl. 2; *id.*, art. VI, cl. 3; *id.* amend. XIV, § 2.

192. *Id.* art. VI, cl. 2; *id.* art. VI, cl. 3; *id.*, amend. XIV, § 2.

193. *Id.* art. III, § 2, cl. 1; *id.* art. IV, § 2, cl. 2.

194. *Id.* art. VI, cl. 2.

value of federalism. This usage is convenient so long as it does not obscure analysis. But "federalism" has been misused as a code word for deference to states;¹⁹⁵ it is important not to forget that federalism has two component values.¹⁹⁶

The courts' freedom to protect constitutional values by invoking open-ended provisions is limited not only by competing constitutional values, but also by specific constitutional provisions and their implications. No matter how much it might have served national unity (or individual autonomy, or open political process, or any other constitutional value), the Supreme Court could not have judicially abolished slavery before the thirteenth amendment; the fugitive slave clause clearly implied constitutional protection for slavery.¹⁹⁷ Similarly, the Supreme Court is not free to cripple enforcement of the fourteenth amendment in the name of federalism.¹⁹⁸

Negative implications tend to be more ambiguous, but also demand attention. For example, the eleventh amendment's explicit provision that states may not be sued in federal court by citizens of other states or foreign countries casts serious doubt on the judicially implied immunity from suit by anyone except the United States or another state, because the drafters could have more easily said that states may not be sued in federal court at all, or by private plaintiffs.¹⁹⁹

One can draw other examples from provisions that are not related to federalism. The third amendment's ban on quartering troops in time of peace, together with its requirement that legislation authorize quartering troops in time of war, precludes implication of a ban on quartering troops in time of war. The fifth amendment's prohibition on compelled self-incrimination in criminal cases makes it difficult to imply a similar protection against compulsion to give evidence against oneself in civil proceedings. Finally, and more controversially, the implication that the state can take life if it does so with due process²⁰⁰ argues strongly against any interpretation of the cruel and unusual

195. See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976).

196. See *Judice v. Vail*, 430 U.S. 327, 346-47 (1977) (Brennan, J., dissenting); *Hicks v. Miranda*, 422 U.S. 332, 356-57 (1975) (Stewart, J., dissenting).

197. U.S. CONST. art. IV, § 2, cl. 3. See also *id.* art. I, § 2, cl. 3 (3/5 of a person clause); *id.* art. I, § 9, cl. 1 (slave trade clause); p. 93.

198. The Court has partially done so in abstention cases, beginning with *Younger v. Harris*, 401 U.S. 37 (1971). See Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1134-36, 1148-60 (1977); Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193; Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636, 666-69 (1979).

199. See *Monaco v. Mississippi*, 292 U.S. 313 (1934); *Hans v. Louisiana*, 134 U.S. 1 (1890).

200. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

punishment clause²⁰¹ that would ban capital punishment entirely.

These clauses differ from the free navigation clause, which protects one kind of travel without implying anything about other travel. In the clearest case, the negative implication arises from words added to a complete statement of a right—words that have no effect unless they limit that right.²⁰² By contrast, the free navigation clause contains no language that makes sense only as a limitation of a more general right. If this clause gives rise to a negative implication on the theory that expressing the specific excludes the more general, then there can be no unenumerated rights. The explicit protection of unenumerated rights means that negative implications can arise only from explicit language that is inconsistent with the existence of a right.²⁰³

The federalism example illustrates one other limitation on interpretation of the Constitution's open-ended provisions. Characterizing a provision as open-ended does not justify ignoring its text; the open-ended provision itself must be interpreted. No open-ended provision authorizes courts to protect the liberties or immunities of governmental units. The necessary and proper clause²⁰⁴ is an open-ended grant of "powers" to the federal government, but it does not speak of rights, privileges, or immunities. The tenth amendment also speaks only of "powers," reserving them to the states or the people. The ninth amend-

201. *Id.* amend. VIII.

202. In each of the following constitutional provisions, the words in brackets appear to limit the right that would be stated if they were omitted: "The Judicial power of the United States shall not be construed to extend to any suit [in law or equity], commenced or prosecuted against one of the United States [by Citizens of another State, or by Citizens or Subjects of any Foreign State]." *Id.* amend. XI. "No Soldier shall, [in time of peace] be quartered in any house, without the consent of the Owner, [nor in time of war, but in a manner to be prescribed by law]." *Id.* amend. III. "No person . . . shall be compelled [in any criminal case] to be a witness against himself nor be deprived of life, liberty, or property, [without due process of law] . . ." *Id.* amend. V.

203. It is occasionally suggested that the phrase "Congress shall make no law" implies that the executive and judicial branches and the administrative agencies are not bound by the first amendment. *See* p. 105. But this overlooks the fact that "all legislative Powers" are vested in Congress. U.S. CONST. art. I, § 1 (emphasis added). When other federal officials make law, they nearly always do so derivatively, construing the Constitution or federal statutes, or acting on a delegation from Congress. Neither the judiciary, *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), nor the executive, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952), has any general power to make law on its own initiative. When federal judges or officials make law pursuant to a congressional delegation, any restrictions on speech depend on an act of Congress and hence are within the reach of the first amendment. However, there are cases in which the Supreme Court or the President might conceivably make law without the support of any statute, pursuant to authority in the Constitution itself. Examples are the Court's original jurisdiction over suits between states, U.S. CONST. art. III, § 2, and the President's authority as commander-in-chief, *id.* art. II, § 2. Arguably, in such a case the first amendment would not apply. But, even here, judicial or executive lawmaking depends on congressional acquiescence. *See City of Milwaukee v. Illinois*, 101 S. Ct. 1784, 1790-92 (1981); *Northwest Airlines, Inc. v. Transport Workers*, 101 S. Ct. 1571, 1582-83 (1981). *See also* Westen, *After "Life for Erie"—A Reply*, 78 MICH. L. REV. 971, 985-88 (1980).

204. U.S. CONST. art. I, § 8, cl. 18.

ment, which speaks of "rights," pointedly protects only the people and not the states. The fourteenth amendment protects "persons" from the states; it may protect the states from each other, or even the United States from the states, to the same extent that natural persons are protected,²⁰⁵ but it does not create any special protections for government. Thus, the whole judge-made body of governmental immunities²⁰⁶ is without constitutional warrant.

One could still argue that these immunities are implied by necessity because the system could not function without them, or that such immunities were inherent in the Framers' concept of government and thus implied by the constitutional language that creates the federal government and acknowledges the state governments.²⁰⁷ These two arguments deserve more attention than I can give them here, but they must ultimately be rejected. The first depends on quite implausible factual assertions, and the second ignores the novelty of the government the Constitution creates—a federal constitutional democracy, with divided sovereignty, constitutionally protected liberties, and judicial review—and therefore begs the question. And both arguments face a heavy burden of persuasion because they lack textual support.

This is not to say that Congress and the state legislatures could not enact certain kinds of governmental immunities, or that courts could not create them at common law. Indeed, the constitutionally granted or reserved "powers" may include the power to create immunities in some circumstances. I have suggested only that the implied immunities are not constitutionally required.

I have identified several limits on the protection of constitutional values through open-ended provisions. Such values must be rooted in specific clauses and are limited by similarly rooted countervailing values, direct and negative implications of specific clauses, and textual limits in the open-ended provisions. These limits are important. They help assure that the method remains interpretivist, and they confirm that the interpretivism proposed here, even with the open-ended provisions taken seriously, does not leave courts free to make up rights out

205. See *City of Milwaukee v. Illinois*, 101 S. Ct. 1784, 1790 n.5 (1981); *Nevada v. Hall*, 440 U.S. 410, 429 (1979) (Blackmun, J., dissenting). See also *id.* at 412 (opinion of the Court).

206. See, e.g., *United States v. County of Fresno*, 429 U.S. 452 (1977) (immunity from taxation); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (immunity from regulation); *New York v. United States*, 326 U.S. 572 (1946) (immunity from taxation); *Monaco v. Mississippi*, 292 U.S. 313 (1934) (immunity from suit); *Hans v. Louisiana*, 134 U.S. 1 (1890) (immunity from suit); *United States v. Lee*, 106 U.S. 196 (1882) (immunity from suit). Cf. *Nevada v. Hall*, 440 U.S. 410 (1979) (refusing to create a constitutional immunity not conferred by the text).

207. *Nevada v. Hall*, 440 U.S. 410, 430-31 (1979) (Blackmun, J., dissenting); *id.* at 432-42 (Rehnquist, J., dissenting).

of whole cloth. Beyond these limitations, courts inevitably retain discretion in the enforcement of unenumerated rights. They are not obligated to recognize every claim of right that can be made to fit these criteria, no matter how attenuated the argument or how costly the interference with governmental operations.

In one sense, this approach still falls short of fully implementing the ninth amendment. To limit that amendment to those rights that serve the same values as more specific clauses is, in a sense, to construe the enumeration of certain rights to deny others. Read in the broadest possible way, the ninth amendment frees the judiciary from all constitutional constraint in the creation of new rights. To say that specific provisions control over general ones is no help; the ninth amendment seems to say that specific provisions do not control.

But this is not the only possible construction of the amendment. We are not forced to choose between giving the ninth amendment no effect, as the courts have done, or giving the enumerated rights no effect, as the most extreme reading of the ninth amendment would do. Documents should be construed to give effect to all their provisions;²⁰⁸ this requires a construction that allows for unenumerated rights without making the enumeration of specific rights meaningless.

There is still a fallback position for those who would break entirely free of constitutional text. One could argue that, even though the ninth amendment is completely open-ended and authorizes the Court to create unlimited constitutional rights, the Court might recognize few or none; the specific clauses have meaning because the Court is required to recognize at least the enumerated rights.

There is no clear textual basis for rejecting this argument and the potentially unlimited scope of ninth amendment rights that it implies. The most one can say is that the text does not compel so broad a reading and that there are plausible reasons to read it more narrowly—perhaps even a preponderance of evidence in favor of a construction like the Redlich-Ely proposal.

The principle of construction known by the unfortunate name of *ejusdem generis* is both familiar and sound. When faced with a very general provision following a list of specifics, a court is to construe the general provision in light of the specifics and need not give it the broadest meaning it might take if unaccompanied by the specifics.²⁰⁹ The specifics indicate the frame of reference for the general, the context

208. *United States v. Manasche*, 348 U.S. 528, 538-39 (1954); T. COOLEY, *supra* note 75, at *57-58.

209. *See, e.g., Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973);

in which the Framers were thinking when they drafted the general. The truest interpretation of the general text is usually one that honors both its generality and its context—that goes well beyond the specifics but continues in the direction to which they point. The ninth amendment, which concludes a long list of specific rights by saying that the list is not exhaustive, fits the pattern to which the *ejusdem generis* rule applies. Construing the amendment to protect rights that serve the same values served by the enumerated rights is thus consistent with the text in light of a familiar rule of construction.

This construction is also more consistent with the distrust of unchecked power reflected in the Constitution's elaborate system of separated powers and checks and balances,²¹⁰ because the construction partially constrains judicial discretion in identifying unenumerated rights. For the same reason, the Redlich-Ely construction reduces the disparagement of unenumerated rights that would inevitably result from the view that the Court has absolutely unfettered discretion to create such rights. Hostility to such discretion is the reason for the Court's failure so far to recognize any ninth amendment rights at all.²¹¹

Even under the Redlich-Ely construction, the ninth amendment confers considerable discretion on the courts; construing the amendment in light of textually identifiable constitutional values does not result in a precise and incontrovertible meaning. *Ejusdem generis* limits general language, but it is not an excuse for ignoring it or unduly narrowing it.²¹² No verbal formula can conceal the discretion involved in deciding how much or how little the general language adds to the specifics.

Moreover, more than one theory may explain the specifics, each with different implications for the general. But only a few theories will fit the specific provisions and the context sufficiently well to deserve serious consideration. These can be evaluated and compared; some will fit better than others. For example, I hope to show that my ac-

Weyerhaeuser Steamship Co. v. United States, 372 U.S. 597, 600-01 (1963); *Garner v. Louisiana*, 368 U.S. 157, 167-68 (1961); T. COOLEY, *supra* note 75, at *57.

210. See, e.g., U.S. CONST. art. I, § 1 (bicameral legislature); *id.* art. I, § 2, cl. 2 (two houses differently composed); *id.* art. I, § 3, cl. 1 (same); *id.* art. I, § 3, cl. 7 (impeachment power); *id.* art. I, § 2, cl. 5 (same); *id.* art. I, § 7, cls. 2, 3 (veto power); *id.* art. I, § 9, cl. 2 (habeas corpus); *id.* art. II, § 1, cl. 1 (executive power vested in President); *id.* art. II, § 2, cl. 1 (pardon power); *id.* art. III, § 1 (judicial power vested in judges appointed during good behavior, whose salaries cannot be reduced); *id.* art. III, § 2, cl. 1 (judicial review of cases arising under the Constitution); *id.* art. III, § 2, cl. 2 (congressional power over Supreme Court's appellate jurisdiction); *id.* art. III, § 2, cl. 3 (trial by jury); *id.* amend. VI (trial by jury); *id.* amend. VII (trial by jury).

211. See text accompanying note 40 *supra*.

212. See *United States v. Powell*, 423 U.S. 87, 90-91 (1975); *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 89-91 (1964).

count of constitutional values fits the text much better than Ely's. My account will be subject to criticism and comparison with other new proposals. In this way, a series of closer and closer approximations can refine our understanding of textually identifiable constitutional values. The insoluble disagreements and irreducible pockets of discretion would soon be no greater—perhaps are already no greater—than in any other approach to the Constitution.²¹³

We can reject in advance the foreseeable theory that the Constitution identifies no values on which any generalization can be based—that each clause stands alone, fully serving its own value and expressing its own limits on that value. This is part of Ely's technique for minimizing substantive rights and keeping them out of the open-ended clauses.²¹⁴ Extend it to the procedural provisions as well, and the ninth amendment would have no content at all. That is what is wrong with the theory—theories that preclude unenumerated rights are inconsistent with the text.

One minor variation would insist that each clause serves its own value, from which no generalization is possible, but would concede that the ninth amendment may create a small penumbra around each of these isolated rights. This theory would also fail to give reasonable scope to the text. It would maximize the strength of the objection that limiting the amendment to textually identifiable values construes the enumerated rights to disparage others. Indeed, it would change the ninth amendment to little more than a proviso that enumerated rights be construed broadly. It would not fit within the *ejusdem generis* rationale for limiting the amendment; if the specific provisions have nothing in common and support no generalizations, *ejusdem generis* cannot apply.²¹⁵ Ironically, a refusal to concede that specific rights identify broader values would leave the ninth amendment intact, unmistakably proclaiming the existence of unenumerated rights, but would eliminate any basis for anchoring those rights in the rest of the Constitution—in short, would give courts unfettered discretion.

Consequently, the search for values that give content to the open-ended clauses must be for values like those identified so far: fair judicial procedure, open political process, national unity, and state sovereignty. Such values are broader than the specific provisions that

213. Cf. pp. 62, 67 (noting that every nontrivial constitutional theory has indeterminate implications and requires "judgment calls").

214. See text accompanying notes 216-20, 233, 238, 287-89 *infra*.

215. *Prussian v. United States*, 282 U.S. 675, 679-80 (1931).

identify them, but they are anchored in the text of those specific provisions, and they link such provisions in coherent patterns.

B. Individualism, Personal Autonomy, and Private Association

Having explored the method of interpretation with respect to values that do not seriously challenge Ely's view of a procedural Constitution, we are now ready to consider substantive values. The Constitution protects a pair of substantive values that I would label "individualism" and "personal autonomy." By "individualism" I mean the idea that every individual is valuable for his own sake, imbued with an irreducible minimum of human dignity and entitled to stand equal before the law and to be treated on his own merits. By "personal autonomy" I mean the idea that each individual is entitled to control his own affairs and to be left alone by government insofar as feasible.

