

JUDICIAL REVIEW AND MODERN JUDICIAL SCHOLARSHIP: A QUESTION OF POWER

*Leslie Friedman Goldstein**

Much of the recent literature about constitutional law is dominated by the debate over interpretivism. This essay will stress, however, a different division: that between scholars who wish to minimize judicial discretion and those who would maximize it. This division provides a richer analytic breakdown than the textualist versus extratextualist line. Interpretivism (or textualism) per se does not answer the question *which* interpretation of the constitutional text to select. Thus, for instance, the Justice often described as the quintessential interpretivist, Justice Black, was no more an interpretivist than his frequent foil, Justice Frankfurter. What really divided them was a difference of opinion over the degree to which judicial discretion ought to be constrained by some expression of will from a popularly responsive branch of government. This difference guided their respective choices of textual interpretation, most notably in due process cases.

This essay finds in the constitutional text support for a certain kind of political constraint on the Court but implicit rejection of other political constraints (such as those advocated recently by John Agresto). It also finds, particularly in the overall structure of government based on a tripartite separation of powers, textual grounds for constraining the Court in terms reminiscent of the old political question doctrine, terms frequently defended by Black. In short, it argues that the American conception of judicial power as separated from legislative power, a conception the Constitution establishes as law, calls upon the Justices to interpret the Constitution in such a way that decisions are textually guided rather than unguided. Judges must fill the open-ended clauses of the Constitution with principles that are traceable not to a Justice's own vision of national ideals but to some expression of the will of the sovereign people (i.e., some statute or some aspect of the constitutional text).

* Professor of Political Science, University of Delaware, Newark. An early version of this paper was delivered at the Midwest Political Science Association Meeting in April, 1985.

THE NATURE OF JUDICIAL POWER

A specter is haunting contemporary Supreme Court criticism. It is the specter of the political question doctrine. The doctrine is as old as the Supreme Court's assertion of the power to declare void federal laws. "Questions, in their nature political," opined Chief Justice Marshall, i.e., that were matters of sheer policy discretion, would be decided by those departments of government whose officers were each "accountable only to his country in his political character and to his own conscience." Courts, by contrast, would settle questions of law; in fact it was "emphatically the province and duty of the judicial department to say what the law is."¹ Our written Constitution indicated by its own words, which prohibited various sorts of legislative or executive acts, that it was intended to be a law above other laws. Thus it, too, Marshall argued, was appropriately subject to the judicial expounding power. Still, that power was a power to expound law, not to invent wholesale.

This principle, distinguishing the power to interpret laws adopted by the people or their agents from the power to make policy, has been accepted throughout Supreme Court history.² In the Court's earliest post-*Marbury* effort to explain this distinction,³ Justice Baldwin explained "the true boundary line between political and judicial power and questions":

A sovereign decides by his own will, which is the supreme law within his own boundary; a court, or judge, decides according to the law prescribed by the sovereign power, and that law is the rule for judgment. . . . [A court is always] bound to act by known and settled principles of national or municipal jurisprudence, as the case requires.⁴

Of course, if this doctrine were fully accurate, judicial review

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 166, 177 (1803).

2. It was reiterated as early as 1814 in *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), and explicated at considerable length in the 1838 case of *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838) (from which Taney, who wrote the later, more well-known explication of the principle in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), dissented). The Justices in 1838 were united in the principle but in disagreement as to its application to the instant case. See generally 5 S. CT. DIG. CONSTITUTIONAL LAW § 68(1) (1967).

3. *Rhode Island*, 37 U.S. (12 Pet.) 657 (1838). The issues were first set forth in the debate in dicta between Justices Iredell and Chase in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (Iredell, J., concurring). The Court announced no consensus on the political question doctrine until *Marbury*.

4. 37 U.S. (12 Pet.) at 737 (citations omitted) (emphasis added). Justice Baldwin's reference to "settled principles" of jurisprudence explicitly included the well-established rules that governed courts of equity as a matter of judicial custom. He did not intend his remarks to preclude common law jurisprudence in the federal courts.

There is, as well, a second feature that can render an issue a "political question." Even if it might be "in its nature" judicially decidable, if the Constitution nonetheless commits authority over it to one of the political branches, the courts are not to decide it. That aspect of the doctrine is not a concern of this essay.

would pose no problem for democracy. Invalidation of unconstitutional law would be an exertion in aid of, rather than in conflict with, the will of the people who adopted the Constitution for themselves and their posterity.⁵ The framers' posterity, every time they voted to elect officials sworn to uphold the Constitution (article VI, section 3), would be renewing the acknowledgment that they did indeed consent to its rules.⁶ And judicial review would simply be the application of the will of the sovereign people to the people's agents, who had agreed in advance to follow that will.

Well, this, more or less,⁷ is the tale told by *Marbury v. Madison*.⁸ But hardly anyone buys it anymore. As should have been clear since at least the time of *Marbury* (where Marshall declared unconstitutional part of a statute written and adopted by a legislature consisting largely of framers and ratifiers), constitutions, statutes, and treaties do not interpret themselves. Reasonable persons may differ as to which interpretation really expresses the will of the people. That in itself is not the problem, because that after all is why we have judges—to provide authoritative applications of generalized rules to specific instances where there is a dispute as to their proper application.⁹ But judicial scholars periodically have trouble convincing themselves that the Court is really expounding law (i.e., applying preexisting, known principles), rather than simply making up rules, as would a political body. One crisis of judicial legitimacy or even judicial identity, was triggered by the *Dred Scott* decision;¹⁰ another by the economic substantive due process decisions of the early twentieth century. The contemporary judicial identity crisis appears to have been set off by *Brown v. Board of*

5. See U.S. CONST. preamble.

6. The argument that voting, where such an oath was constitutionally mandated, did amount to consent to the Constitution was frequently put forth by the Garrisonian abolitionists, who, believing the Constitution to be proslavery, on that score refused to vote. This argument does provide something of an answer to the deprecation by, for example, Alexander Bickel and John Ely of the *Marbury* picture of judicial review as upholding the will of the people against actions of the people's mere agents. Cf. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-17 (1962); J. ELY, *DEMOCRACY AND DISTRUST* 11-12 (1980).

7. I added the part about implicit consent, through voting, of the heirs of the framers. This is also the tale told by Alexander Hamilton in *The Federalist* No. 78.

8. 5 U.S. (1 Cranch) at 176-79.

