REVIEW

Judicial Review and Constitutional Politics: Theory and Practice
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I. THE ALLURE OF MAJORITARIAN DEMOCRACY

Not fully comprehended during the founding period, the power and scope of judicial review remain controversial in American politics. The Supreme Court has proved to be neither "the least dangerous"1 branch nor quiescent under "the chains of the Constitution."2 The judicial branch of government inevitably looms large in the national political process because, as Alexis de Tocqueville observed, "[w]ithout [the judiciary] the Constitution would be a dead letter . . . ."3 Denied the power of the sword or the purse, the Court's power rests with public opinion. The vexatious task of constitutional interpretation and the pressures of a particularly litigious people have provided the impetus for a "government by the judiciary."4 De Tocqueville anticipated the poten-

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3 A. De Tocqueville, Democracy in America 151 (P. Bradley ed. 1945).
tial for an imperial judiciary, noting that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Inexorably drawn into political conflicts, yet not directly politically accountable, armed only with the persuasive force of reason, and wholly dependent on public opinion and the cooperation of other political institutions, the Supreme Court faces the task of preserving the symbols and instruments of free government. As guardian of the Constitution, the Court was destined for controversy. If the Justices do not curb themselves, the people and their elected representatives may curtai or deny the Court's power. The Court's dilemma, Chief Justice John Marshall remarked, lies in "never forget[ting], that it is a constitution we are expounding . . ., [but] a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

More remarkable than the persistence of the debate over judicial review is that the debate, at least as conducted in the twentieth century, centers largely on the incompatibility of judicial review with democratic theory and practice. The contours of that debate in the future will reflect the significant contributions of Jesse Choper and John Hart Ely. Each forcefully and thoughtfully

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6 1 A. de Tocqueville, supra note 3, at 28.
7 In the Pennsylvania convention that ratified the Constitution, James Wilson gave perhaps the fullest definition of free government:

A free government has often been compared to a pyramid. This allusion is made with peculiar propriety in the system before you; it is laid on the broad basis of the people; its powers gradually rise, while they are confined, in proportion as they ascend, until they end in the, most permanent of all forms. When you examine all its parts, they will invariably be found to preserve that essential mark of free governments—a chain of connection with the people.

strives to produce a general theory of judicial review that is compatible with democratic premises and practices. They approach the problem from opposite directions, however.

Choper disregards, albeit not completely, substantive concerns—how constitutional provisions should be interpreted—and concentrates on the Supreme Court's jurisdictional role—when the Court should intervene in the political process. As indicated by the title of his book, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of Judicial Review, Choper's goal is to "advance a principled, functional, and desirable role for judicial review in our democratic political system." He argues that because judicial review is incompatible with majority rule, "a fundamental precept of American democracy," the Court should maximize its limited institutional capital by abstaining from decisions that are "unnecessary for the effective preservation of our constitutional scheme," thereby reducing the "discord between judicial review and majoritarian democracy." Judicial abstemiousness is both principled and prudent with respect to conflicts over federalism and between Congress and the President. The Court, however, should intervene when states intrude on the powers of the national government and when the national government inappropriately restricts or expands federal judicial authority. These jurisdictional proposals, Choper suggests, will conserve the Court's moral and political resources so that it may carry out effectively its legitimate role as the guardian of civil liberties and civil rights.

Like Choper, Ely assumes that "majoritarian democracy is . . . the core of our entire system" and that the exercise of judicial review must conform to that basic precept. Unlike Choper, he attends to the perennial problem of judicial line-drawing in constitutional interpretation. In Democracy and Distrust: A Theory of Judicial Review, he demonstrates the futility of a narrow, clause-bound version of "interpretivism" that requires constitutional provisions to be approached "as self-contained units and interpreted on the basis of their language, with whatever interpretative help the legislative history can provide, without significant injection of

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10 Id.
11 Id.
content from outside the provision.”

This narrow version of interpretivism perpetuates the myth that “[c]ourts are the mere instruments of the law, and can will nothing.”

Although members of the Court long ago decried such “robe-ism,” the myth persists in such recent books as Raoul Berger’s Government by the Judiciary.

Although providing proponents of clause-bound interpretivism with sobering criticism, Ely also criticizes Court watchers who, in rejecting narrow, clause-bound interpretivism, fall prey to some version of “non-interpretivism.”

Noninterpretivism comes in many forms, but all share the original sin, exemplified in Lochner v. New York and Roe v. Wade, of the extraneous discovery of “fundamental” values.

Ely charts a course between these two approaches. He argues for a broad version of interpretivism that he claims is compatible with majoritarian democracy. Although “the most important datum bearing on what was intended is the constitutional language itself,” he insists that justices must draw on the “general themes of the entire constitutional document [but] not from some source entirely beyond its four corners.”