The most obvious protection for individualism is in the corruption of blood and forfeiture of estate clauses:²¹⁶ guilt is individual, and no one may be punished for someone else's treason. The prohibition of slavery²¹⁷ is also an individualist provision: no individual may own another. Ely concedes that each of these provisions protects a substantive value, but he treats them as isolated clauses that identify no larger themes.²¹⁸ Similarly, he acknowledges that the ban on titles of nobility²¹⁹ was designed to "buttress the democratic ideal that all are equals in government," but he sees this as "principally" a procedural purpose.²²⁰

The cruel and unusual punishment clause²²¹ also affirms the dignity of every individual; even heinous criminals must be treated with some modicum of decency. The privilege against self-incrimination²²² is related to this value, given the history of torture to induce confessions;²²³ it also reflects the view that no individual should be expected to cooperate in bringing about his own demise.²²⁴

The Constitution's detailed attention to judicial procedure also

216. U.S. CONST. art. III, § 3, cl. 2.

217. *Id.* amend. XIII.

218. Pp. 92, 98.

219. U.S. CONST. art. I, § 9, cl. 8.

220. P. 90.

221. U.S. CONST. amend. VIII.

222. *Id.* amend. V.

223. Morgan, *supra* note 65, at 14-18. See generally J. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME (1977).

224. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55-56 (1964); Morgan, *supra* note 65, at 1-12.

serves the value of individualism. Ely is right in noting that the Constitution protects political procedural rights as well as judicial ones, but judicial procedural protections are much more extensive. Persons affected by legislation are free to speak and vote, but the legislature is not required to listen or to notify people affected by proposed legislation. These differences reflect traditional ways of conducting legislative and judicial business, separation of powers concerns, and the likelihood that at least someone affected by proposed legislation will hear of it and act to protect all the others.²²⁵

But most importantly, these differences reflect the fact that only judicial and quasi-judicial officers regularly and legitimately make decisions about individuals. Subject to narrow exceptions,²²⁶ legislatures make decisions about groups. The bill of attainder clause²²⁷ generally precludes both Congress and state legislatures from acting to harm specific individuals;²²⁸ the federal definition of "legislative Powers"²²⁹ reinforces this prohibition.²³⁰ Thus, the combined effect of the judicial procedure, bill of attainder, and separation of powers clauses is that government generally cannot act to harm specific individuals without notice and hearing.²³¹

The universally accepted rule that litigants are bound by judicial precedent even though they had no notice of the cases that created the precedents reinforces this view of the significance of these clauses. This rule shows that the right to notice does not depend on which branch of the government acts, but on the way in which it acts; when the judiciary creates general rules, it does not have to give notice either.²³² The extensive constitutional attention to procedural rights when government makes decisions about specific individuals, and the enormous costs of implementing these rights, make sense only if the Constitution places a special value on every individual.

225. Cf. Brilmayer, *supra* note 130, at 306-10 (arguing that standing rules, which ensure that courts establish precedents only after hearing a person affected, similarly protect absentees).

226. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468-84 (1977) (upholding legitimate regulation of one uniquely situated individual). Bills to confer favors are irrelevant to the argument in the text.

227. U.S. CONST. art. I, § 9, cl. 3.

228. *United States v. Brown*, 381 U.S. 437, 442-46 (1965); *United States v. Lovett*, 328 U.S. 303, 313-18 (1946); p. 90.

229. U.S. CONST. art. I, § 1.

230. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398 (1798) (separate opinion of Iredell, J.).

231. See *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 799-802 (1980) (Blackmun, J., concurring); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915).

232. See generally Brilmayer, *supra* note 130, at 306-10. Cf. *Bowles v. Willingham*, 321 U.S. 503, 519 (1944) (if Congress could have acted without a hearing, no hearing is required for administrative agency to take same action pursuant to congressional delegation).

One would expect a constitution that values individuals so highly to accord those individuals autonomy when possible, so all the constitutional clauses that serve the value of individualism also, at least tangentially, support the related value of personal autonomy. Other clauses are directly concerned with autonomy. The most important example is the fourth amendment. Even Ely concedes that "[a] major point of the amendment, obviously, was to keep the government from disrupting our lives without at least moderately convincing justification."²³³ The restriction on the government's right to seize or search the person protects the physical body and the ability to go about one's affairs unmolested. Equally important, the restriction on searches of houses and effects creates a refuge, a place where the government cannot easily interfere with private activities because it generally cannot know about them. The third amendment restriction on quartering troops further protects this refuge and thereby also serves the autonomy value.

Further important protection for autonomy appears in the first amendment, the related ban on test oaths,²³⁴ and the restriction on searches of papers. The speech and religion clauses protect rights of conscience, rights that are peculiarly personal.²³⁵ The Supreme Court has properly construed these clauses as absolutely protecting the freedom to believe,²³⁶ thus marking the mind as an even more private refuge than the body or the home.

This is not to deny Ely's claim that the speech clauses reflect a concern with open political processes.²³⁷ They do, and so do the religion clauses, for religious teaching on morals affects political judgments. But that is not the only function of these clauses. Ely acknowledges that the speech clauses protect more than political speech and thus go beyond opening the political process, but once again he treats such a recognition as an isolated phenomenon.²³⁸

One argument for isolating each constitutional clause that protects autonomy is the fear of proving too much. Almost any liberty can be classified as a form of personal autonomy. Anarchists make an extreme claim for personal autonomy, and laissez faire economics is often

233. P. 96.

234. U.S. CONST. art. VI, cl. 3.

235. Cf. O'Fallon, *supra* note 145, at 1088-92 (relying on these clauses to support a constitutional right "to be respected as a moral agent").

236. *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (dictum). See also *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969).

237. Pp. 93-94.

238. *Id.*

justified in terms of personal autonomy.²³⁹ How does one distinguish *Lochner v. New York*²⁴⁰ from a theory that implements personal autonomy through the ninth or fourteenth amendments?

As to *Lochner*, the easy answer is that the Constitution explicitly authorizes the regulation of commerce,²⁴¹ which can only mean that there is no right to engage in unregulated commercial transactions. Rights can limit powers when the two intersect obliquely; for example, commercial regulation may not suppress speech,²⁴² and state regulation of commerce may not discriminate against interstate transactions.²⁴³ But courts cannot legitimately imply rights that are the very opposite of express powers. *Lochner* and similar cases did not involve some non-commercial freedom that happened to be exercised in connection with a commercial transaction; rather, they involved a direct claim to freedom from commercial regulation, a claim negated by the express power to regulate commerce. Similarly, there can be no implied right to freedom from taxation,²⁴⁴ to the use of copyrighted books or patented inventions,²⁴⁵ or to a career as a pirate.²⁴⁶ These and similar inferences from enumerated powers would limit the ninth amendment even if it were decided that no limiting inferences could be drawn from enumerated rights.

More generally, when an individual interacts with others, any claim to autonomy is dramatically weakened. At the risk of begging the question, he is no longer acting autonomously. There is now a relationship; another person has rights and may be entitled to protection from the state. There is potential for conflict that the state may have to resolve. Neither individualism nor autonomy provides a warrant for letting one private citizen exploit another; indeed, the constitutional value placed on the equal dignity of every individual suggests state intervention to prevent such exploitation, and the Constitution prevents it directly in the extreme case of slavery. So the core case of the autonomy valued by the Constitution is the individual acting alone.

But that cannot be all. The protection of the fourth amendment is not limited to hermits; multimeinber households also have a refuge in their homes. The first amendment explicitly protects group assembly,

239. M. FRIEDMAN & R. FRIEDMAN, *FREE TO CHOOSE* (1980); M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

240. 198 U.S. 45 (1905).

241. U.S. CONST. art. I, § 8, cl. 3.

242. P. 36.

243. See note 181 *supra*.

244. U.S. CONST. art. I, § 8, cl. 1.

245. *Id.* art. I, § 8, cl. 8.

246. *Id.* art. I, § 8, cl. 10.

and the free exercise clause protects organized churches as well as individual believers.²⁴⁷ Plainly, some autonomy is guaranteed to some associations. The starting point for identifying these protected associations is the principal autonomy provisions—the first, third, and fourth amendments. These amendments identify areas in which autonomy is especially important—the mind, the physical person, and the home. Autonomy in these areas should not be forfeited merely because humans are social animals.

Thus, political and religious association is constitutionally protected. More controversially, control of one's body and of activities within one's home²⁴⁸ are of special constitutional concern, and the Supreme Court has correctly identified matters of family, sex, and procreation as entitled to constitutional protection.²⁴⁹ This constitutional protection is not limited to married couples;²⁵⁰ the fourth amendment speaks of "persons, houses, papers, and effects," but not of marriage.

I do not mean to suggest that the state can never interfere in these matters. The private associations that the Constitution protects, like all other associations between humans, carry a potential for exploitation. But not every harm to a member of a constitutionally protected private association can justify state interference in that association. The problem is to define "exploitation" in a way that reconciles the autonomy of private associations with protection of their members.

The key to a solution is that all these private associations are voluntary. Thus, the state may intervene to protect persons held to a relationship involuntarily: persons whose consent is suspect, such as children and mental incompetents; or persons who are subjected to unanticipated mistreatment without being given an opportunity to withdraw from the relationship, such as battered spouses. The case law also suggests that there are some things to which no one can consent—most notably physical violence²⁵¹—but this notion must be narrowly limited

247. See *Jones v. Wolf*, 443 U.S. 595 (1979); *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979); *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presb. Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952).

248. See *Stanley v. Georgia*, 394 U.S. 557 (1969).

249. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

250. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

251. See *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179 (1949) (free exercise clause no defense to prosecution for snake handling), *appeal dismissed sub nom. Bunn v. North Carolina*, 336 U.S. 942 (1949); *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (1942) (same); cf. *State v. Bass*, 255 N.C. 42, 120 S.E.2d 580 (1961) (consent no defense to mayhem prosecution for cutting off fingers); *Rex v. Donovan*, [1934] 2 K.B. 498 (C.A.) (consent no defense to assault prosecution for flagellation).

or the autonomy of private associations will be lost.²⁵²

The abortion cases²⁵³ are extraordinarily difficult on this view. A woman's control over her own body is a constitutionally protected value; the Court was not wrong to get involved. But that premise hardly leads to the conclusion that the fetus does not count at all, and the state's claim to be protecting the utterly helpless fetus from death at the hands of its mother is the sort of claim that justifies state intervention even in private associations. Yet the mother also has a claim to protection from exploitation. The fetus makes extraordinarily aggressive demands on her, imposing what is quite literally a form of involuntary servitude, and a painful and potentially life-threatening servitude at that.

The Court struck a balance among these constitutional values. It would be idle to pretend that the Constitution uniquely dictated the Court's solution, or that the Court's views of sound policy did not influence its discretion. But it is important to note that the values balanced were constitutional values, whose protection is committed to the Court even when they do not dictate a unique answer.

The Court's protection of abortion contrasts oddly with its refusal to protect homosexuality.²⁵⁴ A homosexual act between consenting adults in private is squarely within the area of personal autonomy identified here and in the Court's decisions, and the countervailing interests are trivial in comparison to the abortion cases. Why the Court has pursued the hard case and avoided the easy case is a mystery.²⁵⁵

C. Equal Protection

Equal treatment for all is a pervasive constitutional value. It is stated most explicitly in the equal protection clause. It is also implicit in the Constitution's protection of individualism,²⁵⁶ and in the requirements of equality and uniformity in various categories of federal legislation.²⁵⁷ It is one of the values underlying the privileges and

252. I explore the limits of associational autonomy in much greater detail in a forthcoming manuscript, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. — (1981).

253. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

254. *Doe v. Commonwealth's Att'y*, 425 U.S. 901 (1976) (mem.) (affirming 403 F. Supp. 1199 (E.D. Va. 1975)).

255. See Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979). For attempted explanations, see *People v. Onofre*, 51 N.Y.2d 476, 494, 415 N.E.2d 936, 943 (1980) (invalidating sodomy law); *id.* at 499-500, 415 N.E.2d at 947 (Gabrielli, J., dissenting); Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROB. 83 (1980).

256. See text accompanying notes 216-32 *supra*.

257. See text accompanying notes 175-79 *supra*.

immunities clause of article IV.²⁵⁸ It is a component of many more specific constitutional liberties. The speech and religion clauses, for example, prevent discrimination against those with unpopular views.²⁵⁹ The just compensation clause²⁶⁰ requires that the cost of public projects be spread among the taxpayers and not inflicted unequally on a few.²⁶¹ Like Ely, I have no difficulty finding in the ninth amendment a right to equal protection against the United States substantially equivalent to the right against the states set forth in the equal protection clause.²⁶²

1. Suspect Classifications.—Enforcing this value inevitably requires difficult judgments. The bare language of the equal protection clause does not tell courts how to identify persons similarly situated or what standard of review to apply to legislative classifications.²⁶³ Moreover, more than one standard, or else a highly flexible standard, is required. One of the few things we know with unmistakable clarity from legislative history is that racial discrimination was an important target of the clause.²⁶⁴ Yet the text does not mention race. This anomaly is explicable only on the theory that general language was deliberately chosen because the clause was intended to be of general application.²⁶⁵ A single inflexible standard of review for all cases would either substantially destroy legislative power to classify at all or substantially eviscerate the amendment even in its core application to racial discrimination.²⁶⁶ Thus racial classifications, and other classifications with similar characteristics, must receive special treatment. In conventional usage, such classifications are suspect.²⁶⁷

To this point Ely and I are in substantial accord. But we disagree sharply over which characteristics of race are relevant in identifying other suspect classes, the treatment to be accorded a suspect class once

258. See p. 83.

259. See, e.g., *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Elrod v. Burns*, 427 U.S. 347 (1976); *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958); p. 94.

260. U.S. CONST. amend. V.

261. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980); pp. 97-98.

262. P. 33.

263. Pp. 31-32.

264. P. 30.

265. See p. 199 n.66. One scholar has suggested that race was not mentioned only because to do so was distasteful. *Graham*, *supra* note 34, at 18-21. But this is implausible in light of the references to "any slave" in § 4, to "slavery" and "involuntary servitude" in the thirteenth amendment, and to "race, color, or previous condition of servitude" in the fifteenth amendment. Moreover, *Graham's* implication that only racial discrimination was forbidden by § 1, *id.* at 22-23, is inconsistent with his acknowledgement that at least partial incorporation of the Bill of Rights was undoubtedly intended, *id.* at 19 n.80.

266. Pp. 30-32.

267. P. 145.

it is identified, and whether it is classes or classification schemes that are suspect. These disagreements are rooted in a more fundamental disagreement over Ely's insistence that all the Constitution's open-ended provisions be twisted into exclusively procedural terms.

Ely believes that the definitive characteristic of a suspect class is its systematic exclusion from effective participation in the political process.²⁶⁸ Thus, in his view, racial classifications as such can never be suspect, for at least one race will always have access to the political system. Rather, blacks are a suspect class, because they have been excluded. His conclusion that reverse discrimination is not suspect therefore follows inevitably from his specification of the criteria for suspectness.²⁶⁹

This reading of the equal protection clause is in sharp tension with the constitutional text in three different ways. First, the clause speaks in general terms that cover both substance and procedure; unequal substantive protection is just as much a denial of equal protection as unequal procedural protection. There is absolutely no textual basis for Ely's attempt to limit the clause to procedure, even in the broad sense in which he uses the term.²⁷⁰ Only his extraconstitutional normative judgment about the proper role of courts justifies his approach. Indeed, before he introduces that normative judgment, when he is straightforwardly interpreting the Constitution, he says that the equal protection clause is "a rather sweeping mandate to judge of the validity of governmental choices"²⁷¹—the very thing he later decides on normative grounds that courts cannot do.