9. The fact that judicial interpretation of laws involves a considerable range of discretion (although not one, properly speaking, as wide as that available to lawmakers) was implicitly acknowledged as long ago as in Hamilton's *The Federalist* No. 78 (well before the advent of the school of Legal Realism) in his discussion of the duty of a judge faced with "unjust and partial laws" that nonetheless were *not* "infractions of the constitution." Judicial power, Hamilton argued, would be of benefit "in mitigating the severity, and confining the operation of such laws." *THE FEDERALIST* No. 78 at 528 (A. Hamilton) (J. Cooke ed. 1961).

10. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

Education.¹¹ It has constitutional scholars in a flurry over the question, what is the proper role of the Supreme Court in the American political system?¹²

PHASE ONE OF THE MODERN CRISIS: *BROWN* AND ITS AFTERMATH

In response to *Brown*, Alexander Bickel wrote a much-cited article in the 1955 *Harvard Law Review*¹³ in which he demonstrated, by very thorough historical research, that "section 1 of the fourteenth amendment . . . carried out . . . relatively narrow objectives . . . and hence, *as originally understood*, was meant to apply neither to jury service,¹⁴ nor suffrage, nor antimiscegenation statutes, nor segregation."¹⁵ He went on to argue, however, that the Warren Court was quite justified in refusing to follow the "original understanding" of the sovereign people who had written and adopted the fourteenth amendment, because those people knew that ours was a "broadly worded organic law not [to be] frequently or lightly amended." And, operating with this knowledge, the framers of the fourteenth amendment had deliberately rejected proposed language of a narrow and concrete focus in favor of wording "more receptive to 'latitudinarian' construction," in order to put into our supreme law language "sufficiently elastic to permit reasonable future advances," "a line of growth" in the direction of a higher societal morality than that for which the citizens of 1868 were ready.¹⁶

Bickel was suggesting that ours is a constitution of aspiration, containing moral principles meant to endure but also meant to

11. 347 U.S. 483 (1954). See also *Morehead v. New York*, 298 U.S. 587 (1936); *Adkins v. Childrens Hospital*, 261 U.S. 525 (1923), *overruled by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Lochner v. New York*, 198 U.S. 45 (1905).

12. Lino Graglia, following Alexander Bickel, pinpoints *Brown* as the beginning of the (very activist) judicial era of our time. Graglia, *In Defense of Judicial Restraint*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 135, 158-60 (1982). Bickel makes the point in *THE LEAST DANGEROUS BRANCH*, *supra* note 6, at 244 and in *THE SUPREME COURT AND THE IDEA OF PROGRESS* 7-8 (2d ed. 1978). These scholars are identifying an era of judicial behavior, while I am linking that era to an era of judicial scholarship. In my view the two coincide because the Warren and Burger Courts' era of active judicial policymaking produced a number of policies pleasing to liberal judicial scholars whose legally trained intellectual consciences nonetheless produced discomfort at the degree to which judges were making rather than interpreting law. To cope with this dissonance these legal scholars began to spin out new theories justifying, critiquing, and/or explaining what was going on.

13. Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1 (1955).

14. *Cf. Strauder v. West Virginia*, 100 U.S. 303 (1880).

15. Bickel, *supra* note 13, at 58 (emphasis added). Raoul Berger develops the same evidence, but comes to a contrary conclusion about the propriety of the Warren Court's decision. R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

16. Bickel, *supra* note 13, at 59-64.

evolve along with the moral level of the people themselves.¹⁷ He urged the Justices to take this hope for growth into account when they interpreted the document, even to the degree of contravening the known purposes of the framers.¹⁸ But if the conscious and announced intent of the law's author could be transgressed by a court purporting to interpret *that law*, what, if anything, remained of the idea that courts interpreted and applied the will of the sovereign rather than ruling as sovereign themselves?

Bickel's next three books attempted to answer this question,¹⁹ as did two very influential articles from the 1959 *Harvard Law Review*²⁰ by Henry M. Hart²¹ and Herbert Wechsler.²² Today these responses to the dilemma posed by *Brown* are often misread by an anachronistic application to them of terminology developed in the heady constitutional climate of the 1980's—terms like "extratextualist" or "noninterpretivist." In fact, all three scholars were attempting to develop criteria to be followed by the courts in their job as interpreters of the constitutional text.

As guides for constitutional interpretation, Herbert Wechsler suggested following "the text of the Constitution, when its words may be decisive," and giving weight to "history" and "precedent" as well. He argued at length that reasoned principles must determine the relative role of these three in the interpretive task to be done. To deny, he insisted, that proper criteria exist to guide the Court in its interpretive task would be to render the Court "a naked power organ" rather than a court of law.²³

Hart cited Wechsler approvingly.²⁴ When he described the Supreme Court as "predestined to be a voice of reason, charged

17. The Bickelian notion that ours is a constitution of aspiration is developed at some length in two recent books. See J. AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 52-55, 139-67 (1984); S. BARBER, *ON WHAT THE CONSTITUTION MEANS* 33 *passim* (1984). The phrase "open-texture" is from A. BICKEL, *THE MORALITY OF CONSENT* 29-30 (1975). See also Hurst, *The Role of History, in Supreme Court and Supreme Law* 55-60 (E. Cahn ed. 1954).

18. "If the fourteenth amendment were a statute, a court might very well [be] foreclosed from applying it to segregation in public schools. The evidence of congressional purpose is as clear as such evidence is likely to be . . ." Bickel, *supra* note 13, at 59.

19. A. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 6; A. BICKEL, *THE MORALITY OF CONSENT*, *supra* note 17; A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS*, *supra* note 12.

20. This was the year following *Cooper v. Aaron*, 358 U.S. 1 (1958), signed by all nine Justices, in which the Court reaffirmed the *Brown* holding and declared the federal judiciary "supreme in the exposition of the law of the Constitution." *Id.* at 18.

21. Hart, *The Supreme Court—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

22. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

23. *Id.* at 12, 16-17.