More specifically, he believes the general themes identified with the liberal jurisprudence of the Warren Court—safeguarding the functioning of democratic processes and preserving minority rights—should dictate the

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13 Id. at 12-13.
15 Frank, The Cult of the Robe, SATURDAY RV., Oct. 13, 1945, at 12. Prior to arriving on the high bench, Charles Evans Hughes observed: “We are under a Constitution but the Constitution is what the judges say it is.” C. Hughes, Addresses and Papers of Charles Evans Hughes 139 (1908). While on the bench, Justice (later Chief Justice) Harlan Stone candidly but mistakenly asserted: “While unconstitutional exercise of power by the executive and legislative branches of government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint.” United States v. Butler, 297 U.S. 1, 78-79 (1936).
16 R. Berger, supra note 4. Berger’s approach to constitutional interpretation is similar to Chief Justice Roger Taney’s view that the Constitution “speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers . . . . Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.” Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1857). For a penetrating criticism of Berger, see Murphy, Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?, 87 YALE L.J. 1752 (1978). See also Symposium, 6 HASTINGS CONST. L.Q. 403 (1979).
17 J. Ely, supra note 12, at 43-72.
18 198 U.S. 45, 57 (1905) (“the right of the individual to liberty of person and freedom of contract”).
19 410 U.S. 113, 153 (1973) (right of women to terminate pregnancy).
20 J. Ely, supra note 12, at 12, 16 (emphasis in original).
proper scope of judicial review. In Ely's view, a "participation-oriented, representation-reinforcing approach to judicial review" is compatible with democracy and compelled by the basic tenets of the Constitution.

Diverging in their focus and method, Choper and Ely converge in their reconciliation of the practice of judicial review with democratic principles. Both find their point of accommodation in the famous—or to some, infamous—footnote four of United States v. Carolene Products Co. In that footnote, Justice Harlan Stone, aided by his law clerk and now Columbia University law professor Louis Lusky, argued that special judicial solicitude is necessary in cases involving first amendment freedoms, governmental action impeding or corrupting the political process, and legislative classifications that discriminate against minorities on the basis of race, religion, or nationality. For Choper and Ely, judicial review is more than an "auxiliary precaution" or, as Edward Corwin put it, "an attempt by the American Democracy to cover its bet." Rather, it is the primary check against what Chief Justice Charles Evans Hughes called the "gusts of passion and prejudice which in misguided zeal would destroy the basic interests of democracy." Accordingly, it is the antimajoritarian, undemocratic Supreme Court, as Hughes noted, that must "save democratic government from destroying itself by the excesses of its own power."

Choper's proposals for jurisdictional retrenchment and Ely's

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21 Id. at 87.
22 Id.
24 304 U.S. 144, 152 n.4 (1938).
25 Id. See also Minersville School Dist. v. Gobitis, 310 U.S. 586, 605-06 (1940) (Stone, J., dissenting). As his later judicial record indicates, Justice Stone would not have been comfortable either with Choper's proposals or with the full range of Ely's prescriptions. In a letter to Irving Brant on August 25, 1945, he commented:

My more conservative brethren in the old days enacted their own economic prejudice into law. What they did placed in jeopardy a great and useful institution of government. The pendulum has now swung to the other extreme, and history is repeating itself. The Court is now in as much danger of becoming a legislative Constitution-making body, enacting into law its own predilections, as it was then.

26 The Federalist No. 51, supra note 1, at 322 (J. Madison).
29 Id.
prescriptions for constitutional interpretation are complementary in other ways as well. On the one hand, Choper's preoccupation with jurisdictional matters neglects the urgent judicial responsibility to delineate the limits of constitutional rights in a principled manner. At times, as when he discusses the Court's abortion decisions, Choper's dismissal of substantive concerns about the legitimacy of judicially fashioned constitutional rights appears both unprincipled and imprudent, for in historical perspective the Court's prestige has suffered most often from its rulings on individual rights (and not federalism or separation of powers). Choper's result-oriented jurisprudence is impoverished by minimizing the import of judicial craftsmanship. In this regard, Ely's theory buttresses Choper by providing a way of qualifying Choper's otherwise objectionable individual rights proposal. Ely's theory is sophisticated enough to defend, for example, the extension of first amendment protection to freedom of association, while suggesting the illegitimacy of a judicially-created constitutional right of privacy.

Ely's theory, on the other hand, proves inadequate in precisely those areas of litigation that Choper urges the Court to avoid. A participation-oriented, representation-reinforcing approach to judicial review provides no answers to the inescapable questions of federalism and presidential power raised in such landmark decisions as United States v. Curtiss-Wright Export Corp., the Steel Seizure case, and United States v. Nixon. Thus, as with

30 J. Choper, supra note 9, at 118-22.
34 299 U.S. 304 (1936).
Choper, Ely does not provide a "general theory"\textsuperscript{37} of judicial review. At best, his theory is partially salvageable only if we accept something like Choper's proposals for judicial abstinence.

Although their theories in general are mutually supportive, Choper and Ely disagree on certain matters. For example, Choper has no quarrel with Justice Thurgood Marshall's observation that the nondelegation doctrine is "moribund"\textsuperscript{38} and ought to be laid to rest. He suggests that the doctrine "is premised on the political philosophy that fundamental policy decisions should only be made . . . by broadly based assemblies that are responsible to the people,"\textsuperscript{39} and he argues that these concerns are irrelevant because "the executive branch in the American system of government is politically accountable . . . [and] Congress has exercised its judgment in these instances."\textsuperscript{40} He concludes that because the Court may still engage in statutory construction, the nondelegation doctrine is "neither an efficient nor an appropriate use of the Court's fragile and easily expended power of judicial review."\textsuperscript{41} Ely finds these assumptions dubious. Federal agencies are involved extensively in the formulation of public policy, and they remain directly unaccountable. Like Justice William Rehnquist,\textsuperscript{42} Ely also appreciates that the primary reason for a nondelegation doctrine is "[t]hat legislators often find it convenient to escape accountability."\textsuperscript{43} Judicial imposition of the nondelegation doctrine would serve ostensibly to bring the bureaucracy into line with the ideals of a democracy, for "[a]n argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy."\textsuperscript{44}

Neither Choper nor Ely nor any combination of the two achieves a satisfactory general theory of judicial review. This failure does not gainsay their originality and masterful contributions

\textsuperscript{37} J. Ely, \textit{supra} note 12, at 181.