Second, Ely's reading of the clause focuses on groups rather than individuals. Only by assessing the political power of a group can he determine whether legislation affecting that group adversely is suspect. His view that women may waive their right to equal treatment by not pressing hard enough for it politically²⁷² also highlights his focus on groups as the unit of analysis. But the equal protection clause does not mention groups. "Any person" is entitled to equal protection of the laws;²⁷³ a woman who wants equal treatment is entitled to it no matter

268. Pp. 151-53.

269. P. 170.

270. Similarly, there is no basis for using the phrase "substantive equal protection" to suggest an analogy to substantive due process, as in *Karst & Horowitz, Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 65, and Tussinan & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 361-65 (1949).

271. P. 32. Indeed, he initially exaggerates the extent to which completely unbridled substantive review can be obtained by judicial evasion of the limits inherent in the equality component of equal protection review. Compare *id.* with *Railway Express v. New York*, 336 U.S. 106, 111-13 (1949) (Jackson, J., concurring).

272. Pp. 169-70.

273. U.S. CONST. amend. XIV, § 1.

how many other women are willing to accept discrimination.²⁷⁴ This is no accident of word choice; as noted, individualism is a fundamental constitutional value, closely related to equal protection.²⁷⁵ Recently, another model of equality has emerged, one that emphasizes equal outcomes for groups and demands unequal treatment of individuals to achieve its goal.²⁷⁶ This is a possible model of equality, but there is no textual evidence that it is the Constitution's model.

Third, Ely concludes that the clause confers benefits on blacks and other suspect classes that it does not confer on whites and other nonsuspect classes.²⁷⁷ But that cannot be the meaning of "equal protection." It is no answer to say that Ely's construction is more likely to produce social and economic equality in the long run. That statement, which I do not concede,²⁷⁸ is comprehensible only in terms of equality for groups. But the constitutional command is equality for individuals. Moreover, it is the "protection of the laws" that must be equal, not social and economic statistics.

Recognition that some classifications are more suspect than others does not similarly violate the command of equality, because each individual falls somewhere within each classification. Thus, every individual gets quite limited protection from discrimination based on occupation, much more protection from discrimination based on race,²⁷⁹ and so on; the sum of all these protections is equal for every *person*, however much the standards applied to different *classifications* may vary. Ely makes the clause violate its plain meaning: in his view, the clause provides unequal protection to different persons.

Ely fares no better when he looks for support in other constitutional clauses. He argues at some length that equality rules provide virtual representation to unrepresented groups,²⁸⁰ and so they do. But his emphasis on procedure causes him to view virtual representation as the only function of equal protection, and then to read into this limited function the further requirement that the protected groups be unrepre-

274. See *Lucas v. Forty-Fourth Gen'l Assembly*, 377 U.S. 713, 731-37 (1964).

275. See text accompanying notes 216-32 *supra*.

276. See, e.g., Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 508-11 (1980); Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55; Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213 (1980).

277. P. 170.

278. See Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 792-810 (1979).

279. But see Fullilove v. Klutznick, 448 U.S. 448 (1980); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

280. Pp. 82-87.

sented generally, not merely victimized by the statute at issue.²⁸¹ His evidence for this value is limited to the privileges and immunities clause of article IV.²⁸² That clause does indeed reflect special constitutional concern for a group that is excluded from the political process. But Ely ignores a fundamental difference between the two clauses. The article IV privileges and immunities clause is just as clear about protecting outsiders and not locals as the equal protection clause is about protecting everyone equally.²⁸³

Moreover, other clauses specially protect a fully represented and unusually powerful minority, which could never qualify as suspect under Ely's criteria. This minority is the rich. Three constitutional clauses reflect a special concern that a poorer majority will treat the propertied classes unfairly: the just compensation,²⁸⁴ contract,²⁸⁵ and legal tender²⁸⁶ clauses. Even Ely recognizes that the just compensation clause is a "protection of the few against the many,"²⁸⁷ and that "fear of legislation hostile to the interests of the propertied and creditor classes . . . importantly inspired" constitutional protections.²⁸⁸ But he draws no inference from either of these facts. He belittles the contract clause²⁸⁹ and ignores the legal tender clause.

These clauses reflect a realistic appraisal of the shifting nature of political coalitions. On any given issue, anybody can be discriminated against by a majority running roughshod over his interests, no matter how powerful he is more generally. The Constitution's recognition of this argues strongly against Ely's view that whites are largely left out of the equal protection clause because they do not need the protection.

The reason Ely ignores the risk that rich people or white males might be victimized on particular issues is his determination to avoid substantive review. But this determination forces him to attempt an impossible distinction between cases in which a group that is fairly represented in the political process loses on a particular issue or series of issues and cases in which a group is permanently excluded from effec-

281. Pp. 82, 151.

282. See pp. 82-84.

283. The clause provides that one group, referred to as "The Citizens of each State," "shall be entitled to all privilege and immunities of" another group, referred to as "Citizens." U.S. CONST. art. IV, § 1. The membership of the two groups is arguably unclear, but that ambiguity does not affect the argument in text. The clause requires that the first group be treated as well as the second, and just as clearly does not require that the second group be treated as well as the first.

284. *Id.* amend. V.

285. *Id.* art. 1, § 10, cl. 1.

286. *Id.*

287. P. 97.

288. P. 81. See Sandalow, *supra* note 82, at 1044.

289. Pp. 91-92.

tive political participation by the refusal of other groups to deal with it.²⁹⁰ The Supreme Court's floundering efforts to deal with a similar issue in the multimember district cases show how illusory the distinction is.²⁹¹

Ely's own discussion reveals other insuperable problems. He acknowledges the "formidable" voting power of blacks and electoral proof of their ability "to pool their political interests with those of other groups."²⁹² Yet he says that it would require "an extraordinary insensitivity" to conclude that blacks no longer need special protection, so they are protected after all.²⁹³ But any analysis that makes it a close question whether discrimination against blacks is suspect is untenable in light of the core purpose of the clause. Women were a suspect class in 1973,²⁹⁴ but not in 1980.²⁹⁵ Women made progress in those years, but no one else seems to have noticed that they crossed such a constitutional watershed, and Ely gives not a clue about how a case announcing the change could be litigated or decided under any judicially manageable standard.

Ely necessarily acknowledges the problem of *Castaneda v. Partida*²⁹⁶—that many members of an oppressed majority may accept their own inferiority and the discrimination against them, and even discriminate against their fellows.²⁹⁷ This recognition vastly complicates the task of identifying excluded groups and significantly limits the generalization, on which so much of Ely's analysis depends, that the majority can be trusted not to hurt itself.²⁹⁸ When one adds the possibility that a dominant majority may discriminate against its own members out of guilt, not much of the generalization is left.

290. Pp. 82, 151. For arguments that Ely's test is very difficult to apply and that its implications are more activist than he realizes, see Lupu, *Choosing Heroes Carefully*, 15 HARV. C.R.-C.L.L. REV. 779, 788-91 (1980); Cox, Book Review, 94 HARV. L. REV. 700, 709-12 (1981).

291. See *City of Rome v. United States*, 446 U.S. 156, 183-85 (1980) (plurality opinion); *City of Mobile v. Bolden*, 446 U.S. 55, 65-74 (1980); *White v. Regester*, 412 U.S. 755, 765-70 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 144-61 (1971). The Court has stated:

[W]e have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. . . . To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiff's burden is to produce evidence to support findings that the political process leading to nomination and election were not equally open

White, 412 U.S. at 765-66 (citations omitted).

292. P. 152.

293. *Id.*

294. Ely, *supra* note 155, at 933.

295. P. 166.

296. 430 U.S. 483, 499-500 (1977).

297. Pp. 165-66; see G. ALLPORT, *THE NATURE OF PREJUDICE* 150-53 (1954).

298. Pp. 100, 170-71.

Ely also pays little heed to the diversity of majorities and the likelihood that, when a majority does choose to discriminate against itself, its weakest and most vulnerable members will bear the costs. A medical school faculty that excludes the son of a postal worker is hardly discriminating against itself.²⁹⁹ Nor is a legislative districting committee discriminating against itself when it eliminates an Hasidic legislator in favor of a black legislator.³⁰⁰ Both of these actual cases were litigated with studied disregard for the identity of the victim and studied fixation on the myth of a monolithic white majority. Ely is not completely unaware of these problems.³⁰¹ But, naively in my view, he considers them separable issues, rather than inevitable consequences of reverse discrimination. He completely fails to acknowledge the extent to which these problems complicate the already unmanageable task of identifying unrepresented groups. And the likelihood that discrimination against the majority will turn out to be discrimination against its most vulnerable members exacerbates the inconsistency between Ely's equal protection and the individualistic equal protection that emerges from the constitutional text.

By contrast, the conventional view that it is immutability, irrelevance, and historic abuse that make classifications suspect fits the text and the Framers' focus on race.³⁰² These are characteristics of race that give a plausible account of why racial classifications are suspect and that can be applied to similar classifications without doing violence to

299. *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978); N.Y. Times, June 29, 1978, at A22, cols. 4, 5. Nothing is constitutionally suspicious about a merit selection system that has disparate impact on the sons of postal workers. The point is that such a system places most of the cost of a quota for minorities on the children of lower and working class whites and not on the children of white professors of medicine or other upper class whites. Because that distribution of burdens is foreseeable to the medical faculty when it adopts the quota, its actions cannot be justified on the theory that it is discriminating only against its own members and people like them. See Lupu, *supra* note 290, at 791-92; Van Alstyne, *supra* note 278, at 801-02.

300. *United Jewish Org. v. Carey*, 430 U.S. 144 (1976).

301. P. 258 un.107 & 109.

302. These criteria have figured prominently in analyses of discrimination. See, e.g., *Fronterio v. Richardson*, 411 U.S. 677, 684-87 (1973) (plurality opinion); *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 18-20, 485 P.2d 529, 539-41, 95 Cal. Rptr. 329, 339-41 (1971); Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1, 6-12 (1976); Brillmayer, Hekeler, Laycock & Sullivan, *supra* note 276, at 526-33; Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 240-44 (1971); O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U. L. REV. 19, 56-63 (1979); Schatzki, *United Steelworkers of America v. Weber: An Exercise in Understandable Indecision*, 56 WASH. L. REV. 51, 55-57 (1980); Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1434-36 (1979). Ely's attack on this explanation appeared while Brillmayer, Hekeler, Laycock & Sullivan, *supra* note 276, was in galleys. His attack, and subsequent conversations, suggest that there is less consensus than my coauthors and I realized. See also Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1105-06 (1977).

the textual requirement of equal protection for every person.³⁰³

Ely spurns this account by treating the component elements of the explanation separately and ignoring the sum of the parts. He shows that not all immutable characteristics are suspect³⁰⁴ and that not all irrelevant characteristics are suspect,³⁰⁵ but he ignores the possibility that something might be suspect about a characteristic that is both, especially if for centuries it has been the basis of hatred, prejudice, conflict, or domination.

He also plays with the meaning of immutable, minimizing the fact that illegitimacy can be changed only by the father and not by the child,³⁰⁶ and suggesting that sex-change operations have made sex mutable³⁰⁷ but ignoring racial passing³⁰⁸ and racial disguise.³⁰⁹ Nor does he entertain the possibility that some characteristics should be treated as immutable because of fundamental interests in not changing them. The constitutional value of personal autonomy with respect to one's body³¹⁰ precludes giving constitutional significance to the possibility of escaping discrimination through a sex-change operation; the free exercise clause³¹¹ precludes similar pressure to undergo religious conversion. Ely is generally scrupulous about taking opposing arguments seriously and treating them fairly; his discussion of immutability is an important exception.

As Ely's gamesmanship with the meaning of immutability indicates, the labels that have been assigned to the traditional indicia of suspectness are somewhat ambiguous. But the underlying concepts can be defined by reference to race, the original suspect classification. Thus, "immutability" need not be absolute. Many light-skinned blacks could escape discrimination by "passing" as white. But it would be difficult and degrading to do so, and there is no reason to believe that the Framers would have considered discrimination against these blacks

303. A much simpler analysis can explain why discrimination against blacks is suspect: mistreatment of blacks was the most immediate evil that the clause was to correct. But that analysis cannot explain why the Framers required equal treatment of every person instead of merely forbidding mistreatment of blacks.

304. P. 150.

305. Pp. 155-56.

306. Pp. 150, 249 n.55. Exclusive power in the father means that illegitimacy is immutable from the child's perspective. See text accompanying notes 331-35 *infra*.

307. P. 150.

308. See Burma, *The Measurement of Negro "Passing"*, 52 AM. J. SOC. 18 (1946); Eckard, *How Many Negroes "Pass"?*, 52 AM. J. SOC. 498 (1947).

309. See J. GRIFFIN, *BLACK LIKE ME* (2d ed. 1977).

310. See text accompanying notes 233-34 *supra*.

311. U.S. CONST. amend. I.

any less suspect than discrimination against blacks for whom any attempt to "pass" would be futile.

"Relevance" can also be clarified by examining race. Race is irrelevant in the sense that it is almost never of legitimate interest to the government for its own sake. At most it is statistically associated with some other characteristic that is relevant to a governmental decision—say knowledge of nuclear physics. It is easy to tell which characteristic actually matters by considering two persons identical except for race and two others identical except for knowledge of nuclear physics.³¹² The government has no basis for distinguishing the two who differ only by race, but it may have a basis for distinguishing the two who differ only in knowledge of nuclear physics. For example, it may be hiring physicists, or licensing nuclear reactor personnel.

Of course, this is not the only meaning of "relevance," or even the most common meaning. Statistical associations may be enough to establish relevance in the law of evidence,³¹³ and we often use easily measurable characteristics as predictors of associated characteristics that are more difficult to measure. In the sense of statistical association, race is presently relevant to a vast array of characteristics, perhaps including knowledge of nuclear physics. But that does not entitle the government to refuse to hire or license black physicists.

It is the immutability of race that justifies the constitutional ban on its use as a predictor. If the government accepts or requires a degree in nuclear physics as evidence of knowledge in the field, those few persons who learned nuclear physics outside a degree program can earn the degree if they care enough. Because the predictor characteristic is immutable, individuals can accommodate themselves to it.³¹⁴ But if the government licenses only white nuclear physicists, no black can ever earn a license, no matter how great his abilities or effort. Race is therefore an unacceptable predictor, no matter how few black nuclear physicists there are. More generally, statistical associations are not enough to justify immutable predictors; such predictors can be used only when they are relevant in distinguishing otherwise identical individuals.³¹⁵

312. This is the technique of controlling for other factors, familiar to the sciences, see H. BLACKLOCK, *SOCIAL STATISTICS* 315-25 (rev. 2d ed. 1979), and to employment discrimination litigation, see *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 281-84 (1976).

313. See FED. R. EVID. 401; MCCORMICK ON EVIDENCE § 185, at 436-38 (2d ed. E. Cleary 1972).

314. See Underwood, *supra* note 302, at 1436-42. See also pp. 150, 154-55.

315. When an immutable characteristic is relevant in this sense, there is nothing suspect about using an immutable measure of the characteristic, provided that the reason the measure is immutable is that it reliably predicts the characteristic. For example, intelligence is often relevant, reasonably immutable, and impossible to observe directly. To the extent that a test reliably measures

The "historic abuse" of race includes slavery, domination of one race by the other, physical violence, apparently ineradicable hostility, discrimination (civil, political, and economic), racial stereotyping, and frequent use of race as a predictor or classifier despite its inappropriateness under the immutability and irrelevance criteria. This history is not limited to the United States; similar discrimination has gone on in many times and many places in some substantial portion of all the cases in which races have mixed.³¹⁶ It is not limited to white victimization of blacks.³¹⁷ Humans have a strong tendency to define other races as legitimate victims of hatred and exploitation.³¹⁸

Dean Schatzki agrees that immutability, irrelevance, and historic abuse are the reasons for strictly banning racial discrimination, but argues that in the United States the historic abuse of racial categories has been directed only at certain groups.³¹⁹ He believes that this American experience lends some support to the view that Title VII of the Civil Rights Act of 1964³²⁰ does not prohibit all reverse discrimination. The argument is not implausible, and could be applied to the equal protection clause as well. I reject it for three reasons. Most important, it is inconsistent with the textual requirement of *equal* protection.³²¹ Second, racial discrimination by dominant whites in this country does not appear to be different in kind from racial discrimination by dominant nonwhites elsewhere; the evil is universal. Third, in many cities and counties in the United States, blacks or Chicanos are politically dominant. Even under Schatzki's analysis, reverse discrimination by these local governments is as evil as discrimination by white governments. All racial groups have been victims of discrimination on occasion and may be again.