24. Hart, *supra* note 21, at 99 n.34.

with the creative function of discerning afresh and of articulating and developing impersonal and durable principles," he was talking about principles for interpreting the law. The rest of the sentence that follows reads: "principles of constitutional law and impersonal and durable principles for the interpretation of statutes and the resolution of difficult issues of decisional law."²⁵

Bickel wrote of the Court that in acting upon "its power to construe and apply the Constitution" it must ever be mindful of constitutional text, history, and precedent, as "sources of inspiration" if not the "wellspring" of judgment. However, he added that the Court must also find its reasoned principles in "the evolving morality of our tradition" and must prudently refrain from taking cases when applying firm, reasoned principles to them would be politically unwise.²⁶

Another leading work of this period, by Charles L. Black, while not denying any of the guidelines of text, precedent, history, societal moral tradition, or reasoned principle, added an argument for the wisdom and propriety of finding guidance in the plan of our overall structure of government. But, again, he proffered this suggestion in order to guide the courts in interpreting "the great vague words of the Constitution."²⁷

Thus, the battle among the Court's critics in the post-*Brown* decade²⁸ took place over the terrain of whether the Court was following the proper guidelines in doing its job of interpreting the more malleable phrases of the Constitution—those phrases like "due process" and "equal protection" that had been, as it were, *intended* by the framers to take on *unintended* meaning as society evolved. Those parts of the constitutional text were intended by the

25. *Id.* at 99 (footnote omitted).

26. A. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 6, at 235 *passim*, 113-98. See A. BICKEL, *THE MORALITY OF CONSENT*, to the effect that the Court's obligation "to give us principle," bounded by the need that it be rigorously reasoned and that the Justices consider both "history and changing circumstances," originates in "the Constitution as the Framers wrote it." *THE MORALITY OF CONSENT*, *supra* note 17, at 25-30. See also *The Supreme Court and the Idea of Progress*, which clarifies that Bickel's references to the Court's use of the method of "moral philosophy" was an effort to describe an approach to constitutional interpretation: "The justification must be that *constitutional judgment* turns on issues of moral philosophy"—i.e., "the method of reason familiar to the discourse of moral philosophy, and in *constitutional adjudication*, the place only for that" (as specifically contrasted to policy preferences of either the Justices or of the public). *THE SUPREME COURT AND THE IDEA OF PROGRESS*, *supra* note 12, at 86-87 (emphasis added).

27. C. BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 48 (1960) (the preface, dated 1959, establishes this work as contemporaneous with the Hart and Wechsler pieces).

28. Another influential work of this period was Gerald Gunther's critique of Bickel. Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 *COLUM. L. REV.* 1 (1964).

framers to evolve and grow in meaning as society developed, and to grow in ways that simply could not be foreseen, or in any literal sense planned upon, in advance.²⁹

PHASE TWO OF THE CRISIS: *GRISWOLD* v. *CONNECTICUT* AND ITS AFTERMATH

The Court itself removed the main battlefield to a new plateau in 1965. In *Griswold* the Supreme Court reasserted the long-discredited doctrine of "substantive due process" to protect a right of "marital privacy," nowhere mentioned in the Constitution.³⁰ No member of the majority except Justice Harlan³¹ admitted that the doctrine of substantive due process was being resurrected, but the dissent³² so identified it. Later, Justice Stewart, who had switched from dissent to concurrence,³³ as well as most of the original *Griswold* majority,³⁴ acknowledged the resurrection of the doctrine of substantive due process.

This doctrine had been discredited on a variety of grounds, but the criticism of interest here would go as follows: Substantive due process reads the due process clause as licensing judges to decide what rights are fundamental in America. If *they* believe the rights to be of fundamental importance in our society (i.e., in the good society), even if the Constitution neither mentions them nor alludes to them, the courts may so announce.³⁵ Once they have pro-

29. The open acknowledgment that the Supreme Court sometimes defies the conscious, specific intent of the authors of the law that the Court purports to be interpreting stimulated, as well, a wave of secondary skirmishes over how active the Court ought to be in affecting public policy. This issue, the "activism" versus "restraint" controversy, although important, is secondary in the sense that it addresses not *what* the Court ought to be doing but when, or how often, the Court ought to do it. It is, for that reason, not the focus of this essay.

30. 381 U.S. 479 (1965).

31. Harlan rested his *Griswold* concurrence, 381 U.S. at 499, in large part on his dissent in *Poe v. Ullman*, 367 U.S. 497, 539-55. There, he argued that the due process clause of the fourteenth amendment embraced all of the fundamental (unwritten) rights that article IV, section 2, "privileges or immunities of citizens" clause had protected for persons who change state residency. (He offers no explanation why, within the fourteenth amendment, it is the due process rather than the "privileges or immunities of citizens of the United States" clause that gives this protection.) Harlan specifically insisted that to limit the due process clause to procedural matters would be a foolishly "extreme instance of sacrificing substance to form," *id.* at 551. The *Griswold* concurrences of Justice Goldberg (with Chief Justice Warren and Justice Brennan), 381 U.S. at 486, and Justice White, 381 U.S. at 502, can be read as implying an endorsement of substantive due process. Thus, five Justices at least implicitly endorsed it.

32. *Griswold*, 381 U.S., at 507 (Black, J., dissenting); *id.* at 527 (Stewart, J., dissenting).

33. *Roe v. Wade*, 410 U.S. 113, 167-68 (1973) (Stewart, J., concurring). *See also Eisenstadt v. Baird*, 405 U.S. 438 (1972) where Justice Stewart switched to the side he had opposed in *Griswold*.

34. *Roe*, 410 U.S. at 152-53.

35. I reserve the phrase "substantive due process" for the creation by the Court of *unwritten* fundamental rights, even though one could argue that the Court had long been using that doctrine for the "written" rights (both express and implied) of the first amend-

nounced a particular right "fundamental," the electorally responsive branches of government may not (absent compelling exigency) abridge it. So-called substantive due process turns the Justices from interpreters of a legal text, albeit an opaque, plastic one, into Grand Prohibitors who may overturn any law that strikes them as very bad. Through substantive due process the Court can directly legislate rights. The Justices do not have to "derive" them from any expression of the sovereign will. The distinction put forth in the original political question doctrine disappears, and Americans wind up, on various topics, ruled by nine persons appointed for life who are more or less immune to the influence of majority sentiment.

This reclaiming of judicial power via the resurrection of substantive due process thus radicalized the tension that had always existed between judicial review and democracy. Constitutionalism itself expresses a desire by "the people" (embodied in the hypermajority needed for constitutional ratification and amendment) to restrain themselves (in the form of future legislative majorities) by basic principles deemed worthy of enduring until a new hypermajority wills a change.³⁶ Constitutionalism could, in theory, be maintained by having popularly elected officials enforce upon themselves the enduring principles. Such a system would be more democratic, in the sense of majoritarian, but the principles are more likely to be effective restraints on officials if they are enforced by an aloof, disinterested body (such as a non-elected, life-tenure court). To the extent courts and elected officials have conflicting but legitimate interpretations of those enduring principles, there exists an inevitable tension between judicial review and democracy. But still, that degree of tension is arguably a worthy price for an effectively constitutional democracy. Substantive due process eliminates, however, any claim that the Justices are merely interpreting the will of the people.