\textsuperscript{39} J. Choper, \textit{supra} note 9, at 373 (footnote omitted).

\textsuperscript{40} Id. (emphasis in original).

\textsuperscript{41} Id. at 374.


\textsuperscript{43} J. Ely, \textit{supra} note 12, at 133.

\textsuperscript{44} Wright, \textit{Beyond Discretionary Justice}, 81 \textit{Yale L.J.} 575, 585 (1972) (footnote omitted). \textit{See also} T. Lowi, \textit{The End of Liberalism} (2d ed. 1979).
to an enterprise in which success has eluded so many other eminent scholars. Their failure is due partially to the limited scope of their theories. They also are remiss in not showing how their reconciliation of the undemocratic character of judicial review with majoritarian democracy is instructive in the present crisis over the judiciary. Neither addresses, or for that matter appears capable of coming to terms with, current controversies over the role of the federal courts in ordering and supervising major institutional reforms in public schools, mental health hospitals, and prisons. Any persuasive theory about the proper role of judicial review in a majoritarian democracy should account for the transformation of the judiciary and the changing nature of public law litigation in contemporary society.

A more fundamental difficulty is that Choper and Ely presume that majoritarian democracy is at the core of the Constitution and that the exercise of judicial review must conform to that precept. Both authors assume a futile undertaking, for the tensions between democratic government and judicial review cannot be resolved amicably. More crucially, their presuppositions about majoritarian democracy and judicial review are as misleading as they are misinformed. I shall concentrate on these problems in examining the methodology and internal logic of their analyses and then return to more basic questions of constitutional interpretation and judicial review in a system of free government.

II. FOUR NOT-SO-MODEST PROPOSALS

Article III of the Constitution is silent as to the intrinsic nature and scope of judicial review. To compensate for the Founding Fathers' omissions, Choper provides four jurisdictional proposals—proposals that C. Herman Pritchett calls "startling." The proposals are provocative because Choper urges relentless adherence to the distinction he makes between justiciable and nonjusticiable issues. He agrees with Alexander Bickel that the Court is "a

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48 J. CHOPER, supra note 9 (statement on book jacket).
deviant institution in the American democracy" and that a politically oriented jurisprudence must instruct the Court as to its legitimate role. He replaces traditional axioms of constitutional jurisprudence with techniques of political mediation. However, unlike Bickel's "passive virtues"—or, as Gerald Gunther wryly called them, "subtle vices"—Choper's proposals advocate judicial abstemiousness on a wholesale rather than a retail scale. This jurisdictional retreat from federalism and separation of powers disputes is designed to enhance judicial assertiveness when individual rights are threatened.

A. The Federalism Proposal

Judge Learned Hand argued that the Court's proper role is to distribute political power but refrain from intervention in the area of civil liberties. Hand's judgment that conflicts over federalism were less dangerous than those over civil liberties arose from a result-oriented calculation: "the strains that decisions on these questions set up are not ordinarily dangerous to the social structure. For the most part the interests involved are only the sensibilities of the officials whose provinces they mark out, and usually their resentments have no grave seismic consequences." By contrast, guarantees of the Bill of Rights are "moral adjurations, the more imperious because inscrutable," and therefore dependent on the political rather than the judicial process for "that content which each generation must pour into them anew in the light of its own experience."

No less concerned than Hand with preserving and capitalizing on judicial independence, Choper argues to the contrary. He impressively marshals empirical studies in support of Oliver Wendell Holmes's observation that "the United States would [not] come to an end if we lost our power to declare an Act of Congress

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48 A. BICKEL, THE LEAST DANGEROUS BRANCH, supra note 8, at 18.
void. . . . [But] the Union would be imperiled if we could not make that declaration as to the laws of the several States.\textsuperscript{63} Choper proposes that

[t]he federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates "states' rights" should be treated as nonjusticiable, final resolution being relegated to the political branches . . . .\textsuperscript{54}

Choper bases this "Federalism Proposal" on the Court's record and an array of social science studies purportedly demonstrating Congress's solicitude for states' rights. The historical record amply demonstrates that the Court's rulings on federalism generally have enhanced the national government's authority. Whereas Philip Kurland bemoans the Court's contributions to the demise of states' rights,\textsuperscript{55} Choper finds occasion for celebrating that judicial review has had little deterrent effect on national dominance in regulation.\textsuperscript{56} Because judicial review in this area appears largely inconsequential, he argues that the Court explicitly should decline to adjudicate cases involving, for example, Congress's taxing and spending powers,\textsuperscript{57} the commerce power,\textsuperscript{58} the treaty-making power,\textsuperscript{59} and the enforcement provisions of the Reconstruction amendments.\textsuperscript{60} The Court also should refuse to adjudicate cases