Historic abuse distinguishes race from a characteristic like high blood pressure. High blood pressure is largely immutable and is sometimes used as a predictor of consequences with which it is only statisti-

intelligence, test scores will be as immutable as intelligence itself. But this immutability is derivative, and not suspect if intelligence itself is not suspect. Thus, it makes no difference that test scores are arguably irrelevant on the ground that, if we could measure intelligence perfectly, there would be no basis to distinguish between two persons who are identical in intelligence but different in test scores.

316. See B. BERRY & H. TISCHLER, *RACE AND ETHNIC RELATIONS* 115-45 (4th ed. 1978); E. FRAZIER, *RACE AND CULTURE CONTACTS IN THE MODERN WORLD* (1957).

317. B. BERRY & H. TISCHLER, *supra* note 316, at 90, 92-93, 100-01. See also sources cited note 327 *infra* (evidence of ethnic and religious discrimination by nonwhites).

318. G. ALLPORT, *supra* note 297, at 246. See generally *id.* at 1-519.

319. Schatzki, *supra* note 302, at 55-57.

320. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

321. See text accompanying notes 277-80 *supra*; note 303 *supra*. See generally text accompanying notes 283-91 *supra*.

cally associated. For example, the government might refuse to hire astronauts with high blood pressure, even though some might perform safely. But because there is no long history of conflict or domination between blood pressure groups, not hiring high blood pressure astronauts is far less suspect than not hiring black astronauts or white astronauts. Rejection of those with high blood pressure is less likely to have been motivated by hostility,³²² less likely to add to the cumulative disadvantage and frustration of a group already victimized in many other ways,³²³ and less likely to revive or intensify old hatreds and prejudices.³²⁴

In comparing other classifications to race, no textual or other reason supports the fiction that "suspect" and "not suspect" are the only two classifications. The Supreme Court implies this fiction on occasion,³²⁵ but does not adhere to it in practice.³²⁶ Because the three indicia of suspectness admit of degrees, classifications may be more or less analogous to race. Ethnicity and religion are easy cases, being as immutable, irrelevant, and historically abused as race.³²⁷

Sex is nearly as easy. It is just as immutable and substantially as irrelevant. The pattern of historic abuse is a bit different. Organized group conflict and hostility between the sexes has not been nearly as intense or violent as that between racial, ethnic, and religious groups, and there obviously has been a high incidence of close and friendly relations between men and women. But all the other elements of historic abuse have appeared: domination; physical violence;³²⁸ civil, political, and economic discrimination;³²⁹ stereotyping;³³⁰ and frequent

322. Cf. p. 163 (arguing that victims of high blood pressure are not a suspect class because they should correct any stereotypes about themselves).

323. See Brilmayer, Hekeler, Laycock & Sullivan, *supra* note 276, at 527; Underwood, *supra* note 302, at 1435.

324. See Van Alstyne, *supra* note 278, at 802-08.

325. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); *Dandridge v. Williams*, 397 U.S. 471, 483-86 (1970).

326. See, e.g., *Trimble v. Gordon*, 430 U.S. 762, 766-67 (1977); *Craig v. Boren*, 429 U.S. 190, 197-99 (1976).

327. On historic abuse, see G. ALLPORT, *supra* note 297, at 246; B. BERRY & H. TISCHLER, *supra* note 316, at 106; M. FINLEY, *ANCIENT SLAVERY AND MODERN IDEOLOGY* 75 (1980); *GROUP PREJUDICES IN INDIA* (M. Nanavati & C. Vakil eds. 1951); S. GUTERMAN, *RELIGIOUS TOLERATION AND PERSECUTION IN ANCIENT ROME* (1951); J. HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (1955); B. TUCHMAN, *A DISTANT MIRROR* 369-72 (1978); Freedman, *The Chinese in Southeast Asia*, in *RACE RELATIONS IN WORLD PERSPECTIVE* (A. Lind ed. 1955); Hourani, *Race and Related Ideas in the Near East*, in *RACE RELATIONS IN WORLD PERSPECTIVE* 116 (A. Lind ed. 1955); Okada, *Race Relations in Formosa Under the Japanese*, in *RACE RELATIONS IN WORLD PERSPECTIVE* 371 (A. Lind ed. 1955).

328. See *Bruno v. Codd*, 47 N.Y.2d 582, 393 N.E.2d 976 (1979); Powers, *supra* note 276, at 119-22; Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L.L. REV. 623, 624-25 (1980).

329. See *Frontiero v. Richardson*, 411 U.S. 677, 684-86 (1973) (plurality opinion); G. ALL-

use of sex as a predictor or classifier. And much of the friendliness has been conditional on acceptance of male domination. Sex is virtually as suspect as race.

Distinctions between legitimacy and illegitimacy are also suspect, but less so. The possibility that an illegitimate may persuade his parent to legitimate him reduces immutability somewhat, but legitimation is not always possible,³³¹ and illegitimacy, like race, can never be changed by one's own efforts.³³² The parent may be uncooperative³³³ or uninformed,³³⁴ and is often dead before the question arises.³³⁵ Illegitimacy is irrelevant; claims that it is relevant to proof of paternity, paternal love, or economic dependence are based only on presumed statistical associations. Illegitimates have been discriminated against for centuries with respect to certain civil, political, and economic matters,³³⁶ but there seems to have been no slavery, domination, or stereotyping, and no hostility of the kind directed at racial, ethnic, and religious groups. However, illegitimates have suffered because of hostility to their parents; this should count in assessing historic abuse, and is particularly suspect in light of the constitutional value of individualism.³³⁷

Thus, illegitimacy is irrelevant, largely immutable but not as immutable as race, and historically abused but not as severely or extensively as race. Obviously, a factual inquiry and an exercise of judgment are necessary to assess historic abuse, but a one-time judgment about the past is much more judicially manageable than Ely's continuing assessment of political power.

The slightly lesser degree of immutability and historic abuse justi-

PORT, *supra* note 297 at 109; L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 1-99 (1969); Brilmayer, Hekeler, Laycock & Sullivan, *supra* note 276, at 538 n.159; Powers, *supra* note 276, at 70-88.

330. G. ALLPORT, *supra* note 297, at 33-34, 138-39.

331. See *Jimenez v. Weinberger*, 417 U.S. 628, 631 (1974) (legitimation after onset of parental disability would not make a child eligible for disability benefits); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 171 n.9 (1972) (legitimation forbidden by statute).

332. Cf. *Parham v. Hughes*, 441 U.S. 347, 352-53 (1979) (distinguishing discrimination against father of an illegitimate child from discrimination against child and noting that status is immutable for child but not for father).

333. See *Gomez v. Perez*, 409 U.S. 535 (1973) (per curiam).

334. See *Quilloin v. Walcott*, 434 U.S. 246, 254 n.14 (1978).

335. See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977) (intestate succession); *Matthews v. Lucas*, 427 U.S. 495 (1976) (orphan's benefits); *Levy v. Louisiana*, 391 U.S. 68 (1968) (wrongful death).

336. *Matthews v. Lucas*, 427 U.S. 495, 505-06 (1976); H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 21-42 (1971); Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 19-38 (1969).

337. See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 174 (1972); text accompanying note 216 *supra*.

fies slightly less strict scrutiny of the classification. In the context of reduced immutability or historic abuse, "less strict scrutiny" consists of relaxing the relevance standard. A legitimacy classification may therefore be upheld on the basis of a strong association between legitimacy and the trait in which the legislature is really interested—for example, reliable proof of paternity. But the Court should be aggressive in identifying categories of cases in which the association is not so strong or in which the state's need to rely on a mere association is not great enough to justify use of a substantially suspect classification. No theory can rationalize the Court's tortured illegitimacy jurisprudence, but the analysis offered here could help develop a coherent body of law that takes account of the concerns that seem to have motivated the Court.³³⁸

Distinctions based on citizenship are also only somewhat suspect. Citizenship is immutable for the same reason that religion is immutable: there is a fundamental interest in not changing it involuntarily. The Constitution explicitly protects the citizenship of persons born in the United States;³³⁹ they could not be forced to renounce their citizenship to escape discrimination. And because the fourteenth amendment requires *equal* protection, a resident alien's choice not to relinquish his foreign citizenship must be accorded similar respect. Because alienage has always been associated with race and ethnicity, aliens have suffered comparable historic abuse.

What distinguishes citizenship from race is that citizenship is sometimes relevant. It is the definitive indication of the polity with which one is affiliated. Few would suggest that aliens are constitutionally entitled to vote,³⁴⁰ to hold high public office, to carry an American passport, or to invoke the protection of the American embassy, rather than their own, when traveling abroad.³⁴¹ Similarly, however loyal and trustworthy an alien may be, he owes a higher loyalty to a foreign power. Dismissing this duty as a mere formality, unrelated to the alien's true feelings, would make citizenship mutable: the argument

338. Compare *Lalli v. Lalli*, 439 U.S. 259 (1978), and *Matthews v. Lucas*, 427 U.S. 495 (1976), with *Trimble v. Gordon*, 430 U.S. 762 (1977); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Gomez v. Perez*, 409 U.S. 535 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Labine v. Vincent*, 401 U.S. 532 (1971); and *Levy v. Louisiana*, 391 U.S. 68 (1968). Compare *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972); and *Glover v. American Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968), with *Parham v. Hughes*, 441 U.S. 347 (1979), and *Quilloin v. Walcott*, 434 U.S. 246 (1978).

339. U.S. CONST. amend. XIV, § 1.

340. But see *Rosberg*, *supra* note 302.

341. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873); *Rosberg*, *supra* note 302, at 1133-34.

that an alien should not be coerced to renounce his foreign citizenship assumes that his citizenship means something to him.

It is easy to imagine cases in which the government has a basis for distinguishing between two persons who are identical except that one is not a member of the polity and owes a higher loyalty to a foreign power. Because citizenship is relevant in a nontrivial range of cases, courts have more reason to defer to a legislative judgment that citizenship is relevant in a particular case. Although one can argue over particular decisions, the Supreme Court is on the right track in holding discrimination against aliens generally suspect³⁴² but distinguishing cases in which affiliation with the polity arguably matters.³⁴³

Poverty has been another much-debated problem case.³⁴⁴ Under the approach urged here, the question is not whether the poor are a suspect class, but whether wealth or income are suspect classifications.³⁴⁵ The cases that have been thought to raise the issue did not involve government classifications on the basis of wealth or income, but rather the financing of government services in ways that had disparate impact on the poor.³⁴⁶ The effects of a classification are not irrelevant to its constitutional status. But surely the Supreme Court was right when it later held that a classification with disparate impact on a suspect classification is not the same as, or as suspect as, the suspect classification itself.³⁴⁷ If every classification affecting races unequally were at the core of the equal protection clause in the same way that racial classifications are, government could not function.³⁴⁸

When government does classify directly on the basis of wealth or income, almost invariably it does so to help those with lower incomes.³⁴⁹ Cases presenting the issue would be challenges to the progressive income tax, sliding scale fees for government housing or medical care, and need tests for welfare, scholarships, and other forms

342. *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 602 (1976); *In re Griffiths*, 413 U.S. 717, 721 (1973); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

343. *Ambach v. Norwich*, 441 U.S. 68, 73-74 (1979); *Foley v. Connelie*, 435 U.S. 291, 295-97 (1978).

344. *See, e.g., San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 18-28 (1973); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

345. *See* text accompanying notes 268-80 *supra*.

346. *See, e.g., San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (public education); *Dandridge v. Williams*, 397 U.S. 471 (1970) (welfare); *Griffin v. Illinois*, 351 U.S. 12 (1956) (review of criminal convictions).

347. *Washington v. Davis*, 426 U.S. 229 (1976).

348. *Id.* at 248.

349. Of course, government may use other classifications in a deliberate effort to hurt the poor, as in exclusionary zoning laws.

of government aid. In all these cases income and wealth are directly relevant to ability to pay or to financial need; if two persons are identical except for wealth, the wealthier can afford to pay more.

Wealth and income do have important elements of immutability and historic abuse. They are changeable in principle, but changing them is difficult and often impossible. Class prejudice and class conflict are as old, deeply rooted, and intense as racial and ethnic prejudice and conflict.³⁵⁰ Thus, wealth and income are most easily compared to citizenship, which is immutable and historically abused, but sometimes relevant. Wealth and income are a little less immutable, about as historically abused, and much more often relevant. As with citizenship, the primary solution is to defer to plausible legislative judgments that wealth or income is relevant in particular cases, and to strike down wealth and income classifications that plainly do not meet the relevance criterion. And, as with illegitimacy, the slightly lesser degree of immutability justifies a slight relaxation of the relevance standard.

Classifications in economic regulation are rarely immutable, irrelevant, or historically abused, so much greater deference to such classification is justified. However, there are exceptions, and the commercial context should not insulate the exceptional case from more serious judicial review.

An example is *Morey v. Doud*,³⁵¹ in which a state had distinguished between the American Express Company and all other companies issuing money orders. Only American Express was exempt from a burdensome regulatory scheme enacted to solve the problem of undercapitalized currency exchanges. The Court properly invalidated the legislation. Not being American Express is an immutable characteristic. It is also irrelevant; the state would have no basis for distinguishing American Express from a company identical to it. American Express and the rest of the world have no long history of hatred and conflict, but there is some reason for suspicion: there is a long history of legislation conferring monopolies or special privileges being motivated by favoritism or even bribery.

This "American Express" classification is not nearly as suspect as race, but it is a lot more suspect than classifications typically found in economic regulation. Something more than the mere rationality stand-

350. See, e.g., W. DURANT, CAESAR AND CHRIST 23-25, 38, 47, 77, 86-87, 111-208, 632-33, 656, 668-69 (1944) (describing recurring class war in ancient Greece and Rome); B. TUCHMAN, *supra* note 327, at 171-82, 365-97 (describing class conflict in fourteenth century Europe); W. WILSON, THE DECLINING SIGNIFICANCE OF RACE (1978) (arguing that class is more important than race in late twentieth century United States).

351. 354 U.S. 457 (1957).

ard is therefore justified. Because the legislature can accomplish any legitimate purpose without this classification, in a completely unsuspect way—by classifying in terms of capitalization, net worth, net current assets, years in business without default, or some similar measure of solvency and financial stability—even slightly heightened judicial scrutiny is enough to strike down the immutable classification actually drawn. The recent overruling of *Morey*³⁵² was a step in the wrong direction.

2. *Fundamental Interests*.—Interpreting broad constitutional clauses in light of more specific ones also explains and clarifies the fundamental interest branch of strict scrutiny under the equal protection clause.³⁵³ When government discriminates with respect to a textually identifiable constitutional value, the text supports stricter scrutiny of the classification, even if the right that identifies the value is not itself violated.