These implications were apparent in 1965, but few Americans cared to oppose the idea that persons who wanted to use contraceptive devices should be allowed to; *Griswold* went more or less unno-

ment. I would argue that the application of first amendment rights against state governments is legitimate *not* as a matter of "substantive due process" but either because those are certainly "privileges or immunities of citizens of the United States" or because these are rights essential to a democratic lawmaking process and thus are "due" to Americans as *procedural* "due process." The merger of these two arguments is a central theme in J. ELY, *supra* note 6.

36. The idea that constitutionalism expresses a will by the majority for self-restraint appears in the work of a number of judicial scholars. See, e.g., J. AGRESTO, *supra* note 17, at 52-55; A. BICKEL, *THE MORALITY OF CONSENT*, *supra* note 17, ch. 1; C. BLACK, *supra* note 27, at 105-09, 117-19, 178-82; L. TRIBE, *THE CONSTITUTIONAL STRUCTURE OF AMERICAN GOVERNMENT* 9-11 (1978).

ticed.³⁷ After 1973, however, when *Roe* extended *Griswold's* logic, pandemonium broke loose in judicial scholarship. No longer was the Court legislating at the margins against curious, outdated, and nationally unpopular state laws; now it was legislating in bold and broad strokes, dramatically shaping the life of the nation. And it was doing so in its Grand Prohibitor mode, with no apparent embarrassment at the absence of any textual basis in the constitutional text for its assertion that there is a fundamental right to choose to have an abortion.³⁸ The Justices were very obviously doing something other than interpreting law, and they were doing it in ways that had tremendous societal impact. Scholars began to line up on either side of this new development.

CURRENT DIVISIONS IN JUDICIAL SCHOLARSHIP

A number of scholars, of course, reacted against this new development. John Ely³⁹ produced the most impressive of the criticisms along traditional lines. Raoul Berger took up the outpost at the furthest extreme opposing the new trend, insisting that the only legitimate role for judges is to follow the exact and specific intent of the framers, where such intent is discoverable, so that even *Brown* was for him an illegitimate use of judicial power.⁴⁰

But surprisingly many scholars support the Court's new power to create unwritten rights. Thomas Grey has argued that the defense of "extratextual" rights by judges has a respectable but relatively neglected history in America, and that it is therefore thoroughly appropriate for Justices to announce and enforce as law their perception of our national ideals.⁴¹ Walter Murphy has essen-

37. Besides, *Griswold* was concurred in by Justice Harlan, widely known as an opponent of "judicial activism," and since many scholars were busying themselves with the activism versus restraint question, they did not give *Griswold* much heed. (As should by now be clear, the concern of this essay is not the degree of influence over public policy by the judges, but rather the source of judicial authority and the degree of discretion in that authority.)

38. Not one of the Justices who currently *opposes* the idea that there is a constitutional right to seek an abortion wishes to abandon the *doctrine* that the due process clause licenses judges to decide which rights are fundamental for Americans. See *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (O'Connor, J., with White and Rehnquist, J.J., dissenting). These Justices do not deny there is a fundamental right under the fourteenth amendment to privacy in reproductive matters; they simply argue that state concerns for protecting fetal life should be viewed as compelling enough to override the fundamental right. *Id.* at 459-61. Thus, they would continue to protect the Court's (i.e., their own) power to declare other unwritten rights fundamental.

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

40. R. BERGER, *supra* note 15.

41. Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703 (1975); Grey, *Origins of the Unwritten Constitution*, 30 STAN. L. REV. 843 (1978).

tially seconded that argument.⁴²

Michael Perry defends judicial enforcement of values "not constitutionalized by the Framers" on the grounds that such exercise of "noninterpretive" judicial review will benefit our polity. Noninterpretive review, he argues, is not dangerous because it is limitable by the jurisdiction-denying power of our electorally accountable Congress.⁴³

Similarly, Laurence Tribe⁴⁴ and Philip Bobbitt⁴⁵ defend the creation of unwritten rights by the Court on the following grounds: (1) that the Constitution endorses limited government; (2) that this concept implies that certain intimate aspects of human life are off limits to the government; and (3) that judges should elucidate those limits when legislators fail to acknowledge them. And Arthur S. Miller has argued for open abandonment of the supposed pretense that the Constitution operates or has operated in any meaningful way as written law. Rather, it has been from the start merely an "empty vessel" into which judges poured their own values. He has urged that we drop the charade, avoid appointing lawyers to the Supreme Court (for they are victims of the "legalized brain damage" of a law school education) and appoint instead persons renowned for ethical wisdom who would act as our "Council of Elders" throwing out any laws that conflict with "the Good."⁴⁶ These scholars are in no sense at all an extremist fringe of judicial studies; they are among its most respected figures, professors at leading law schools, producers of books for Harvard, Yale, and Oxford Press. The bandwagon of noninterpretive, or extratextual, judicial review, seems to be displaying unstoppable momentum.⁴⁷

Indeed, even as he wrote a masterful book attempting to constrain it,⁴⁸ John Ely provided (or acknowledged) very important

42. Murphy, *The Art of Constitutional Interpretation: A Preliminary Showing*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 130, 135-47, 155-59 (M. Harmon, ed. 1978).

43. M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 93 (1982) (especially chapter four).

44. L. TRIBE, *THE CONSTITUTIONAL PROTECTION OF INDIVIDUAL RIGHTS* 893, ch. 15 (1978).

45. P. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (especially chapters seven through twelve).

46. A. MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT* 24 (1982). For a highly theoretically sophisticated variant of the "empty vessel" approach, see L. CARTER, *CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS* (1985), or any of the constitutional scholarship of the self-designated Critical Legal Studies movement.

47. With the possible exception of Miller, this group that I have called extratextualists would fit the category that William Harris dubs "transcendent structuralist." Harris, *Bonding Word and Polity*, 76 *AM. POL. SCI. REV.* 34, 41 (1982).

48. J. ELY, *supra* note 6.

ammunition for the noninterpretivist argument. The text *itself*, Ely argued, mandates extratextual rights. The textual passages that do this—that acknowledge an unspecified body of substantive rights that all government officials, including judges, are expected to honor—are, according to Ely, the ninth amendment and the privileges or immunities clause of the fourteenth amendment.