\textsuperscript{63} O.W. HOLMES, Law and the Court, in COLLECTED LEGAL PAPERS 291, 295-96 (1920).
\textsuperscript{64} J. CHOPER, supra note 9, at 175.
\textsuperscript{65} P. KURLAND, WATERGATE AND THE CONSTITUTION 174 (1978).
\textsuperscript{66} J. CHOPER, supra note 9, at 215.
\textsuperscript{57} See, e.g., United States v. Butler, 297 U.S. 1 (1936) (whether Congress has the power to subsidize farmers in exchange for reduction of planted acreage); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (whether Congress has the power to impose a tax on enterprises employing child labor); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (whether Congress has the power to impose a national income tax).
\textsuperscript{58} See, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918) (whether Congress has the power to prohibit interstate transportation of goods produced in factories employing child labor).
\textsuperscript{59} See, e.g., Missouri v. Holland, 252 U.S. 416 (1920) (whether the President and the Senate have the power to enter into a treaty to protect migratory birds).
\textsuperscript{60} See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (whether Congress has the power to forbid racial discrimination in housing under the thirteenth amendment); United States v. Raines, 382 U.S. 17 (1960) (whether Congress has the power to forbid racial discrimination in voting under the fifteenth amendment); Civil Rights Cases, 109 U.S. 3 (1883) (whether Congress has the power to forbid racial discrimination in public accommodations under the fourteenth amendment).
involving executive actions on subjects that allegedly lie beyond federal power and that consequently are reserved to the states.\textsuperscript{61}

Judicial review is expendable, Choper insists, because the states' interests are safeguarded adequately by the national political process. Principal among the safeguards are the election of senators from each state, the electorate's proclivity to select senators and representatives who have had prior political experience in state and local government, the constituency factors in committee assignments, the influence of "intergovernmental lobbies" on legislation, and the recurrent threat of defeat at the polls.\textsuperscript{62} Conceding that "certain identifiable segments of the country have been and will be periodically submerged by the force of competing numbers,"\textsuperscript{63} Choper contends that the general record of the national government manifests concern for state and local autonomy. Choper finds virtue where others have found vice: in a political process fragmented by powerful interest groups and bureaucrats, increasingly suffering from the absence of presidential leadership and declining party loyalty.

Federal legislation no longer requires the judicial imprimatur because, as Kurland lamented a decade ago, we "have reached the stage of political evolution when 'legitimation' of congressional authority is unnecessary. There may now be a consensus that there are no areas of individual behavior not subject to national government control . . . ."\textsuperscript{64} The political record, Choper concludes, shows that "the absence of pervasive federal control over all conduct within the states has been more the product of political than of judicial restraint."\textsuperscript{65} Thus, the Court behaves imprudently when accepting jurisdiction and striking down legislation in such cases as \textit{National League of Cities v. Usery}.\textsuperscript{66}

Choper limits the scope of his Federalism Proposal in two important respects. First, although he contends generally that "there should be no judicial review at all" "when the only constitutional

\textsuperscript{61} Choper's proposal would require judicial abstention in cases like United States v. Pink, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or [executive] agreement.") and United States v. Belmont, 301 U.S. 324 (1937) (same).

\textsuperscript{62} J. Choper, supra note 9, at 176-84, 236-40.

\textsuperscript{63} Id. at 216.

\textsuperscript{64} P. Kurland, Politics, the Constitution and the Warren Court 36 (1970).

\textsuperscript{65} J. Choper, supra note 9, at 216.

\textsuperscript{66} 426 U.S. 833 (1976) (invalidating amendments to the Fair Labor Standards Act that regulated the wages of state and municipal employees).
issue presented by action of the national political branches is one of states' rights (as it usually is),”76 he maintains that the Court should intervene in such cases when individual rights are independently or coincidentally asserted.88 For instance, when reviewing challenges to the prohibitions in the Civil Rights Act of 1964 against racial discrimination in public accommodations, the Court should refuse to rule on the merits of Congress's power to regulate commerce.89 In such cases the Court should presume the validity of the legislation and entertain only those claims alleging infringement of individuals' constitutional rights. There are two reasons for this qualification. First, the Court "is the most effective guarantor of the interests of the unpopular and unrepresented precisely because it is the most politically isolated,"70 and it should conserve its "precious capital for those cases in which it is really needed."71 Second, Congress and the national political process are both more competent and more trustworthy than the courts to produce a "fair constitutional judgment"72 on issues of federalism.