To explore this proposition it is necessary to explore the structure of fundamental interest cases. In *Shapiro v. Thompson*³⁵⁴ a state denied welfare to those who had recently migrated into the state. An equal protection attack on the classification between travelers and non-travelers is indistinguishable from a claim that the right to travel has been violated by penalizing those who exercise it. Were there no right to travel—if one could be imprisoned for crossing a state line—there could hardly be a right not to be discriminated against for having traveled. The Court has not quite acknowledged this, but it reached a similar result in *Johnson v. Robison*.³⁵⁵ *Johnson* presented equal protection and free exercise challenges to the denial of veterans benefits to conscientious objectors. The Court held, without explanation, that strict scrutiny did not apply to the equal protection claim because the free exercise clause had not been violated.³⁵⁶

*Skinner v. Oklahoma*³⁵⁷ illustrates another equal protection theory. There, the state punished some thieves with sterilization, but exempted embezzlers. An equal protection attack on the distinction between embezzlers and other thieves is independent of a claim that the punishment violates a constitutional right to reproductive freedom.

352. *City of New Orleans v. Dukes*, 427 U.S. 297, 306 (1976).

353. See generally *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 29-37 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634, 638 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

354. 394 U.S. 618 (1969).

355. 415 U.S. 361 (1974).

356. *Id.* at 375 n.14.

357. 316 U.S. 535 (1942).

*United States v. Ricketson*³⁵⁸ was similar. It concerned discrimination between two classes of criminal defendants with respect to the right to confront witnesses. The court should have applied strict scrutiny even though the case came within an exception to the confrontation clause. Fair judicial procedure, particularly confrontation of witnesses in criminal trials, is of constitutional significance. If Congress extends additional confrontation rights to some defendants, it should have a very good reason for not extending the same rights to others. Certainly discrimination with respect to reproduction or confrontation is more suspect than discrimination with respect to the right to prescribe eyeglasses.³⁵⁹ Unfortunately, the court of appeals in *Ricketson* cited *Johnson* for the proposition that strict scrutiny does not apply to the equal protection claim unless the underlying right is also violated.³⁶⁰ The court did not notice that the equal protection claim had been redundant in *Johnson* but that the quite different equal protection claim in *Ricketson* was not redundant at all; indeed, no court has noticed that two quite different equal protection theories appear in fundamental interest cases.

Notice, I say two different theories but only one kind of case.³⁶¹ At a sufficient level of abstraction, both theories apply to every case, although one generally fits the facts better than the other. Thus, in *Shapiro* the penalty on travel was quite uneven; those ineligible for welfare on other grounds were unaffected by it. *Shapiro* can be thought of as giving more travel rights to persons ineligible for welfare, just as *Skinner* gave more reproductive rights to embezzlers and *Ricketson* gave more confrontation rights to non-organized criminals. As in *Skinner*, this classification would deserve strict scrutiny even if the right to travel were not itself violated. A compelling interest in restricting everyone's travel might be quite irrelevant to the discriminatory restriction on travel actually imposed.

Similarly, *Skinner* can be thought of, somewhat awkwardly, as distinguishing between those who desire to reproduce and those who do not: only the former care about the threat of sterilization in deciding whether to steal. But an equal protection claim on this theory is no different from a claim that the right to reproduce cannot be infringed as punishment for theft.

358. 498 F.2d 367 (7th Cir. 1974), cert. denied, 419 U.S. 965 (1974).

359. See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955).

360. 498 F.2d at 375.

361. Cf. L. TRIBE, *supra* note 11, at 1002-03 (suggesting that the distinction depends on how the "inequalities" are "structured").

More generally, every case of a penalty on a constitutional right or constitutionally valued activity involves two classifications: between those who exercise the right and those who do not, and between those affected by the penalty and those who are not. Equal protection challenges to the first classification are redundant; challenges to the second classification deserve strict scrutiny.

*Griffin v. Illinois*³⁶² illustrates one important line of cases explained by this analysis. In *Griffin* the state distinguished between those who pay for a transcript and those who do not by allowing only the former to appeal errors committed at trial.³⁶³ This classification is a rational way of paying for transcripts, and its disparate impact on the poor does not by itself make it suspect.³⁶⁴ But the Court's decision to order free transcripts on equal protection grounds was justified because the statute discriminated with respect to a constitutional value. The Constitution never has been construed to require criminal appeals, but allowing such appeals plainly serves the constitutional value of fair judicial procedure; discrimination with respect to appeals deserves strict scrutiny.

III. Conclusion

Democracy and Distrust is a strangely schizoid book. Its interpretivism turns out to be a preface, largely irrelevant to its wholly noninterpretivist and idiosyncratic conclusion. Most other reviewers have understandably focused on the conclusion.³⁶⁵ But the interpretivist beginning should not be overlooked. Ely's argument for hewing close to constitutional text is compelling, even if he goes on to ignore it himself. And the Redlich-Ely solution to the interpretation of open-ended constitutional clauses is a genuine contribution that lays the basis for a workable interpretivism that would not ignore those clauses.

This review has outlined how such an interpretivism might be developed. The suggested approach would restore the Constitution itself as the prime basis of constitutional adjudication. And it would take seriously every clause of the constitution, not just those that correspond to the liberal, conservative, activist, restrained, or other personal predilections of each judge, scholar, or lawyer. Legislative history and individual judgment can not and should not be eliminated from the

362. 351 U.S. 12 (1956).

363. *Id.* at 13 n.2.

364. See text accompanying notes 344-50 *supra*.

365. Cox, *supra* note 290; Lupu, *supra* note 290; Miller, Book Review, 32 FLA. L. REV. 369 (1980); Murphy, Book Review, 65 MINN. L. REV. 158 (1980); O'Fallon, *supra* note 145; Steinberg, *supra* note 95; Tribe, *supra* note 145; Tushnet, *supra* note 95.

process. But they must be firmly subordinated to the constitutional text if we are to be faithful to the premise and promise of a written Constitution. This review, and Ely's first three chapters, are a plea to take the Constitution itself more seriously in the future.

Judicial Review and the Problem of the Comprehensible Constitution

JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS. By Jesse H. Choper.[†] Chicago: University of Chicago Press, 1980. Pp. xviii, 494. \$28.50.

DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW. By John Hart Ely.[‡] Cambridge: Harvard University Press, 1980. Pp. viii, 268. \$15.00.

Reviewed by Sanford Levinson*

I. Introduction

The first thing one should note about these two important books¹ is their titles: both are books about judicial review, not analyses of the Constitution that inevitably happen to touch on the role of the courts. In effect, the books stand the initial treatment of judicial review—*Marbury v. Madison*²—on its head. Chief Justice Marshall's argument in *Marbury* cannot be understood apart from his emphasis on the importance of a written Constitution. He noted generally that in America "written constitutions have been viewed with so much rever-

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* Professor of Law, The University of Texas. A.B. 1962, Duke University; Ph.D. 1969, Harvard University; J.D. 1973, Stanford University. Some of the themes suggested in this Review about the notion of constitutional comprehensibility will be elaborated in Levinson, *Law as Literature* (to be published in the *Texas Law Review*). This forthcoming essay will examine the implications of contemporary literary theory for those who would be "guided" by the text of the Constitution, whether by its "plain words" or its purported "structure." This Review was substantially completed before publication of the superb symposium in 42 OHIO ST. L.J. (1981). A number of articles in that issue relate to the concerns of this Review; in the best of all possible worlds, which this is not, I would have been able to take serious account of them.

For help on this Review, I am indebted to Mark Yudof and James E. Fleming. Fleming helped me to understand better Professor Ely's approach toward constitutional analysis. His forthcoming Ph.D. dissertation at Princeton University, "Toward the Ultimate Interpretivism of Constitutional Democracy," promises to be a major contribution toward the assessment and, one prays, the synthesis of many competing paradigms of constitutional interpretation. I should also note the contribution of several discussions with Douglas Gordon, Class of 1980, The University of Texas School of Law.

1. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) [hereinafter cited as J. CHOPER]; J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) [hereinafter cited as J. ELY].

2. 5 U.S. (1 Cranch) 137 (1803).

ence,"³ and he labeled a "written constitution" as "the greatest improvement on political institutions"⁴ made by the citizenry of the new United States.

The charm of a written Constitution is the possibility of its providing "a set of objectively knowable principles setting limits on the power of all governmental organs, not excluding the Court, regardless of political pressure on particular issues."⁵ Indeed, this was the basis of Marshall's argument in *Marbury*: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution is void."⁶

It is, however, precisely the "knowability" of our written Constitution that is no longer a secure part of our contemporary intellectual climate, and it appears increasingly implausible to view judicial decisions as the simple transmission of messages garnered from the Constitution itself. Consider the following comment by Professor Brest:

In sum, if you consider the evolution of doctrines in just about any extensively-adjudicated area of constitutional law—whether "under" the commerce, free speech, due process, or equal protection clauses—explicit reliance on originalist sources has played a very small role compared to the elaboration of the Court's own precedents. It is rather like having a remote ancestor who came over on the Mayflower.⁷

Brest's image brilliantly captures the sense of a distant Constitution. The Constitution may "exist" more surely than most contemporary intellectuals believe that God exists,⁸ but its ability to serve as a source of

3. *Id.* at 178.

4. *Id.*

5. L. LUSKY, BY WHAT RIGHT? 356 (1975). Professor Lusky does not endorse a purely textual approach to constitutional interpretation; indeed, the major point of his book is the development of a theory of implied judicial power that justifies at least some judicial intervention even in the absence of explicit textual warrant. His book is well worth reading, especially given his status as one of the de facto authors (as Justice Stone's law clerk) of footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), to which much of Professor Ely's book is indebted.

6. 5 U.S. (1 Cranch) at 177.

7. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 234 (1980). By "originalism," Brest means an attempt to ground constitutional adjudication on what can be found "in" the document—assuming that the Constitution *is* a document rather than a set of institutional practices. This is not synonymous with "textualism," insofar as that approach often emphasizes guidance by the unadorned "plain meaning" of constitutional language, whereas other originalists look to shared understandings of 1787 language or to specific intentions of "the Framers." Brest attacks all such approaches to original understanding. See also Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

8. I have discussed the analogy between religious and constitutional faith in Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123 (1980). Justice Black certainly

meaningful guidance is equally dubious.

Although the source of discontent about the knowability of constitutional command goes back at least as far as the "legal realists" of the 1920s and 1930s,⁹ one might profitably focus on the work of Professor Charles Black of the Yale Law School. His seminal book, *Structure and Relationship in Constitutional Law*,¹⁰ has good claim to being the single most influential essay on this generation of constitutional theorists. A source of its influence, one suspects, is its rejection of radical legal realism—that is, the dismissal of the very notion of a meaningful Constitution¹¹—even as it embraces some of the realists' skepticism regarding an easily read Constitution.

Black joins many realists in dismissing "the method of *purported* explication or exegesis of the particular textual passage."¹² He views this "method" as substituting "Humpty-Dumpty textual manipulation" for candid "political inference which not only underlies the textual manipulation but is, in a well constructed opinion, usually invoked to support the interpretation of the cryptic text."¹³

According to Black, if the text itself is no longer genuinely readable, or is merely the source of instrumental manipulation rather than of plausible "exegesis," then we must learn to find constitutional meaning between the lines—in the very structure of the Constitution. Although this view overthrows the textual emphasis of *Marbury*, Marshall conveniently provided the necessary alternative in *McCulloch v. Maryland*:¹⁴ "There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated

did retain belief in Marshall's argument: "It is of paramount importance to me that our country has a written constitution." H. BLACK, A CONSTITUTIONAL FAITH 3 (1969). But Black has had no true successor on the Court, nor is the legal academy filled with persons who think that clearer methods of reading will provide answers to important constitutional disputes.

9. For two good historical treatments of the realist movement, see E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973) and W. RUMBLE, AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS (1968).

10. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

11. Probably the most extreme adherent of such "realism" was Fred Rodell of the Yale Law School. "And it is worth repeating, and remembering, that the alleged logic of Constitutional Law is equally amorphous, equally unconvincing, equally silly whether the decisions the Court is handing down are 'good' or 'bad,' 'progressive' or 'reactionary,' 'liberal' or 'illiberal.' . . . No matter in which direction the legal wand is waved, the locus-pocus remains the same." F. RODELL, WOE UNTO YOU, LAWYERS! 64-65 (1980). Rodell's book was originally published in 1939.

12. See C. BLACK, *supra* note 10, at 7 (emphasis added).

13. *Id.* at 29.

14. 17 U.S. (4 Wheat.) 316 (1819).

from it, without rending it into shreds."¹⁵

Note that "textualism," like more orthodox "textualism," is oriented, in some strong sense, to the document known as the United States Constitution. Black is antirealist because he views the essential meaning of the Constitution as genuinely comprehensible, even as he sounds like the realists in disdaining conventional emphasis on textual words and phrases. Black's structuralism thus fits into what Professor John Hart Ely calls "interpretivism"—the view that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."¹⁶ Structuralism remains within "the four corners of the document,"¹⁷ even though it emphasizes the angle or shape of the corner rather than the words themselves.

Both structuralism and orthodox textualism are sharply distinct from noninterpretivism—the judicial enforcement of norms that cannot be discovered within the four corners of the document.¹⁸ Incidentally, a court's refusal to enforce norms that are discoverable within the Constitution—a possibility raised by Professor Choper in the volume here reviewed¹⁹—would be equally noninterpretivist. As noninterpretivists admit, recognition of an "unwritten Constitution" complements the reliance on a "written constitution."²⁰ And an unwritten Constitution raises the most profound problems for traditional constitutional theory, even as modified by the structural approach of Professor Black.

Yet the shift from written text to "texture" as the basis for judicial review creates its own disquiet, even for those who agree that the text does not provide the kind of scaffolding for judicial power that Marshall claimed in *Marbury*. Professor Blasi, reviewing Black's argument just after its publication, noted the possibility that "structural reasoning [will] likewise, and to the same extent, fall prey to 'Humpty-Dumpty manipulation.'"²¹

15. *Id.* at 426.

16. J. ELY 1.

17. *Id.*

18. *Id.*

19. J. CHOPER 409.

20. See Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HAST. L.J. 957 (1979). Mention should also be made of the as yet unpublished manuscript by Professor Michael Perry of Ohio State University, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (forthcoming), which is certainly the most extensive attempt to defend "noninterpretivism" in light of the specific challenges posed by Ely and others.

21. Blasi, *Creativity and Legitimacy in Constitutional Law*, 80 YALE L.J. 176, 189 (1970). See also C. BLACK, *DECISION ACCORDING TO LAW* 20 (1981).

As if to corroborate Blasi's fears Justice Rehnquist's opinion in *National League of Cities v. Usery*²² is probably the most brilliant and audacious example in recent years of the Supreme Court's structural reasoning/manipulation. *National League of Cities* prevented Congress from extending the benefits (such as they are) of minimum wage laws to state employees. Although Justice Rehnquist found that the tenth amendment prohibited the imposition of federal minimum wage standards upon state employees,²³ he made clear that the amendment is relevant only insofar as it is "an express declaration"²⁴ of a preexisting limitation on national power. It is our "federal system of government," not the text, that "imposes definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power."²⁵

Justice Rehnquist's opinion provoked one of the angriest dissents in years from Justice Brennan, joined by Justices White and Marshall. At the very least, one cannot say that structural analysis carries with it the kind of "knowability" that persuades those dubious of its answers. Although no evidence exists that Black was specifically influenced by the structuralist movement in linguistics and anthropology, identified with such theorists as Saussure²⁶ and Levi-Strauss,²⁷ the movement has been notoriously plagued by the problem of validity in interpretations.