I find Ely's discussion of the ninth amendment quite unconvincing. The most direct reading of the language and the sparse legislative history of the amendment⁴⁹ seem to me to support the traditional view of its meaning. It functions merely as a warning not to read the existence of a bill of rights as a derogation of the idea that the federal government is one of enumerated rather than plenary powers.

On the other hand, there seems no denying (the *Slaughter-House Cases*⁵⁰ to the contrary notwithstanding) that the privileges or immunities clause creates a constitutional shield around the substantive fundamental rights of American citizenship.⁵¹ If it is the Supreme Court's job to interpret the legal text, including that clause, it would indeed seem that the people of the United States in 1868 authorized the Supreme Court⁵² to identify those rights that were fundamental enough to rank as "privileges or immunities of citizens of the United States." Thus, this essay's argument seems to have moved in a circle: textualism appears to point to extratextualism. Or to put it another way, perhaps the privileges or immunities clause of the fourteenth amendment did away with the legal question/political question distinction for cases involving state governments (the government level where the vast majority of controversial decisions arise).

There are some scholars who try to avoid this dilemma by following Raoul Berger in assigning to the privileges or immunities clause a meaning so narrow that it merely duplicates the due process and equal protection clauses of the same amendment.⁵³ That

49. Compare *id.* at 34-41 with Perry's critique *supra* note 43, at 22-24.

50. 83 U.S. (16 Wall.) 36 (1873).

51. Perry, following Raoul Berger, attempts the denial, *supra* note 43, at 23, 61-75, but his denial ignores the deliberate choice of open-ended language for the provision and the very open-ended description of the concept of "privileges or immunities of citizenship" in the leading federal case at the time, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). Justice Harlan's classic defense of substantive due process in his *Poe v. Ullman* dissent anticipated Ely's privileges or immunities clause argument by quoting directly from *Corfield* to explain what "substantive due process" protects. In fact, Harlan in that dissent at least implicitly suggests most of the arguments later developed by extratextualist scholars. See 367 U.S. at 539-45.

52. At least, that is, as a back-up mechanism for failures of omission by Congress; see section 5 of the fourteenth amendment.

53. Compare R. BERGER, *supra* note 15, with M. PERRY, *supra* note 43, at 61-62.

reading, however, certainly does not come from the words. Nor does it follow the meaning assigned in the earliest case interpreting the clause.⁵⁴ And it is a meaning disfavored by at least two common guides to constitutional construction: First, if possible, words of the Constitution ought to be assumed to have a meaning, a *raison d'être*. Second, any deliberate choice by the framers (including a choice for open-ended as against precise and narrow language) ought not to be ignored.

Thus, the interpretivist/noninterpretivist (or textualist/extratextualist) distinction is not a tenable basis on which to condemn the Court's unwritten fundamental-rights jurisprudence. What the Court purports to do under the banner of substantive due process (aided or not by the ninth amendment), it could reasonably claim it was entitled to do under a not particularly strained interpretation of the privileges or immunities clause. So Ely moves beyond the textualist debate, to look for appropriate constraints upon judicial power; he finds these in the intent of the constitutional text to establish a representative, democratic political process.

IN DEFENSE OF (YET ANOTHER) NEW TYPOLOGY

My task here is not to elaborate or critique Ely's argument. It is rather to suggest that the goal of constraining judicial power by some expression of the sovereign popular will⁵⁵ is a worthy goal. It has roots as deep as the political question versus the legal question doctrine; it is a goal that goes further than the term "textualist" toward explaining the much-discussed jurisprudence of Justice Black; and it is a goal that deserves attention because policymaking by life-tenured judges really is somewhat undemocratic.

I am suggesting here a reconceptualization of judicial scholarship. I would replace the textualist/extratextualist categorization with a continuum that focuses upon the degree of constraint that a particular jurist imposes on judicial power. This is not to be equated to the old judicial activism versus self-restraint conception. That focused on the degree of judicial impact upon public policy.

Justice Black, for instance, was no self-restraintist; he was happy for Court decisions to have an enormous influence upon public policy. But he wanted judicial flexibility constrained by the words adopted by the people in the Bill of Rights.⁵⁶ Justices Frankfurter

54. *Slaughter-House*, 83 U.S. (16 Wall.) 394 (1873). I disagree with the Court's reading of the clause in that decision, as well.

55. In Ely's case, an expression he finds in the structure of government established by the constitutional text and the political process it implies.

56. *Adamson v. California*, 332 U.S. 46, 68-70 (Black, J., dissenting) (1947).

and Cardozo read the text of the fourteenth amendment as authorizing judges to decide which procedural rights for accused criminals were "implicit in the concept of ordered liberty"⁵⁷ or were required by "immutable principles of justice."⁵⁸ Justice Black condemned this reading because it "subtly convey[ed] to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power"; and it could "be used . . . to license this Court . . . to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain."⁵⁹

Although less of a constraintist than Black when interpreting the due process clause, Frankfurter, too, felt that some constraints on the range of judicial discretion were needed. His choice when confronted with the truly open-ended privileges or immunities clause was far more drastic than that of Justice Black, who would have constrained its reach by the Bill of Rights. Justice Frankfurter, as did Justice Miller long before him,⁶⁰ when faced with the awesome degree of latitude conferred by the clause, chose simply to shut his eyes, to see no conferral of any power or any other meaning in the clause.⁶¹

57. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

58. *Adamson*, 322 U.S. at 60 (Frankfurter, J., concurring).

59. *Adamson*, 322 U.S. at 75, 90 (Black, J., dissenting). Justice Black was making a dual argument: (1) that the historic intent of the framers of the fourteenth amendment was compatible with his, and not Frankfurter's reading; and (2) that Justice Frankfurter's reading would have the *bad institutional consequence* of producing limitless judicial power. When his historical argument was persuasively challenged, he did not abandon his interpretation. See *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring); *Rochin v. California*, 342 U.S. 165, 174-77 (1952) (Black, J., concurring); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

60. *Slaughter-House*, 83 U.S. (16 Wall.) 394 (1873).

61. "I put to one side the Privileges or Immunities Clause of that Amendment. For the mischievous uses to which that clause would lend itself if its scope were not confined to that given by . . . the Slaughter House Cases, . . . see the deviation in *Colgate v. Harvey*, 296 U.S. 404, overruled by *Madden v. Kentucky*, 309 U.S. 83." *Adamson*, 322 U.S. at 61-62 (citation omitted) (emphasis added).