Congress, however, is institutionally incapable of anticipating state and municipal enactments and ensuring their compatibility with the national goals of a federal system. Hence, Choper proposes a second limitation on the scope of his Federalism Proposal: the Court should continue to review state action that allegedly invades or nullifies federal power. Choper defends judicial intervention in such conflicts—in contrast with those over the federal government's encroachment on state powers—by pointing again to a number of practical political considerations. National interests are not reflected in state legislatures, and there are too many obstacles for systematic congressional determination of whether state legislation conflicts with federal legislation. Moreover, Choper argues that in repelling state encroachments on federal power the Court "acts only as an intermediate agency between the states and Congress," for "this aspect of the Court's work is akin to statutory interpretation and not to judicial review."73 In other words, it is Congress and not the Court that has "the final constitutional word."74

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67 J. CHOPER, supra note 9, at 200 (emphasis added).
68 Id. at 197-98.
70 J. CHOPER, supra note 9, at 69.
71 Id. at 258.
72 Id. at 203.
73 Id. at 207, 208.
74 Id. at 207 (emphasis added).
Proponents of states' rights will find that Choper's Federalism Proposal stacks the deck. They also will dispute his reading of congressional solicitude for states' rights. At one point, Choper admits that his presentation "may, at least in part, be fairly characterized as being not only fragmented but adversarial as well." Indeed, any book that reads like an extended Brandeis brief surely will evoke comments reminiscent of Chief Justice Edward White's: "Why, I could compile a brief twice as thick to prove that the legal profession ought to be abolished!"

More seriously, constitutional scholars will pause to contemplate whether Choper's proposal over the long run would prove more pernicious than praiseworthy. They inevitably will ask, as Gunther did about Bickel's proposals, whether "we [can] really expect to be substantially better off if the Court 'stays its hand, and makes clear that it is staying its hand and not legitimating.'" Bickel himself perceived that "[i]t is unreal to think that by putting such matters out of view the Court keeps itself out of politics. Actually, it merely abandons control of the direction in which, inevitably, its decisions on the merits do influence public opinion and the political institutions."

Is Congress both entitled to constitutional supremacy on these questions and better equipped politically to decide them? There are substantial reasons to doubt the wisdom of the judiciary's abdication of all responsibility. As Martin Shapiro argues, "the nature of the legislative process, combined with the nature of constitutional issues, makes it virtually impossible for Congress to make independent, unified, or responsible judgments on the constitutionality of its own statutes."

For other reasons, James Madison thought that the judicial branch was "the surest expositor of ... the [constitutional] boundaries ... between the Union and its members." Madison's understanding of constitutional politics was markedly different from that of Choper, who urges judicial abstemiousness when Con-

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75 Id. at 83.
76 Quoted in A. Mason, supra note 25, at 31.
77 Gunther, supra note 50, at 7 (quoting A. Bickel, The Least Dangerous Branch, supra note 8, at 70).
78 A. Bickel, The Least Dangerous Branch, supra note 8, at 140.
80 Letter from James Madison to unidentified person (Aug. 1834), reprinted in 4 Letters and Other Writings of James Madison 350 (Phila. 1865).
gress encroaches on the states and judicial assertiveness when states intrude on national powers, because Congress, not the Court, possesses the final constitutional word. For Madison, the final constitutional word came neither from the Congress nor from the Court: it came from the dynamic process of free government. As Edward Corwin argued:

Judicial review considered as a method for interpreting the Constitution is an intermediate, not a final process. For while a judicial construction of the Constitution is final for the case in which it is pronounced, it is not final against the political forces to which a changed opinion may give rise, whether in the legislature, or in the judiciary itself.81

Fundamentally, Choper advocates the removal of issues of federalism from the scope of judicial review because he inflates the finality, and hence the peril, of the Court’s decisions. In so doing, he promises political dividends that are questionable and exacts a high price from constitutional politics. These objections become more pressing with Choper’s separation of powers proposals.

B. The Separation of Powers Proposals

Justice Louis Brandeis argued that

[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.82

Although the Constitution itself is a prescription for political struggle, “[t]he purpose of the Constitution was not [only] to grant power, but to keep it from getting out of hand.”83 “Without an arbiter to construe the Constitution,” Eugene Rostow cautioned, “the system would have collapsed into endless conflicts over the boundaries of authority, otherwise incapable of resolution.”84

Choper argues to the contrary: “since, as a functional matter,

82 Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).
83 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).
The political branches are fully capable of protecting their own vital constitutional interests, the Court will better secure its own critical constitutional role in our system by forcing them to do so. His functional reconsideration of the Court's role leads to two proposals for separation of powers conflicts. The first and least controversial is the "Judicial Proposal": the Court should continue to review and reject improper attempts by Congress and the President to restrict or expand the Court's jurisdiction. The second is the "Separation Proposal": the Court should not decide constitutional questions concerning the respective powers of Congress and the President vis-à-vis one another; rather, the ultimate constitutional issues of whether executive action (or inaction) violates the prerogatives of Congress or whether legislative action (or inaction) transgresses the realm of the President should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process.

Choper's Separation Proposal amounts to the political question doctrine writ large. The Court's reliance on that doctrine often has appeared ad hoc, illogical, and circular. "[P]olitical questions," John Roche mused, "are matters not soluble by the judicial process; matters not soluble by the judicial process are political questions. As an early dictionary explained, violins are small cellos, and cellos are large violins." The proposal raises to a constitutional principle what has been established mainly by practice, at least with respect to presidential power. The Court reviews only a small fraction of presidential actions, and the contours of presidential power are largely "presidentially, not judicially, shaped." Under Choper's proposal, this judicial acquiescence would become a permanent feature of the political process, except when misconduct by the executive branch injures private citizens or when federal agencies go beyond presidential and congressional directives. A whole range of constitutional and political issues would become nonjusticiable. Presidential claims to removal, veto, and impoundment

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85 J. CHOPER, supra note 9, at 379.
86 Id. at 263.
powers,\textsuperscript{89} to executive privilege,\textsuperscript{80} and to inherent powers in domestic and foreign affairs\textsuperscript{91} would be presumptively valid, ultimately to be resolved through negotiations between Congress and the President.