There is no telling whether any really informed and intelligent observer ever quite fully believed that the courts did or can or ought to decide all cases and all questions as an act of obedience to clearly ascertainable commands of law, without there entering anything like the judges' "will." The important thing now is that the most fundamental work of our century on the nature and functioning of law has demonstrated, to the satisfaction of virtually every competent student, that this picture is illusory. The point is not that, although definite "law," susceptible of being definitely obeyed, is *there*, it is very hard to discover, so that judges make many mistakes; it is rather that the very nature of the material we call "law," of the material we look to when we look for "law," and of the methods we use in this search for right "law," are such that they very often make it not merely *possible* but *inevitable* that the beliefs and even the feelings of the judge go into the making of judgment. This is true because the whole body of "law," separate from those beliefs and feelings—even if fully known and handled with the highest expertness—very often does not suffice to lead the mind, by scientific or logical manipulations, to an unequivocally established right result, and must in the nature of things fail to do this.

Id. (citation omitted) (emphasis in original). There is a clear tension in Professor Black's work between the "realism" revealed above (and its concomitant invitation to instrumental manipulation) and his eloquent insistence that the Constitution genuinely contains certain core values. See C. BLACK, *supra*, *passim*. One wonders what Professor Blasi will have to say about Professor Black's latest work.

22. 426 U.S. 833 (1976).

23. *Id.* at 842.

24. *Id.* at 843.

25. *Id.* at 842.

26. See J. CULLER, SAUSSURE (1976); J. CULLER, STRUCTURALIST POETICS 5-16 (1975).

27. See J. CULLER, STRUCTURALIST POETICS 40-54 (1975); E. LEACH, CLAUDE LEVI-STRAUSS (1976).

Moreover, what links structuralism and traditional legalism is the attempt to escape the role of contingency, replacing the "rule of (wo)men" with the abstract "rule of law." As Judith Shklar points out in her valuable study *Legalism*,²⁸ the legitimacy of traditional legal analysis depends on its assertion that the body of rules "out there" in the world can be known or, in traditional language, discovered. The realists' emphasis on the crucial role of individuals who happen to be judges threatens the ideology of legalism as much as the focus on individual idiosyncrasy challenges the conceptual foundations of structuralism.

One might think, then, that the central task facing constitutional theorists is to develop a theory of constitutional meaning, because the alternative is to recognize how opaque the Constitution has become—an ancient ancestor, perhaps venerable but not really understandable. Or, if opacity is not a satisfying image, one might refer to the Constitution as the equivalent of a thematic apperception test in psychology—an ambiguous stimulus whose "story" we complete by projecting onto it our own fears and fantasies, myths and hopes. In either case, one has given up the illusion that the Constitution "speaks" for itself.

If the Constitution "speaks," judges ultimately are only the "messengers" bringing constitutional truth to the public at large. A silent or opaque Constitution, on the other hand, requires the use of different metaphors to describe the role of constitutional interpreters. It is no secret that one contributing factor to the publication of such books as those under review is the continuing public and scholarly controversy about the propriety of certain judicial decisions, probably the most important of which is *Roe v. Wade*.²⁹ Arguably, *Roe* has had more impact on American politics than any other decision since *Dred Scott v. Sandford*,³⁰ perhaps with equally lamentable results. Partly because of *Roe*, the foundations of our legal order interest a far wider constituency than simply those legal academics who have chosen it as their life's study.

Both of the books under review offer interestingly different, though less than satisfactory, approaches to the problem of constitutional meaning. Professor John Hart Ely proffers a quite specific notion of the Constitution. He thus takes the problem of meaning far more seriously than does Professor Choper, who dispenses with it in favor of an almost purely functional analysis of the desirable role of the

28. J. SHKLAR, *LEGALISM* (1964).

29. 410 U.S. 113 (1973).

30. 60 U.S. (19 How.) 393 (1857).

Supreme Court within the American political structure. But the central question for both Ely and Choper is the role of the Supreme Court in checking the decisions made by the overtly political branches³¹ of government.

There is one all-important difference between the Ely and Choper volumes. Ely, though critical of much judicial intervention, is primarily interested in sketching out the proper circumstances for continued activism. Choper, though indicating his support for certain judicial intervention, devotes the overwhelming bulk of his book, which is almost twice as long as Ely's, to a call for complete judicial withdrawal from specific areas of constitutional interpretation.

I shall discuss each book separately, beginning with Choper's, though the end of this Review considers further the contemporary crisis regarding the notion of a comprehensible Constitution.

II. Choper

Professor Choper's argument can be summarized by referring to what he terms his four "Proposals."

1. The Federalism Proposal: The Supreme Court and all other judicial bodies should withdraw from adjudicating any question turning solely on "the scope of national power vis-a-vis the states."³² "It should be emphasized," says Choper, that this proposal does not speak "to the substantive question of whether, in any given instance, the national government has overreached its delegated authority. Rather, the Federalism Proposal is addressed solely to the question of which branch of government should decide this constitutional issue."³³ The answer to this latter question is Congress, limited only by the President's veto power.

31. The phrase "overtly political" is not without its problems. Perhaps betraying my background as a political scientist, I would be happy to defend the proposition that the Court is an overtly political branch. See, e.g., M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* (1964). Nonetheless, the conventions of American political discourse reserve the term "political branch" for those institutions inhabited by people elected overtly on the basis of political policy preferences. Increasingly, of course, one of the political policy preferences discussed, especially at the presidential level, is the character of judicial appointments (and values held by appointees) likely to be made by the respective candidate. I probably find this less offensive than do many readers of this law review. See Levinson, *U.S. Judges: The Case for Politics*, in *COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 139 (3d ed. W. Murphy & H. Pritchett 1979). For a discussion of the profession's response to the 1980 Republican Party platform promise to work for the appointment of judges who respect traditional family values and the sanctity of innocent human life, see *GOP Blasted on Judges' Plank*, *NAT'L L.J.*, July 28, 1980, at 3, col. 1.

32. J. CHOPER 193.

33. *Id.* at 175-76.

2. The Separation Proposal: "The federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President vis-a-vis one another." Conflicts concerning these matters "should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process."³⁴

3. The Individual Rights Proposal: "Since, almost by definition, the processes of democracy bode ill for the security of personal rights and, as experience shows, such liberties are not infrequently endangered by popular majorities, the task of custodianship should be assigned to a governing body that is insulated from political responsibility and un beholden to self-absorbed and excited majoritarianism."³⁵ That body, to no one's surprise, is the judiciary.

4. The Judicial Proposal: "[T]he Supreme Court should pass final constitutional judgment on questions concerning the permissible reach and circumscription of 'the judicial power.'"³⁶

As I already have noted, Choper devotes most of this book to defending the first two proposals, though his recurrent mention of the third assures us that his is by no means a traditional "judicial restraint" argument in the Frankfurterian mode. Choper immersed himself in a vast amount of political science literature; he devotes much space to effectively summarizing that literature, particularly as it relates to his first two proposals. For example, he argues that it is little short of preposterous to believe that states need any protection from the Supreme Court beyond the manifold protections contained in the very fabric of American politics.³⁷ Choper would inter *National League of Cities v. Usery*³⁸ not because Justice Rehnquist's opinion was "wrong," but because the Court simply should get out, once and for all, of the business of deciding federalism cases.

The basis of Choper's argument, though, is a bit odd. It is one thing to say that the Court should not intervene because the states are well enough protected anyway. He does say this, and I agree with him wholeheartedly. But he goes on to make a quite different argument as well, which is that the Court should withdraw its jurisdiction from federalism issues in order to preserve its scarce power for use when it is really necessary—to preserve individual rights.³⁹ This argument, remi-

34. *Id.* at 263.

35. *Id.* at 68.

36. *Id.* at 382.

37. *Id.* at 176-90.

38. 426 U.S. 833 (1976).

39. J. CHOPER 169-70.

miscant of Robert McCloskey's earlier exercises in *realpolitical* analysis of the Court's role,⁴⁰ rises or falls on its political cogency, and I confess myself almost wholly unconvinced.

Despite law professors' excitement over or fury at *National League of Cities*, it is impossible for me to believe that any average person in the street today cares about the current doctrine of American federalism. To be sure, this was once a vitally important topic; indeed, the country fought a civil war over the issue.⁴¹ But if ever one is locking the barn after the demise of the horse, Choper does so with his federalism proposal. It seems unlikely that anyone furious about the contemporary Court—and I unscientifically suspect that ninety-eight percent of the fury results from cases that courts would continue to decide under Choper's Individual Rights Proposal—would find reassurance upon being reminded that the Court is not deciding abstruse cases dealing with federalism or separation of powers.

Choper's faith that the public will sit still for an activist court in regard to individual rights is a bit politically naive. The great "individual rights courts" of the early 1940s and 1960s might well be described as accidents. Neither President Roosevelt nor President Eisenhower had more than the slightest interest, if that, in the protection of individual liberties in which "their Justices" engaged. As Presidents and the public (including Senators elected by the public) become more sophisticated about what courts can and are willing to do, appointees with the commitments of a William O. Douglas or William J. Brennan seem unlikely. Martin Shapiro, the extremely able political scientist who has emphasized the Court's special relationship to constituencies that otherwise could not protect themselves effectively in the legislative or executive branch,⁴² never explained why politicians who would not give the time of day to certain groups lobbying for protective legislation would nonetheless appoint judges who would see their central role as protecting these same groups.

American politicians may be venal, but they are rarely stupid. Yet the sophisticated functionalism espoused by Shapiro and Choper depends for its operational success on an ultimately glazed public incapable of figuring out that they are receiving something quite trivial (withdrawal from cases involving federalism and separation of powers)

40. See R. McCLOSKEY, *THE MODERN SUPREME COURT* (1970); R. McCLOSKEY, *THE AMERICAN SUPREME COURT* (1960).

41. For a fascinating and important study of the legal and political implications of federalism on the coming of the Civil War, see P. FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981).

42. See M. SHAPIRO, *FREEDOM OF SPEECH AND THE SUPREME COURT* (1966).

in return for judicial *carte blanche* in protecting unpopular individuals—such as Communists, criminals, and Iranian students—from various depredations that the public visits upon them. I wish Choper all the success in the world; his values are roughly my values, and I would love to see a national consensus develop around his proposals. But I am not optimistic. Moreover, such a consensus would make less necessary the judicial role that he espouses, for political leaders then would know that their constituents will judge them in part on how well they protect individual rights.

Choper's method of argument is wholly political-functional, having quite literally nothing to do with the traditional constitutional discourse found in law schools or judicial opinions.⁴³ Although this fact bothers me less than it probably will many other lawyer-readers (I only wish that his political argument made more sense), at least one implication of his method is worth addressing.

I return to Choper's concession, quoted above, that it remains a theoretically conceivable "substantive question of whether, in any given instance, the national government has overreached its delegated authority."⁴⁴ What can this mean? One approach to answering this question is that provided by Paul Brest.⁴⁵ A conscientious member of Congress would be obliged to believe that federalism means something and, therefore, that she could not cast her vote on certain issues without first considering the implications of federalism for the constitutionality of the proposed legislation. After all, she has taken an oath to support, protect, and defend the Constitution, and her responsibilities are no less awesome than those of John Marshall, who parlayed the written Constitution plus the oath of office into full-scale judicial review.

Consider therefore the "Energy Conservation Act of 1984." Because locating state capitals in cities other than the largest city within a state wastes a lot of energy and disrupts the flow of commerce, Congress exercises its constitutional authority to encourage a more efficient flow of commerce and mandates that state capitals be moved to cities fitting a designated profile—for example, to cities scoring highest on some combination of size, access to major financial institutions, and airport facilities. The capital of Texas would become Dallas or Houston; of California, Los Angeles; of Oregon, Portland.

43. This point is a description, not a criticism. See Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEXAS L. REV. 1307 (1979).

44. J. CHOPER 175-76.

45. Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

I do not defend the merits of the bill outlined above, but I am curious about what the Constitution might “say.” Justice Rehnquist emphasized in *National League of Cities* that the Constitution protects a state’s right to locate its capital wherever it pleases.⁴⁶ (Presumably the right to select a state flag, bird, song, and motto is equally protected.) I confess my skepticism on this point—after all, the Constitution does not explicitly grant any such right—and I might advise my conscientious senator or representative that the Constitution does not prevent such a law. Two answers can handle the objection that judicial precedents indicate otherwise. First, courts have been known to make mistakes and overrule previous decisions when faced with congressional statutes that obviously exceed “bounds” established by precedent.⁴⁷ Second, Choper’s theory, under which the conscientious legislator is operating, has no “savings clause” for cases decided before the self-willed withdrawal from federalism conflicts. If the Court has no business intervening now, it never did, so the legislator can ignore the precedents. In any case, the Energy Conservation Act passes.

Under Choper’s proposal, the Court would decline all jurisdiction, saying modestly that this is an issue for the political branches to resolve. Note that the Court does not simply respond that reasonable people can disagree about the question and that courts should not intervene in the absence of a clear legislative mistake.⁴⁸ Nor does the Court argue that the written Constitution textually assigns interpretations concerning the limits of federalism to Congress.⁴⁹ Instead, the Court is reduced to saying one of two things:

(1) “It is no longer possible to tell what federalism means; the word is no longer a meaningful part of our language. To the extent that the Constitution seems to refer to states, we can only sadly confess we don’t understand what it means. ‘Whereof one cannot speak, thereof one must be silent.’”⁵⁰

(2) “We agree that Congress could not plausibly think that the Constitution authorizes the Energy Conservation Act, but we’re not go-

46. 426 U.S. at 845.

47. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918)). Although “[j]udicial exegesis is unavoidable . . . the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.” *Graves v. New York*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring) (overruling *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871)).

48. See Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

49. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 521 (1969).

50. L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 6.54 (1921).

ing to help you out by declaring the Act unconstitutional. Your only remedy is to sear their consciences and then vote the rascals out."

"But why?" the plaintive state attorneys-general ask. "Because," the Court replies, "we wish to save our political clout for the important issues of individual rights."

That I am not particularly offended by this scenario may only evidence my inability to take very seriously traditional constitutional argumentation. But I suspect that Choper's understanding of the relationship between the Court and the Constitution is alien to both traditional constitutional theorists and ordinary citizens. Choper may think he is making only a set of modest proposals, but full acceptance of his extraordinarily provocative arguments would trigger nothing less than a revolutionary reordering of the way we conceptualize our political-constitutional world.⁵¹

"[T]o imagine a language means to imagine a form of life," Wittgenstein noted.⁵² And a Constitution is just that—an imagination of a form of life that takes language with the utmost seriousness. Choper's imaginings call forth, in ways that he apparently does not begin to recognize, the most basic questions about the peculiar American fixation on written constitutions.

One should consider carefully Choper's proposals, upon which this Review has just touched. (And I hope the University of Chicago Press will bring out a paperback version allowing people to read the book without paying \$28.50 or violating the laws of copyright.) Even traditional analysts will benefit from some of his arguments. Choper demonstrates, for example, that the problem of "state action" is nothing more than federalism in another guise,⁵³ since the sole issue in part of that hoary set of cases is whether the national government can do what the state government clearly can do. The *Civil Rights Cases*⁵⁴ would thus get the burial they have deserved from the instant of their unfortunate creation, since no issue of individual rights is genuinely present from the perspective of those raising the state action defense against the federal law. Even if one rejects Choper's injunction that the Court

51. For the influential notion of paradigms and paradigm changes, see T. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* (1977), and T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). It is increasingly clear that contemporary constitutional theory is without the guiding paradigm that makes a "normal science," including the "science of law"—that is, thinking like a lawyer—possible. Choper and Ely merely represent the latest contestants in an ever-longer list of those who seek to make sense out of the anomalies of constitutional law.

52. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 83 (3d ed. 1958).

53. J. CHOPER 198-200.

54. 109 U.S. 3 (1883).

withdraw entirely from federalism questions, one might endorse *in toto* the analytical symbiosis between state action and federalism. I have ignored entirely, moreover, Choper's extremely interesting and supple arguments in defense of his "Separation Proposal."⁵⁵

Choper's book contains scattered hints that the book is simply the first volume of a more sustained reinterpretation of American constitutional theory.⁵⁶ If so, one hopes especially that subsequent volumes will address the interpretive issues that Choper so artfully avoids.