In my own opinion, the *Colgate* reasoning on the privileges or immunities clause is much more impressive than that in *Madden*. But it is probably useful to note the dissent in *Colgate* by Justice Stone (with Justices Brandeis and Cardozo):

The reason for this reluctance to enlarge the scope of the [privileges or immunities] clause . . . [beyond the Slaughter House view that it did no] more than duplicate the protection of . . . other provisions of the Constitution, [is that] [i]t would enlarge judicial control of state action and multiply restrictions upon it to an extent difficult to define, but sufficient to cause serious apprehension . . .

Colgate, 296 U.S. at 445 (Stone, J., dissenting).

Similarly the *Slaughter-House Cases* shied away from allowing the language of the privileges or immunities clause to carry any real meaning. Justice Miller, writing for the Court, explained that to take the words at face value would be to "constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve." *Slaughter-House* 83 U.S. (16 Wall.) at 409. So,

A constraint-minimizer to constraint-maximizer scale of jurists might look suspiciously like a "clause-bound interpretivist."⁶² The difference, however, is significant. Frankfurter, no less than Black, was an interpretivist. But the latter chose interpretations more constraining of judicial discretion, because of his views on the appropriate relation between a democratic polity and its life-tenured judges (i.e., because of his political theory).

Compared to extremists of the Raoul Berger variety, Justice Black as well as Justice Frankfurter, like John Ely, would fall somewhere in the middle range on a judicial constraint scale—they were judicial discretion, or judicial constraint, *optimizers*. Those scholars, like Raoul Berger, who try to confine Justices by the specific, conscious original intent of the framers would fit at the extreme, constraint-*maximizing* (or discretion-minimizing) end of the scale. And the self-proclaimed noninterpretivists, such as Thomas Grey⁶³ or Arthur Miller⁶⁴ would appear at the constraint-*minimizing* (or discretion-maximizing) extreme of the scale.

At this point, moreover, the degree-of-constraint scale would be useful in highlighting differences among noninterpretivists. Noninterpretivist Michael Perry builds into the judicial role some traditional nontextual constraints, such as the rule that judges' opinions ought to be rationally justified by neutral and general principles.⁶⁵ By contrast, noninterpretivist Arthur Miller⁶⁶ rejects even these traditional judicial-role constraints, wanting total discretion for a lifetime-appointed Council of Elders.

The purpose here is not to introduce yet another category of jargon (constraint-maximizer, discretion-minimizer) into American jurisprudence—far from it. But it is to argue that the dispute over the degree to which judges' opinions are guided by textual or nontextual considerations is to a certain degree beside the point. The question over which judicial-constraintists and judicial-discretionists are most fundamentally divided is the very question that animated John Marshall's political question doctrine: To what

instead, the Court read the clause as securing only those rights created by the relation between the citizen and the federal government, rights that predated the fourteenth amendment and that were already enforced by the supremacy clause. U.S. CONST. art. VI, sec. 2. See *Crandall v. Nevada*, 73 U.S. 35 (1868), cited in *Slaughter-House*, 83 U.S. (16 Wall.) at 409, which predated the fourteenth amendment. See also discussion in J. ELY, *supra* note 6, at 22-30, 193-200.

62. The term is from J. ELY, *supra* note 6, ch. 2.

63. Grey, *supra* note 41.

64. A. MILLER, *supra* note 46.

65. M. PERRY, *supra* note 43, at 25-27.

66. A. MILLER, *supra* note 46.

degree should judges' power be hemmed in by some expression of the will of the people?

Thus, after Ely exposed the weaknesses of textualism per se as a constraint, certain scholars sought out constraints elsewhere. Michael Perry found some (as just described) in the traditional concept of "judicial" power itself, which is in a sense traceable to the text of article III, but he also found some constraints in the power of our elective Congress to make exceptions to federal court jurisdiction. He devoted a good deal of attention to defending the appropriateness of using this legislative power as a check on judicial power.⁶⁷

In the same vein, a recent book by John Agresto defends additional checks by the political branches. Beyond Congress's jurisdiction-limiting powers, Agresto (taking pages from the histories of Abraham Lincoln and Franklin Roosevelt) insists on the legitimacy of outright defiance by Congress of Supreme Court readings of the Constitution.⁶⁸ According to Agresto, Congress has just as much right to read the Constitution its way as the Supreme Court has to prefer its own version. Thus, it is perfectly legitimate for Congress to pass laws that directly and intentionally defy the Supreme Court's view of constitutional law.⁶⁹ Lincoln came up with this theory when faced with the extreme crisis of the *Dred Scott* decision. But he limited it to those constitutional positions that had not yet taken firm root in judicial doctrine, that had not been "fully settled," that had not been "affirmed and re-affirmed through a course of years." For those rules that *had* been repeatedly reaffirmed by the Court, Lincoln, at least, felt that they should control "the gen-

67. M. PERRY, *supra* note 43, at 126-45.

68. J. AGRESTO, *supra* note 17, at 96-138.

Defiance, that is, of the rules of law pronounced by the Court. Like Lincoln, Agresto would insist that the executive and legislative branches must cooperate in imposing the Court-ordered particular result on the specifically involved litigants. In addition to the examples of Lincoln and Roosevelt, Agresto is also very much influenced by the judicial history of federal civil rights laws. See, e.g., J. AGRESTO, *supra* note 17, at 126-27; Civil Rights Cases, 109 U.S. 3 (1883); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

69. Agresto characterizes this not as defiance but as a power "to force reconsideration" by the Court, a power "repeatedly to call for reexamination and reconsideration." J. AGRESTO, *supra* note 17, at 126, 130. Eventually, one presumes, the Supreme Court would get to decide again upon a law that Congress had repassed after it had been declared void, but, in the meantime, much mischief could be done—for example, innocent people might spend years in jail. Agresto does not view the matter from that angle because he has in mind judicial mischief—errors of interpretation by the Supreme Court that need correcting. Still, to the degree that his view became accepted, congressional flouting of Supreme Court reasoning would be understood as legitimate and normal day-to-day behavior (rather than as a response to an extreme crisis, as it was with the *Dred Scott* decision and the Great Depression.) It is very difficult to imagine that this would not undermine the general respect for law in America.

eral policy of the country, subject to be disturbed only by amendments of the Constitution."⁷⁰ Agresto pointedly refrains from endorsing Lincoln's limit on the Congressional power of defiance.⁷¹

Thus, Agresto takes on the calculated risk of loosening the bonds of law in order to promote effective checks on judicial power. What I would describe as a somewhat dangerous unleashing of a spirit of lawlessness, he would defend as in keeping with the overall scheme of the American constitutional structure, namely one of checked power where no one branch is trusted to go unchecked by the others.