Choper adduces historical evidence for his proposal, contending that the Founding Fathers "trusted the political interplay between the two branches—rather than judicial intervention—to maintain the proper balance of legislative and executive power."\textsuperscript{92} Prior to the ratification of the Constitution, Madison argued in \textit{The Federalist} that "[t]he several departments being perfectly coordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . . ."\textsuperscript{93} Although there was little doubt that on issues of federalism the national government, and the Supreme Court in particular, was "ultimately to decide,"\textsuperscript{94} the power of the Court relative to that of the coordinate branches was more problematic. For instance, in a debate during the First Congress over the power to remove the Secretary of State, Madison conceded that "in the ordinary course of Government, . . . the exposition of the laws and Constitution devolves upon the Judiciary."\textsuperscript{95} Nevertheless, Madison asked "to know, upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments,"\textsuperscript{96} arguing that "[n]othing has yet been offered to invalidate the doctrine, that the meaning of the Constitution may as well be ascertained by the legislative as by the judicial authority."\textsuperscript{97}


\textsuperscript{92} J. Choper, \textit{supra} note 9, at 267.

\textsuperscript{93} \textit{The Federalist} No. 49, \textit{supra} note 1, at 314 (J. Madison).

\textsuperscript{94} \textit{Id.} No. 39, \textit{supra} note 1, at 245 (J. Madison).

\textsuperscript{95} 1 \textit{ANNALES OF CONG.} 500 (Gales & Seaton eds. 1789).

\textsuperscript{96} \textit{Id.}.

\textsuperscript{97} \textit{Id.} at 546-47.
The Constitution apparently failed to settle the matter for others as well. Challenging the Court's decision in \textit{Worcester v. Georgia}, an irate President Andrew Jackson declared: "John Marshall has made his decision, now let him enforce it." Jackson elaborated that comment in his Veto Message of 1832:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.\footnote{President's Veto Message (July 10, 1832), reprinted in \textit{2 Messages and Papers of the Presidents} 582 (J. Richardson ed. 1897) [hereinafter cited as \textit{Messages and Papers}].}

Although these historical examples support Choper's Separation Proposal, they also invite controversy over its constitutional validity and auspiciousness. In attacking Jackson's views, Daniel Webster raised both issues:

The President is as much bound by the law as any private citizen . . . . He may refuse to obey the law, and so may a private citizen; but both do it at their own peril, and neither of them can settle the question of its validity. The President may say a law is unconstitutional, but he is not the judge. . . . If it were otherwise, there would be no government of laws; but we should all live under the government, the rule, the caprices of individuals. . . .

. . . [President Jackson's] message . . . converts a constitutional limitation of power into mere matters of opinion, and then strikes the judicial department, as an efficient department, out of our system. . . .

. . . [The message] denies first principles. It contradicts truths heretofore received as indisputable. It denies to the judiciary the interpretation of law . . . .\footnote{8 CONG. DEB. 1232, 1239-40 (1832) (remarks of Sen. Webster). Likewise, in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (footnote omitted), Justice Jackson observed:}
Webster thus believed that judicial review—along with dedication to the rule of law, separation of powers, federalism, and a dependence on the people—was among the first principles of free government.

There is substantial historical evidence for rejecting a rigid tripartite interpretation of the Constitution's distribution of powers—evidence Choper fails to dispute. The Court admittedly guarded its declared monopoly through self-restraint in not invalidating congressional legislation, except in a handful of cases, until the end of the nineteenth century. The Founding Fathers, however, understood judicial review to be a logical implication of a political system based on a written Constitution. Numerous delegates to the state ratifying conventions expressly endorsed the idea of judicial review. In the Pennsylvania convention, James Wilson argued that

under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. . . . [T]he power of the Constitution [is] paramount to the power of the legislature acting under that Constitution; for it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges,—when they consider its principles, and find it to be incompatible with the superior power of the Constitution,—it is their duty to pronounce it void . . . .

In Connecticut, Oliver Ellsworth declared: "The Constitution defines the extent of the powers of the general government. If the general legislature should at any time overlap their limits, the judicial department is a constitutional check."

Choper's proposal and much of the continuing controversy

With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.


103 2 Elliot's Debates, supra note 6, at 445-46 (italics in original).

104 Id. at 196.
over the Court's proper role arise in part from the misapprehension that judicial review is tantamount to judicial finality or supremacy. Madison, no less unambiguously than Thomas Jefferson and Chief Justice Marshall, rejected that contention. In constitutional conflicts the Court's decision is final for only the instant case and is not dispositive of the attendant political controversy. The Court remains a political forum of last resort but, as Madison explained, "this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government; not in relation to the rights of the parties to the constitutional compact, from which the judicial, as well as the other departments, hold their delegated trusts." In his first inaugural address, President Abraham Lincoln reflected Madison's understanding:

the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

The Court provides an auxiliary precaution, and not the primary check, on political conflicts. It is judicial supremacy, not judicial review, that is antithetical to free government. Contrary to Choper's apprehension, judicial review is part of an ongoing dialogue, a "vital national seminar," and as such is neither constitutionally objectionable nor necessarily pernicious in the resolution of separation of powers conflicts.