III. Ely

Choper's view of the Constitution as basically opaque must be inferred from the general structure of his argument. Ely addresses the problem much more directly, although his argument is suitably complex. He recognizes "The Allure of Interpretivism"⁵⁷—firm guidance and restriction by the written text—but he immediately demonstrates all too successfully "The Impossibility of a Clause-Bound Interpretivism."⁵⁸ Yet his argument has a twist that enables him to refer to himself as engaging in "ultimate interpretivism."⁵⁹ Ely notes that interpretivists have figured out no coherent way to handle those written parts of the Constitution, particularly the ninth amendment⁶⁰ and the privileges and immunities clause of the fourteenth amendment,⁶¹ that seemingly direct the reader beyond themselves. His taking seriously these parts of the written Constitution leads to the possibility of "ultimate interpretivism."

However, Ely hastens to add that these clauses do not invite courts to read additional substantive rights into the Constitution. Judicial intervention, he argues, denies the essentially representative-democratic premises upon which he thinks this country is founded.⁶² Indeed, he is particularly effective in castigating the various theories, whether allegedly based on text or on the "unwritten Constitution," that supposedly justify intervention in the name of generalized "fundamental values."⁶³

55. J. CHOPER 315-79.

56. See, e.g., *id.* at 77, 79.

57. This is the title of Ely's first chapter. J. ELY 1-9.

58. This is the title of Ely's second chapter. *Id.* at 11-41.

59. *Id.* at 88.

60. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

61. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." *Id.* amend. XIV, § 1. Like Professor Lusky, Ely views as ripe for overruling the evisceration of the clause in the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873). See J. ELY 22-30; L. LUSKY, *supra* note 5, at 183-202.

62. J. ELY 40-41.

63. *Id.* at 43-72.

He especially criticizes the use of such values to overturn substantive policies enacted by state or federal legislatures.⁶⁴ He does not advise ignoring the so-called "open-ended" provisions of the Constitution, but instead argues that they are best read as directed only at the procedures of democratic governance.⁶⁵ He describes his approach as one that "bounds judicial review under the Constitution's open-ended provisions by insisting that it can appropriately concern itself *only* with questions of participation, and not with the substantive merits of the political choice under attack."⁶⁶ He thus stands at the furthest distance from his Harvard colleague Laurence Tribe, whose monumental treatise *American Constitutional Law*⁶⁷ is in part a program for continued judicial imposition of preferred substantive values in the face of majoritarian indifference or hostility. Ely's Constitution does not, under any interpretation he finds plausible, grant judges power to set aside majoritarian policies in the name of substantive values extrinsic to majoritarian democracy itself. The Constitution does outline a set of procedures that a state must go through before legitimately exercising its power against a recalcitrant citizen, but he sees no genuine substantive constraints upon the state, once it follows those procedures. As one might imagine, Ely's particular *bête noire* is *Roe v. Wade*,⁶⁸ in which the Court impregnated the Constitution with the substantive right of abortion.⁶⁹

Ely, however, is scarcely eager to return to the impotent judiciary championed by Felix Frankfurter, a judiciary whose task, in Judith Shklar's words, was "not to restrain Congress, but only to legitimize its acts by providing rationalizations which allow them to be fitted into the Constitution."⁷⁰ The judiciary, in Ely's view, retains a central role in making sure that the procedures operate effectively.⁷¹ As Ely freely

64. *Id.* at 43.

65. *Id.*

66. *Id.* at 181 (emphasis added).

67. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978). See also Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978). Tribe's own views of Ely's endeavor can be found in Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Tribe's article follows Mark Tushnet's essay-review of Ely, Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980). Ely's book is probably the most widely reviewed book in constitutional theory since A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

68. 410 U.S. 113 (1973).

69. Professor Lusky shares Ely's view of *Roe*. See L. LUSKY, *supra* note 5, at 14-20. For Tribe's quite different reaction, see L. TRIBE, *supra* note 67, at 924-33 (replacing an earlier defense, see 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)).

70. J. SHKLAR, *supra* note 28, at 216.

71. J. ELY 74.

admits,⁷² he is adumbrating the implications of footnote four of *United States v. Carolene Products Co.*,⁷³ particularly the footnote's second and third paragraphs.⁷⁴

The courts' central role of monitoring the actual processes of representative democracy generates two basic inquiries. The first scrutinizes constraints blocking effective participation in the political process. This, of course, is the basic rationale for vigorously enforcing the first amendment to ensure a variegated presentation of ideas, issues, and candidates to the public. But this emphasis on a formally unblocked political process is not enough to ensure what Ely labels "representation reinforcement."⁷⁵ A second inquiry is also necessary: does legislation cut against certain groups whose position in American society is such that one can legitimately suspect that their interests are systematically undervalued through prejudice and hostility?

Ely borrows from Professor Dworkin the notion that all participants in the American polity are entitled to equal concern and respect.⁷⁶ When it has reason to believe that equal concern and respect are absent, the Court should step in, not necessarily to invalidate legislation, but to make sure that the legislative rationale is especially strong.⁷⁷ When legislation implicates no such groups—what lawyers have been trained to call "suspect classifications"—Ely requires almost no scrutiny.⁷⁸ He takes great pains to attack the general brief for rationality review, by which courts assess the nexus between supposed ends and legislative means, that Gerald Gunther⁷⁹ among others has articulated.⁸⁰

In a helpful distinction suggested by James Fleming,⁸¹ one might regard Ely's first inquiry, and the second paragraph of the *Carolene*

72. *Id.* at 75-77.

73. 304 U.S. 144, 152 n.4 (1938).

74. Professor Lusky, one of the authors of that footnote, see A. MASON, HARLAN FISKE STONE 513 (1956), points out that paragraph one, referring to those "specific" portions of the Constitution, was added at the behest of Chief Justice Hughes. L. LUSKY, *supra* note 5, at 110-11. This bow to pure textualism makes little analytical sense when placed next to the pure functionalism of paragraphs two and three, which are based respectively on impediments to democratic process and prejudice against discrete and insular minorities. As one might expect given Ely's views about textualism, his footnote four, like that of most of its latter-day adherents (including myself) simply ignores the first paragraph.

75. See J. ELY 73-134.

76. *Id.* at 82 (citing R. DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977)).

77. *Id.* at 101-04.

78. *Id.*

79. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

80. See J. ELY 125-31.

81. Personal communication.

Products footnote, as directed at the *actual* representation allowed plaintiffs claiming blockage from the use of tactics such as suppression of speech, inordinately high election filing fees, or needlessly complicated requirements for access to ballots. Such blockage harms not only minority dissenters, but also, at least in theory, the majority itself, which presumably might benefit from exposure to the blocked plaintiff. The second inquiry addresses the *virtual* representation of minorities within the political system: do nonminority representatives demonstrate enough concern and respect for the outvoted minority to justify viewing legislation as something more than the ruthless ganging up of those with power against those without? As Professor Baker recently has shown,⁸² this second inquiry raises the most complicated problems for democratic political theory because it challenges the particular kinds of preferences that a majoritarian system can legitimately take into account on other than purely substantive grounds. Nonetheless, how one can escape the questions that Ely raises is hard to see.

It should be emphasized that Ely, unlike Choper, purports to find guidance in a specific notion of the initial Constitution. "[M]y claim is only that the original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not the identification and preservation of specific substantive values."⁸³ This is obviously a controversial reading of the initial Constitution.⁸⁴ Yet Ely does not seriously purport to be writing constitutional history, and I do not consider here the accuracy of his claim. Any complete assessment of his arguments must analyze the plausibility of his assertion concerning the intentions of the Constitution's framers and ra-

82. Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEXAS L. REV. 1029, 1044-48 (1980).

83. J. ELY 92.

84. For some effective ripostes, see Tribe, *supra* note 67. Moreover, as Charles Fried has noted in regard to some claims of the economics-rights theorists of law, themselves highly process oriented, one cannot make sense of the right to engage meaningfully in a process like contract (or political representation) without having a wholly nonprocess-based substantive theory of human personality that gives the process its integrity. See C. FRIED, *RIGHT AND WRONG* 81-107 (1978).

Although I share Ely's doubts about the ability of courts and judges to engage in the articulation of substantive rights endorsed by Tribe, Tribe has the better of the argument over whether one can so completely divorce an understanding of process from that of the character of the individuals engaging in it. Whether the judiciary should be so substance oriented is a completely different question than whether law and legal discussion should be concerned with substance. It would be a tragedy if the moral of Ely's book was wrongly taken to be that discussions of substantive rights or conceptions of the human *persona* are senseless. Indeed, if Ely has much to say to judges, he has almost nothing to say to legislators; if Tribe perhaps is mistaken in his message to judges, it is absolutely crucial that legislators read him so they can do *their* jobs effectively. We should learn to talk about the Constitution more and about judicial review less, or at least put judicial review back in its place as only one aspect of constitutional theory, not the major focus. To this extent, both Choper and Ely deserve the future development of constitutional theory.

tifiers. But the nature of the "historical" Constitution does not necessarily decide what we wish "our" Constitution to mean,⁸⁵ and the heart of Ely's enterprise is this latter question.

Ely's argument against a judicial mandate to declare fundamental rights or values as sanctuaries against legislative intervention rests on a simple but, I think, accurate point: If rights or values are truly "fundamental," integral to our collective self-definition as a social order, then there is no reason to believe that legislatures will prove incompetent or unwilling to enforce them.⁸⁶ Almost by definition, a fundamental value should be of interest to every member of the polity; there is no need for, or legitimacy in, judicial declarations that majoritarian institutions cannot figure out what is fundamental about our society.⁸⁷ But the legitimacy of legislative decisions depends on the integrity of the underlying political process and on particular care that specific minorities are not singled out for unjustified discrimination. I turn now to some specific problems with Ely's theory, especially insofar as he summarizes its thrust as "representation reinforcement."

The initial judicial inquiry suggested by Ely, which examines the formal nature of the political process, has at least two problems. One is pragmatic; the other is more theoretical. Concerning the former, note that representation reinforcement offers a thoroughly adequate defense of free speech and press decisions dealing with *political* topics. One can hardly respect majoritarian decisions unless they are the product of potential exposure to all competing points of view. This is nothing more than the now hoary free market of ideas theory of political speech.⁸⁸ But representation reinforcement offers little, if any, protection to modes of nonpolitical expression, which range from so-called commercial speech to pornography.⁸⁹

85. See Cover, Book Review, *THE NEW REPUBLIC*, Jan. 14, 1978, at 26-28; and the letter in response by Raoul Berger, *THE NEW REPUBLIC*, Feb. 11, 1978, p. 7.

86. J. ELY 67.

87. The particular target of Ely's criticism is Alexander Bickel, particularly in regard to arguments made in *The Least Dangerous Branch*, see A. BICKEL, *supra* note 67. Owen Fiss more recently has defended the judiciary's basic role as articulator of collective norms. Fiss, *The Supreme Court, 1979 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

88. For Ely's exposition of his own ideas on this point, see J. ELY 105-16.

89. Professor Ely's sole discussion of this point is the following:

We can attribute other functions [beyond protection of the integrity of the political process] to freedom of expression, and some of them must have played a role, but the exercise has the smell of the lamp about it: the view that free expression per se, without regard to what it means to the process of government, is our preeminent right has a highly elitist cast. Positive law has its claims, and I am not suggesting that such other purposes as are plausibly attributable to the language should not be attributed: the amendment's language is not limited to political speech and it should not be so limited by construction (even assuming someone could come up with a determinate definition of "political").

Id. at 94 (footnote omitted). This conclusion is sheer assertion, for Ely offers no guidance to the

It may be a sign of my own inconsistency, rather than Ely's, that I accept his view as to the illegitimacy of *Roe* yet wish to protect nonpolitical speech and expression. However, he does not devote adequate attention to how much his argument would curtail the contemporary protection given to such expression. For example, Professor Bork, who has proffered a somewhat similar political process view of the first amendment, clearly would give no protection to nonpolitical speech, at least as a matter of constitutional right.⁹⁰ That Ely takes us where we might not want to go is not necessarily fatal to his argument. But he should have confronted more directly the tension between his overarching view of the Constitution as only procedural and the substantive limitations on regulation of speech and conduct that the Supreme Court has read into the Constitution over the past several decades.⁹¹

Ely's notion of representation reinforcement as an adequately neutral guide to the judiciary contains theoretical, as well as pragmatic, problems. Professor Tushnet emphasizes one of these problems.⁹² Ely generally defends all the Court's access-to-ballot decisions, from *Baker v. Carr*⁹³ to *Kramer v. Union Free School District*,⁹⁴ on what he claims are almost self-evident grounds: "[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage."⁹⁵ But Tushnet, borrowing from Justice Stewart's dissent in *Kramer*,⁹⁶ has a devastating riposte.⁹⁷ *Kramer*, who could not vote in the local school board election since he was not a property owner, a renter of a taxed apartment, or a parent of a schoolchild, could vote for representatives

"positive law" of the first amendment beyond process-protection. Moreover, the problem of deciding what can be plausibly attributed to the language of the amendment itself raises complex difficulties of interpretation that Ely hardly addresses. See generally P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (1975); Levinson, *supra* note *.

90. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

91. Indeed, Professor Perry emphasizes the extent to which most contemporary decisions protecting freedom of expression can be analyzed only in terms of the judiciary's going well beyond anything "in" the text and adopting instead civil liberties theories that have no textual basis. M. PERRY, *supra* note 20; Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 241 (1981). Perry hardly opposes this; instead, he makes his point as a means of demonstrating to "interpretivists" (including those of Ely's type) how much of contemporary constitutional doctrine we would sacrifice if we genuinely wished to remain guided only by the Constitution. Paul Brest presumably would agree. See text accompanying note 7 *supra*.

92. Tushnet, *supra* note 67, at 1045-48.

93. 369 U.S. 186 (1962).

94. 395 U.S. 621 (1969).

95. J. ELY 117. One might add to "denial of the vote" any diminution of one's voting power, such as assigning farmers a stronger vote than city dwellers. See *Baker v. Carr*, 369 U.S. at 234-37.

96. 395 U.S. at 639 (Stewart, J., dissenting).

97. Tushnet, *supra* note 67, at 1049-51.

to the New York State Legislature, which had authorized the discrimination in question. Why wasn't *that* right to vote sufficient? Why could the Supreme Court reinforce Kramer's representation in that specific election? Ely refers to "unjustified discriminations in the distribution of the franchise,"⁹⁸ but unless he believes that the Constitution mandates the right to vote in any election, he does not make clear how an unjustified distribution of the franchise differs from any other legislative distribution, such as subsidizing wheat and not cotton. Although he rejects, without adequate argumentation, Paul Brest's suggestion that the Constitution grants no substantive right to vote at all,⁹⁹ Ely does not even begin to defend the much broader argument suggested in the previous sentence.¹⁰⁰

Let me retreat once more to the favorite approach of law professors—a hypothetical case designed to expose difficulties in an argument. A disadvantage with living in New Jersey, one of my several former domiciles, is that a citizen may vote, in elections concerning the executive branch of New Jersey Government, only for the Governor. One gets no vote for the judiciary, whose members are nominated by the (elected) Governor and confirmed by the (elected) senate. Compare New Jersey with several other states.