WHAT CAN THE CONSTITUTION CONTRIBUTE?

At this point it may be useful to examine the structure of the Constitution for light that it may shed on the matter of appropriate constraints on judicial power. The Constitution does create a pretty clear hierarchy of authority. At its peak is the procedural hypermajority that counts as "the people" for Constitution-making purposes. This group—for amending and ratifying purposes, most commonly those people represented by two-thirds of each house of Congress and then by majorities in both houses of three-fourths of the states—is extremely difficult to mobilize. Thus a very extreme degree of gradualism was initially imposed on the process by which our fundamental law is to be reformed.

From the hyper-majority comes the written rules that are to govern the lawmaking majority, which then produces the statutes and regulations that govern individual citizens. The lawmaking majority, of course, is not a simple majority; it results from varieties of ways of counting majorities, first in staggered and districted election systems, then in two separate legislative houses, and then by an overrideable (by a two-house hypermajority) executive veto. Thus, further gradualism was built into the lawmaking process.

The enforcement of the Constitution—the fundamental rules of the hyper-majority (the people)—upon the lawmaking majority was entrusted, at least implicitly, to the federal courts. They are authorized (article III, section 2, clause 1) to decide cases "arising under the Constitution" and are told to treat as supreme law those federal laws that are in fact "in pursuance" of the Constitution (article VI, section 2).

From Madison's notes on the Constitutional Convention, we know two facts about judicial review. First, we know that most of

70. A. LINCOLN, *Speech at Springfield, June 26, 1857*, in *COLLECTED WORKS* (1953) (cited in J. Agresto, *supra* note 17, at 128-29).

71. J. AGRESTO, *supra* note 17, at 128-29.

the framers who were vocal on the subject expected the federal courts to exercise this power.⁷² Secondly, we know that the framers voted down (more than once) the suggestion that the Supreme Court share the President's veto power. Adding this vetoing group, labeled a Council of Revision, would have changed the Constitution in two ways: (1) judicial vetoing could have been done on *any* policy ground, not just the ground that the supreme law had been violated; and (2) judicial vetoes done in this manner would have been overrideable by two-thirds vote in Congress. Both of these were rejected at the Constitutional Convention.⁷³

The Constitution's system of checks on the Court's interpreting power gives one check to the hyper-majority—constitutional amendment—and several to the lawmaking majority: (1) the power over the size of the Court, (2) the power over new appointments to the Court—shared by the President and the Senate, (3) the power of impeachment for flagrant abuses, and (4) power to make exceptions to and regulations of the Court's jurisdiction. These are extremely blunt instruments, as Agresto's book stresses, and unsuitable for altering particular unpopular Supreme Court decisions.⁷⁴ They also operate gradually, although, as Charles Black argues, not terribly gradually. (He calculated the average modern Supreme Court Justice's tenure to be about thirteen years, roughly as long, he noted, as two terms on the Federal Trade Commission.)⁷⁵ These imprecise, unwieldy and gradualist mechanisms for channeling the Court's interpretive choices, are all that the Constitution gives the elective branches who represent the lawmaking majority. One direct check on the Court, the lowering of judicial salaries, is of course expressly forbidden (article III, section 1). The only other check is the self-restraint meant to stem from the oath taken by "all judicial officers" (article VI, section 3) "to support this Constitution."

The framers deliberately chose to keep from the lawmaking majority any direct, precise power to overrule the Court; to limit their checks on the judiciary to very blunt, uncertain, and gradual techniques; and to have the primary constraint on the judiciary stem from its conscientious reading of the law.⁷⁶ This constitu-

72. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97-98, 109 (M. Farrand, ed. 1911); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73, 76, 78, 93, 298-99, 376, 440. For a more guarded assessment, see L. LEVY, JUDICIAL REVIEW, HISTORY, AND DEMOCRACY: AN INTRODUCTION, IN JUDICIAL REVIEW AND THE SUPREME COURT 1-42 (1967).

73. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73-80, 298. Cf. J. AGRESTO, *supra* note 17, at 134-35.

74. J. AGRESTO, *supra* note 17, at 96-138.

75. C. BLACK, *supra* note 27, at 179-81.

76. Of course, if Congress disagreed with the Court's reading of one of its own statutes,

tional scheme would seem to be at odds with Agresto's view that Congress may deliberately flout judicial readings of the Constitution. The Constitution seems to go some lengths to attenuate the inevitable linkage between the political force of majority will and the outcome of Court decisions. This pattern of constitutional choices, then, would seem to militate against the quest for more precise political constraints on the Court's interpretive power.

Alternatively, can the text of the Constitution be said in some manner to provide constraints on judicial power, the kind of constraints that Justice Black and John Ely sought there? Ely argues yes. His book defends the enhancing of an egalitarian, representative political process as the guideline-setting goal for judicial review, on the grounds not that this process is favored by Ely's own political theory, but rather that it is the political theory implicitly endorsed by the whole Constitution.⁷⁷

The extratextualists can challenge Ely with the reminder that the text nonetheless includes clauses, like the privileges or immunities clause, that seem to license judges to roam all over the map of social policy, striking down any law they strongly feel to be wrong.⁷⁸ And Ely's books appears not to have an answer for them because it does not give an account of his own desire to find constraints in the text.⁷⁹ Yes, one can find them if one wants to constrain judicial discretion, but one can also find discretion-enhancing clauses if one sets out to look for them.

In other words, Ely's argument is essentially as follows: the Constitution sets up a representative form of government; the Supreme Court is not a very representative body; so let's look for ways to constrain its discretion, so that Court power will be limited to enhancing the representative process. One could as easily argue a contrary view: the Constitution provides a series of checks on majoritarian, legislative power; the Supreme Court can provide such a check; so let's look for ways to enhance its discretion in order to let it do more checking. I attempt in the text below to show a way to choose among these arguments.

Congress could simply rewrite the law. To the extent that the Constitution implied a power of federal judicial review, however, it seems to create a deliberate distance between the law-making majority and the Court, so that only the hyper-majority with Constitution-amending power can act directly and precisely to undo a Court decision.

77. J. ELY, *supra* note 6, at 87-102.

78. As I read Philip Bobbitt's defense of what he calls "ethical judicial review," it seems to match this description. See P. BOBBITT, *supra* note 45, at 93-177.