When and to what extent the Court should intervene remains the persistently vexing quandary. The Court's predicament is not alleviated by Choper's counsel of absolute judicial abstemiousness.

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105 Thomas Jefferson objected to judicial supremacy, not judicial review. See Letter from Thomas Jefferson to W.H. Torrance (June 11, 1815), reprinted in 11 The Works of Thomas Jefferson 471-75 (P. Ford ed. 1905); Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), reprinted in 12 id. at 175. Chief Justice Marshall also recognized that although the power of judicial review extends to matters entrusted to coordinate branches of government, that power is neither unconditional nor unlimited. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).


107 A. Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in 8 Messages and Papers, supra note 100, at 3210.

108 E. Rostow, supra note 84, at 167-68.
His departure from the traditional understanding of judicial review is occasioned by his preoccupation with modern justifications for the Court. Choper's primary concern lies with political viability, not constitutional validity, for the Separation Proposal is a technique for institutional survival. "[H]istory teaches," he argues, "that the Court's participation has, on balance, been counterproductive."108 He adds that Congress and the President have sufficient incentives to guard and consolidate their powers. For those who fear an imperial presidency, Choper recalls the constraints imposed on presidential action "by institutional inertia within the executive branch itself and by external political pressures ranging from party organizations, labor and business groups, and the press to the electorate as a whole."110 Accordingly, judicial review not only is unnecessary, but may be an obstacle to political accommodations between Congress and the President. In the event that a constitutional crisis reaches Armageddon, he insists, judicial intervention would prove unsuccessful: either there would exist sufficient public pressure to produce an acceptable resolution in the political marketplace or, if not, any judicial ruling would fail to achieve a general agreement sufficient to resolve the crisis.111

Choper agrees with Robert Dahl that "policy at the national level is the outcome of conflict, bargaining, and agreement among minorities; the process is neither minority rule nor majority rule but what might better be called minorities rule, where one aggregation of minorities achieves policies opposed by another aggregation."112 He also rejoices in his assertion that "the Court is almost powerless to affect the course of national policy."113 Indeed, the Court as national policy maker invites disaster. Yet it does not follow inexorably that the Court never should intervene in disputes between Congress and the President. Choper's view commends itself only if constitutional checks and balances may be replaced propitiously by the polycentric, fragmented, and often redundant bargaining of the national political process. This exacts a high price from the constitutional system, and the political benefits are dubious. Constitutional checks and balances and the rule of law are superseded—or subverted—by interest-group pluralism and

108 J. Choper, supra note 9, at 314.
110 Id. at 276.
111 Id. at 305-08.
113 Id. at 293.
political accommodation. Other scholars already bewail the demise of separation of powers. Deploiring the Court's abdication of responsibility in conflicts over presidential power, Kurland charges that the nation is now governed essentially, not by laws enacted by Congress, but by rules and regulations promulgated by the executive branch and by independent agency actions. . . . With this greatly expanded governmental function, the executive branch has become a series of bureaucracies uncontrolled even by the upper echelons of executive officials and only occasionally subjected to judicial scrutiny.\textsuperscript{114}

Ironically, Choper criticizes past judicial intervention for following "a path of unprincipled expediency"\textsuperscript{115} while counseling future judicial retreat because the Court \textit{qua} power broker should intervene only when expedient and when individual rights are threatened. Choper underestimates the import of the more rigorous constitutional inquiry that emerged in the last thirty years from the Court's rulings on presidential power. The \textit{Steel Seizure}\textsuperscript{116} and \textit{Pentagon Papers}\textsuperscript{117} cases, along with \textit{United States v. Nixon},\textsuperscript{118} demonstrated that nonjusticiability is no longer an irrebuttable presumption. The \textit{Nixon} Court, Choper argues, neither did nor should have resolved the clash between Congress and the President over executive privilege. Rather, the Court's analysis centered on the conflict between article II powers and the function of the courts under article III. Yet Choper ignores the symbolic and political value of the Court's intervention in granting certiorari before judgment by the court of appeals and in deciding the case during the impeachment debates in Congress. He also fails to appreciate the shrewd and responsible exercise of judicial power in that case. Unlike Choper and Kurland,\textsuperscript{119} the public and most Court watchers applauded the Court's "increased inclination toward judicial intervention and the critical attention which was paid to problems of structure [that] combined to establish with un-

\textsuperscript{114} P. KURLAND, supra note 55, at 176.

\textsuperscript{115} J. CHOPER, supra note 9, at 307.

\textsuperscript{116} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).


\textsuperscript{118} 418 U.S. 683 (1974).

\textsuperscript{119} \textit{See} P. KURLAND, supra note 55.
Judicial Review

precedent clarity that the President is accountable to the law.”