In Texas I may vote for a whole array of executive officials, such as the Attorney General and the Comptroller, as well as members of important regulatory bodies like the Texas Railroad Commission, which controls basic energy pricing in Texas. And my duties as a voting citizen do not end there: I get to vote for local constables, justices of the peace, and members of the Texas Supreme Court and the Texas Court of Criminal Appeals. California and North Carolina are fairly similar, although California does not formally elect the judiciary. Instead, the voters have the option of booting out judges they do not like. Massachusetts gave me no opportunity to vote for judges, but the ballot contained an otherwise dazzling panoply of offices, including sheriff. New Jersey, though, reduced me to an almost abject poverty of voting possibilities. Was that fair? Or, even more to the point, was that constitutional? Does New Jersey *really* have a republican form of govern-

98. J. ELY 119.

99. J. ELY 116-17, 234 n.30 (citing Brest, *supra* note 45, at 595).

100. *But see* J. ELY 118 n.* ("[W]hatever additional content Article IV's Republican Form of Government Clause may have, at a bare minimum it means that *states must hold popular elections*. . . . One of the things we mean by labeling something a right is that it shall not be denied, or granted in only watered-down form, to some subset of persons unless there is a good reason for doing so.") (emphasis added) (citation omitted). Clearly, a strong difference exists between the claim asserted in the first quoted sentence and the much milder suggestion that, once the state has decided to have a popular election, it must distribute the franchise equally.

ment?¹⁰¹

As a political scientist I can point out that forcing me to aggregate my complex policy preferences into one all-or-nothing vote for Governor deprives me of all sorts of opportunities for meaningful representation. Although one often votes for a candidate only because one is willing to overlook the candidate's position on some issues in favor of those positions that one likes, this scarcely counts as a full measure of representation, especially when measured against the triumph of representative democracy that is Texas! So why does representation reinforcement not permit (nay, require) the judiciary to declare New Jersey's way of doing things unconstitutional? If Kramer's rather trivial interests are worthy of protection, why aren't my substantially greater ones protected?¹⁰²

That any well-trained lawyer in 1981 would regard my suit as frivolous is beside the point, for books such as those under review are eloquent testimony to the emptiness of the Supreme Court's claim to being the ultimate interpreter of the Constitution¹⁰³ in any other than a posi-

101. *See id.*

102. The debate over the cogency of *Kramer* continues within the Court. Justice Stewart, writing for the majority in *Ball v. James*, 101 S. Ct. 1811 (1981), upholding a property-weighted voting scheme for an Arizona water district, included a footnote pointing out that "appellees, of course, are qualified voters in Arizona and so remain equal participants in the election of the state legislators who created and have the power to change the District." *Id.* at 1821 n.20. Justice Powell, concurring, also noted that *Kramer*, though formally unaffected by *Ball*, "has been questioned." *Id.* at 1822 n.2.

The four dissenters, in an opinion by Justice White, pick up the challenge in a footnote of their own:

It is suggested by the Court in footnote 20 . . . and by Justice Powell in his concurring opinion that since the nonvoters living in the district may, of course, vote in the state legislature elections, their interests are sufficiently represented since the state legislature maintains ultimate control over the operation and authority of the District. This suggestion lacks merit and has been specifically rejected in past decisions of this Court. . . . In most situations involving a state agency or even a city, the state legislature and ultimately the people could exercise control since any municipal corporation is a creature of the State. *The Fourteenth Amendment requires a far more direct sense of democratic participation in elective schemes which is not satisfied by the indirect and imprecise voter control suggested by the Court and by Justice Powell.*

Id. at 1829 n.11 (citation omitted) (emphasis added). This response contains the same ambiguity as Ely's argument. "Democratic participation in elective schemes" may simply mean that the vote must be available to everyone whenever it is available to anyone. This still allows the vote to be available to no one should the legislature decide against elections at all in regard to given officials.

But the quoted language can be read far more radically as a requirement of "democratic participation" per se. Such a requirement might call into question the legitimacy of legislative decisions establishing appointment rather than election as the process of office selection—if not, as suggested in the text, the legitimacy of various state constitutions insufficiently committed to participatory democracy. If the Constitution requires a "direct sense of democratic participation," why is there enjoyment of this right only when a state has established "elective schemes"? Why are the "schemes" themselves not a constitutional requirement?

103. *See, e.g.,* *United States v. Nixon*, 418 U.S. 683, 704 (1974); *Powell v. McCormack*, 395 U.S. 486, 521 (1969); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). *See also* Levinson, *supra* note 8, at 137-48.

tivist sense. Both books argue eloquently and at length that the Court's view of the Constitution has been seriously mistaken. Most relevant in the context of this Review, however, is Ely's likely response to my hypothetical suit, because how *he* could regard it as frivolous is not clear, unless he significantly modified his zeal for representation reinforcement as the Supreme Court's master key to reading the Constitution correctly.

Ely is a great friend of "the right to vote in state elections [as] a rather special constitutional prerogative,"¹⁰⁴ and whether my having a chance to vote only for the Governor and a local state representative fulfills that prerogative is questionable, especially given Ely's endorsement of the majority decision in *Kramer*. One answer to my suit is simply to say that the citizenry has no right to vote for any particular office; that is a question for constitutional framers. Once selection of an office is thrown open to the voters, everyone must have an equal vote. Even this answer has problems since everyone does not have the right to vote—witness children, felons, and non-citizens. Moreover, this answer causes us to drift into a discussion of equality, not of representation reinforcement. Equality is a good thing, and it amply justifies *Reynolds v. Sims*¹⁰⁵ and *Harper v. Virginia Board of Elections*.¹⁰⁶ But this is not the framework that Ely adopts, and his interesting and provocative emphasis on representation reinforcement is disconcertingly sketchy, given the weight he places on it.

Ely's unwillingness to confront *Buckley v. Valeo*,¹⁰⁷ which he mentions only in a footnote,¹⁰⁸ is especially disappointing. I regard *Buckley* as perhaps the worst decision—considering both attempts at rationales and results—in the past forty years. It seems especially egregious as a violation of any notion of representation reinforcement, since it limits participation in political campaigns through campaign contributions and, much more seriously, protects the Democratic and Republican parties from significant marketplace competition by upholding the massive public subsidies to those parties (and, at least pre-election, to those parties alone). One might think that Professor Ely would object to *Buckley* as much as to *Roe*, about which he has written with justified passion.¹⁰⁹ Could he possibly think that *Buckley* was correctly de-

104. J. ELY 118 n.*.

105. 377 U.S. 533 (1964).

106. 383 U.S. 663 (1966).

107. 424 U.S. 1 (1976).

108. J. ELY 234 n.27.

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

cided?

The question is not as simple as my remarks might suggest. As Dean Wellington recently argued, there is a theory of representation reinforcement (although he does not use this term) that could justify the federal statutes considered in *Buckley*.¹¹⁰ Indeed, marketplace of ideas buffs would recognize traditional state interventions in the economic marketplace as an embodiment of the same theory: when monopolists (large contributors) threaten the maintenance of a truly competitive marketplace, the state can legitimately intervene by passing antitrust laws (laws regulating campaign finances). One might still reject this theory, either by criticizing its empirical foundation or by grounding freedom of expression in some theory other than the free marketplace of ideas.¹¹¹ But one must recognize the centrality of the issues presented by *Buckley* to the debate over the contemporary meaning of the first amendment and the realities of modern representative government. Ely's failure to confront *Buckley* adequately adds to my suspicion that representation reinforcement, when all is said and done, reduces simply to a somewhat fancy phrase trotted out to explain the access-to-ballot cases.

At the very least, representation reinforcement scarcely serves as a means of assigning to courts a clearly delimited area within which intervention is permissible while differentiating those areas in which the results reached by ordinary political processes should control. Read expansively, it licenses a form of judicial intervention that makes the access-to-ballot cases look like a tea party. Read restrictively, it justifies some decisions of the 1960s while removing theoretical support from more general protection of freedom of expression.

I have little to say regarding Professor Ely's second major theoretical discussion—the role of the judiciary in safeguarding the integrity of the political process by paying special attention to the results reached when certain groups seem to be the legislative losers. I find his arguments convincing, both as an explanation of the decided cases and as a guide for further discussion. He recognizes all the problems involved in identifying the “suspect classes” whose treatment should trigger “strict scrutiny.”¹¹² He realizes full well that he has not yet provided

110. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1126-42 (1979).

111. See P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 197-203 (Supp. 1980).

112. J. ELY 145-70. As a result of reading Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981), I would modify my statement that Ely recognizes “all” the problems, since Brest persuasively argues that there is no way of deciding what groups are entitled to suspect status without some substantive theory of politics. See also Alexander, *Modern Equal Protection Theories: A*

completely satisfying answers to all the conundrums that can be raised about such identification. His attempt to divide the political world into "we's" and "they's," so that legislation seemingly directed against "them" will be scrutinized more carefully than legislation that burdens "us," is a decent first approximation, especially in regard to issues such as the constitutionality of affirmative action.¹¹³

Although there are certain overlaps between Choper and Ely, Ely scarcely sympathizes with Choper's general program of the courts as guardians of individual rights, unless such rights can be put within the representation-reinforcing mode or the special procedural rights of criminal defendants. Although Choper does not say for sure, he may wish to defend *Roe* as a protection of individual rights; Ely obviously rejects *in toto* any special judicial role to protect that kind of individual right, however much he would support legislation to that end. On the other hand, it is hard to imagine that Choper would reject any of Ely's affirmative program, though he presumably would not think it sufficient.

IV. Conclusion

Fewer and fewer books or articles seem genuinely to believe that we can any longer speak meaningfully of the 1787 Constitution, even as amended, except in the context of Brest's "remote ancestor" metaphor.¹¹⁴ Choper makes several attempts to show that his views are "consistent" with the Founders' vision,¹¹⁵ but he clearly is not animated by any special concern to follow that vision. Ely, too, while tipping his hat to the Founders,¹¹⁶ speaks to us directly as citizens facing the tasks of maintaining a common life in 1981 rather than as members of a political family seeking only to follow the terms of great-grandfather's will.

One can call this "living" constitutionalism, but, as Raoul Berger

Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3 (1981); Baker, *supra* note 82. Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223 (1981), contains some telling criticisms of the specific vision of American politics that underlies both Choper's and Ely's arguments and thus limits their capacity to be sufficiently aware of the actualities of representation and participation in contemporary American society.

113. *Id.* at 170-72. Affirmative action, according to Ely, is constitutional because the white majority bears the cost of such programs. Because there is no reason to believe that whites have any difficulty in exercising their will within the ordinary political process, they have no claim to special judicial scrutiny.

114. See text accompanying note 11 *supra*. See also Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity?*, 42 OHIO ST. L.J. 336 (1981).

115. J. CHOPER 62, 241, 244, 385.

116. J. ELY 39.

has pointed out over and over again,¹¹⁷ the very point of constitutionalism, from the perspective of the Framers, was to fetter the future. "In questions of power," Thomas Jefferson wrote in the Kentucky Resolutions of 1798, "let no more be heard of confidence in man, but bind him down from mischief by the chains of the constitution."¹¹⁸ Had the Framers been great optimists about the caliber of their descendants, they scarcely would have felt it necessary to frame a very complex Constitution or, especially, to make formal amendment so ludicrously difficult. To draw on Brest's metaphor once more, one might note that most adults who came over on the Mayflower were still sufficiently imbued with traditional values of patriarchy to believe that they (particularly the fathers) would "govern" their children in the accustomed manner.¹¹⁹ In this, as in so many other aspects, settlement in America was a great human tragedy instead of a triumph, as Perry Miller has pointed out so stunningly.¹²⁰ The Founding Fathers also had great hopes that their control would reach into the future and prevent the almost inevitable corruption of their wastrel sons. Thus, they gave us the Constitution and bequeathed to us the tensions of attempting to take it altogether seriously as a source of continuing guidance for our lives.

"How blind they are," said Hegel, "who may hope that institutions, constitutions, laws which no longer correspond to human manners, needs, and opinions, from which the spirit has flown, can subsist any longer; or that forms in which intellect and feeling now take no interest are powerful enough to be any longer the bond of a nation!"¹²¹ From one perspective, of course, the very books under review testify to the continuing presence of "intellect and feeling" about our 1787 Constitution. But I wish to emphasize the other side of the message revealed by scrutiny of the books' arguments: the books' relative inability to view the Constitution as other than opaque to the modern reader. And a major reason for the opacity is precisely that our contemporary "manners, needs, and opinions" are so radically different from those of two centuries ago.¹²² As Hegel implied, the crisis about the meaning of constitutional fidelity is not a professional argument

117. *E.g.*, Berger, *supra* note 85, at 7.

118. *Id.*

119. See P. MILLER, *ERRAND INTO THE WILDERNESS* (1956).

120. *Id.*

121. HEGEL'S POLITICAL WRITINGS 244 (T. Knox trans. 1964).

122. This is not a new theme of mine. See, e.g., *A.A.L.S. Law and Religion Panel: Law as Our Civil Religion*, 31 MERCER L. REV. 477 (1980); Levinson, *The Specious Morality of the Law*, HARPER'S May 1977, at 35; Levinson, Book Review, 57 TEXAS L. REV. 847 (1979).

restricted to lawyers, but an integral part of the cultural crisis of our times.

The very brilliance of the books under review—not to mention Professor Tribe's¹²³ and other books and articles not singled out here for extensive comment—is thus as much a cause for alarm as for pleasure. Everyone seems more successful at demolishing existing approaches to the interplay between court and Constitution, especially as revealed in opinions of the Supreme Court, than at putting forth a new understanding around which our discourse might cohere. Only modernist intellectuals confuse the brilliance of intellectual fireworks, and concomitant “deconstruction,” with the preconditions of political order, whether defined in terms of stability or justice.

“Teachers” of constitutional theory have more and more fascinating books to assign their students, all in the name of learning to “think like a (professional) lawyer.” But one wonders what the students will make of the mutually exclusive visions of the Constitution and of the judiciary contained in those books. One also wonders what beyond possession of a law degree denotes “professionalism,” particularly in regard to the subject of constitutional law.

Ultimately, one must recognize the extent to which discussions of constitutional theory implicate the very notion of our identity as Americans and, more particularly, our relationship to our national past. In a fundamental sense, no nation is so obsessed with the symbols of its political past as is the United States, just as perhaps no nation has as much trouble resolving the tensions between its zeal for modernity and its profession of consistency with a heritage rooted in the dim past. Part of that heritage is the Constitution of the United States; it is incumbent upon us to decide whether that heritage can structure our own lives.

* * * *

On the last night, with my trunk packed and my car sold to the grocer, I went over and looked at that huge incoherent failure of a house once more. On the white steps an obscene word, scrawled by some boy with a piece of brick, stood out clearly in the moonlight, and I erased it, drawing my shoe raspily along the stone. Then I wandered down to the beach and sprawled out on the sand.

Most of the big shore places were closed now and there were hardly any lights except the shadowy, moving glow of a ferryboat across the Sound. And as the moon rose higher the inessential

123. L. TRIBE, *supra* note 67.

houses began to melt away until gradually I became aware of the old island here that flowered once for Dutch sailors' eyes—a fresh, green breast of the new world. Its vanished trees, the trees that had made way for Gatsby's house, had once pandered in whispers to the last and greatest of all human dreams; for a transitory enchanted moment man must have held his breath in the presence of this continent, compelled into an aesthetic contemplation he neither understood nor desired, face to face for the last time in history with something commensurate to his capacity for wonder.

And as I sat there brooding on the old, unknown world, I thought of Gatsby's wonder when he first picked out the green light at the end of Daisy's dock. He had come a long way to this blue lawn, and his dream must have seemed so close that he could hardly fail to grasp it. He did not know that it was already behind him, somewhere back in that vast obscurity beyond the city, where the dark fields of the republic rolled on under the night.

Gatsby believed in the green light, the orgiastic future that year by year recedes before us. It eluded us then, but that's no matter—tomorrow we will run faster, stretch out our arms farther. . . . And one fine morning—

And so we beat on, boats against the current, borne back ceaselessly into the past.¹²⁴

124. F. FITZGERALD, *THE GREAT GATSBY* 181-82 (1953).