79. His earlier essay, *The Wages of Crying Wolf*, did contain a hint for an answer: *Roe v. Wade* is "a very bad decision . . . because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." Ely, *supra* note 39, at 947 (emphasis in original). His later book does not really follow up on this lead.

The answer to these extratextualist critics, as to why, in America, one ought to look for constraints on judicial discretion, is provided in some of Justice Black's opinions. His approach to the problem is more subtle than his deceptively simple rhetoric. When Black condemns his colleagues' more freewheeling reading of the due process clause, his opinions repeatedly appeal to the traditional distinction between legislative and judicial power (i.e., to the core of the old political question doctrine). He says that his opponents "appropriate for this Court a broad power which we are not authorized by the Constitution to exercise." Their version "subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power." It might be used "to license this Court . . . to roam at large in the broad expanses of policy and morals, and to trespass, all too freely, on the legislative domain." It is one thing for "courts proceeding within clearly marked constitutional boundaries . . . to execute policies written into the Constitution."⁸⁰ It is quite another matter for them to "roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people."⁸¹

The U.S. Constitution does, after all vest judicial power in the Supreme Court; it vests legislative power elsewhere. The framers consciously opted not to set up a Council of Revision, as they called it, or a Council of Elders as Arthur Miller calls it.⁸² "Judicial power" did not necessarily mean (contra Raoul Berger)⁸³ a power limited to the narrowest possible reading of the specific, conscious original intent of the lawmaker, but it did mean a power to interpret some expression of the sovereign will. It is in the Constitution's division between legislative and judicial power that one can locate the obligation to seek constraints on judicial discretion, constraints that must be found in some textual expression, implicit or explicit, of the popular will.

Some examples may clarify my meaning. There are many opaque phrases in the Constitution: due process of law, equal protection of the laws, the privileges or immunities of citizens, a republican form of government. The jurist exercising "judicial restraint" would be guided by the desire to displace as few popularly selected rules as possible. Thus, a Justice like Frankfurter would read "due

80. *Adamson*, 332 U.S. at 70, 75, 90, 91-92 (Black, J., dissenting).

81. *Id.* at 91 (quoting his own dissent from *Federal Power Commission v. Pipeline Co.*, 315 U.S. 575, 599, 601 n.4).

82. See A. MILLER, *supra* note 46.

83. See R. BERGER, *supra* note 15.

process" in a judicially self-restrained, but discretion-maximizing way: the clause permits whatever procedures are reasonable. This means most state-adopted procedures would be upheld, but the judge who becomes nauseated by such egregious measures as coercive police-mandated stomach pumping can declare them unreasonable.⁸⁴ Similarly, the self-restraintist might invoke what I would view as a distorted version (albeit an old one) of the political question doctrine and declare certain clauses of the constitutional text, like "republican form of government," judicially unenforceable.⁸⁵

The constraintist, on the other hand, would look to the constitutional text itself for the suggested bounds of such concepts as "privileges or immunities of citizens" or "due process of law" or "a republican form of government." Tying "due process" to the criminal procedure outlined in the Bill of Rights might be one example, finding first amendment liberties to be part of the "privileges" of citizenship might be another. The constraintist, when faced with state legislative apportionment questions (instead of ducking them as the self-restraintists wanted to do), might try to be guided by section 2 of the fourteenth amendment (supplemented by the fifteenth and nineteenth) instead of ignoring it as the Court did.⁸⁶

Equal protection is harder to elaborate in constraintist terms. One constraintist route is that of Justice Rehnquist who takes his guidance from the well-known historic background of the fourteenth amendment and would consequently limit the clause to racial discrimination. Other constraintists might find that too narrow or too broad a reading. They might read in the history of the same text (e.g., the contemporaneous Freedmen's Bureau activities) a concern to ban only *invidious* racial discrimination, racial discrimination against out-groups.⁸⁷ Or, they may read in the textual history (specifically, the choice to employ broad language and to omit mentioning race or slavery) a broader concern about invidious prejudice against "discrete and insular minorities," or prejudice against relatively powerless groups whose distinctive traits were both accidents of birth and unrelated to the primary goal of the legislation (e.g., statutes barring women from practicing law).⁸⁸

In short, a judiciary determined to take the constitutional text seriously as a constraint on its own discretion would not necessarily

84. *Rochin*, 342 U.S. 165.

85. *Colegrove v. Green*, 328 U.S. 549 (1946); *Luther*, 48 U.S. (7 How.) 1.

86. See *Reynolds v. Sims*, 377 U.S. 533, 593-94 (1964) (Harlan, J., dissenting).

87. See *Regents v. Bakke*, 438 U.S. 265, 390-92, 396-98 (1978) (Marshall, J., separate opinion).

88. Cf. *Craig v. Boren*, 429 U.S. 190 (1976); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

be an inactive judiciary. Nor would its decisions be mechanistically predictable in the format of a computer program. But it would be a judiciary that honored the Constitution's concern for separation of powers and for the ultimate sovereignty of the people.⁸⁹

89. This separation of powers argument was anticipated by Thomas Grey when he launched the modern defense of extratextualism or "non-interpretivism" in 1975. He countered it by asserting that the case-by-case evolution of decision rules by judges is an "entirely traditional judicial task" of common law courts. And then he posed the rhetorical question:

If common law development is an appropriate judicial function, falling within the traditionally accepted judicial role, is not the functionally similar case-by-case development of constitutional norms appropriate as well?

And he elaborated in a footnote his belief that common law judges are applying rather than making law: "The law in question consists of the generally accepted social norms applied in the decision of the cases, norms that are . . . best seen as 'part of the law.'" Grey, *Do We Have An Unwritten Constitution?* *supra* note 41, at 715, n.48. His point is that the identification and elaboration of consensual social norms, or customary judicial norms, has traditionally been understood in the Anglo-American legal system as a legitimate part of the judge's function.

Grey then went on to acknowledge a problem: "[T]he supremacy of constitutional law over legislation, when contrasted with the formally inferior status of common law, makes a great difference." But he insisted that court *authority* to override legislation on the basis of unwritten higher law is a question essentially separable from the question whether applying nonstatutory law to a case is a judicial function. And then he asserted, without claiming to prove, that the framers did intend this authority for the federal courts. Here is where Grey mistook the message of the Constitution.

As W.W. Crosskey noted in the course of his extensive elaboration of the framers' understanding of the common law role of federal courts, to grant that the article III reference to "laws of the United States" included common law rulings does *not* entail granting that the courts' power of judicial review can make common law rights override statutory rights. 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 622 (1952).