C. Judicial Intervention and the Individual Rights Proposal

Constitutional law, Justice Felix Frankfurter once remarked, “is not at all a science, but applied politics.” Because constitutional interpretation basically is a creative art, demanding political acumen and legal craftsmanship, Choper’s proposals for judicial abstemiousness fail to resolve the Court’s dilemma of preserving its prestige when intervening in political conflicts. Underlying his proposals is not merely the misapprehension that equates judicial review with judicial supremacy; he also accentuates the political peril of judicial intervention and encourages confidence in the ability of the political marketplace to settle disputes over federalism and separation of powers. His proposals minimize the Court’s important role in maintaining the broad and flexible lines drawn in the constitutional distribution of powers. “In a society in which rapid changes tend to upset all equilibrium,” Justice Jackson observed, the Court, “without exceeding its own limited powers, must strive to maintain the great system of balances upon which our free government is based.”

In historical perspective, judicial intervention does not appear to be as ad hoc, episodic, and counterproductive as Choper contends. Instead, the Court has legitimized, with a few notable exceptions, the major changes of dominant political coalitions and thereby has preserved and cultivated the constitutional growth essential to a system of free government. The Court generally has displayed a posture of moderate interventionism, and properly so, for the judicial function is a modest one. The Court is not well suited to continuously active and intrusive review of legislative and executive decisionmaking, nor does judicial abstemiousness appear constitutionally sound or politically desirable. In a system of free government, “[t]he fact is that the Judiciary, quite as much as Congress and the Executive, is dependent on the cooperation of

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120 C. ROSSITER, supra note 88, at 212 (additional text by R. Longaker, ed.). See also Tanenhaus & Murphy, Patterns of Public Support for the Supreme Court: A Panel Study, 43 J. Pol. 24, 33 (1981).
121 F. FRANKFURTER, The Zeitgeist and the Judiciary, in LAW AND POLITICS 6 (A. MacLeish & E. Prichard Jr. eds. 1939).
the other two, that government may go on.” As noted by Chief Justice William Howard Taft, the only President who later served on the Supreme Court:

The Federal Constitution nowhere expressly declares that the three branches of the Government shall be kept separate and independent. . . . Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the Constitution and the normal operation of government under it easily demonstrate.

The Federalism and Separation Proposals do not merely reflect Choper’s view that judicial supervision of these areas “is unnecessary to effective preservation of the constitutional scheme”; they are designed “to ease the commendable and crucial task of judicial review in cases of individual constitutional liberties.”

Before turning to Choper’s proposal for judicial solicitude for individual rights, it should be noted that his four proposals effectively elevate the Bill of Rights above the Constitution. Together they illustrate the radical departure in the twentieth century from the way in which the Constitution’s relationship to the Bill of Rights was comprehended in the late eighteenth century and throughout the nineteenth century. At the founding, many thought a declaration of rights was unnecessary and even dangerous due to the difficulties of inclusion and exclusion in any enumeration of protected rights. More importantly, the Constitution’s enumeration of certain delegated powers was designed to limit the reach of the national government’s coercive powers and to allow the states and the political process to safeguard individual rights. Antifederalists persisted, and Thomas Jefferson prevailed on James Madison. In proposing amendments to the Constitution in the First Congress, Madison argued:

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impene-

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124 Id. at 119-20.
125 J. CHOPER, supra note 9, at 169.
126 In March 1789, Jefferson wrote Madison: “In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary.” Letter from Thomas Jefferson to James Madison (March 15, 1789), reprinted in 14 THE PAPERS OF THOMAS JEFFERSON 659 (J. Boyd ed. 1958). See also Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in id. at 16.
trable bulwark against every assumption of power in the legis-
lative or executive; they will be naturally led to resist every
encroachment upon rights expressly stipulated for in the con-
stitution by the declaration of rights.127

The Bill of Rights is indeed a pretext for heightened judicial activ-
ity. "The very purpose of a Bill of Rights," Justice Jackson wrote,
"was to withdraw certain subjects from the vicissitudes of political
controversy, to place them beyond the reach of majorities and offi-
cials and to establish them as legal principles to be applied by the
courts."128 Nonetheless, the dilemma of when and to what extent
the Court should intervene in protecting individual rights is no less
problematic than judicial intrusion into disputes over federalism
and separation of powers.

Choper's "Individual Rights Proposal"—"that the essential
role of judicial review in our system is to prevent violations of that
category of constitutional provisions that secure individual liber-
ties"129—seems standard fare for contemporary constitutional
scholars, particularly given the constitutional revolution forged by
the Court in nationalizing the Bill of Rights and supervising the
equal protection of the laws. Choper, however, also offers a func-
tional justification for the Court's guardianship of individual
rights. He argues that

[s]ince, 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 ma-
ajorities, the task of custodianship has been and should be as-
signed to a governing body that is insulated from political
responsibility and unobehdon to self-absorbed and excited
majoritarianism.130

To Choper, the Court's essential role and burden lies in safeguard-
ing minority rights while facilitating the processes of majoritarian
democracy.

Choper recognizes the political fact that judicial review is an
institutional solution to the dilemma that John Locke posed for
himself in arguing for a right to revolution.131 "[I]f judicial review

127 1 ANNALS OF CONG. 457 (Gales & Seaton eds. 1789) (remarks of James Madison).
129 J. CHOPER, supra note 9, at 2.
130 Id. at 68.
were nonexistent for popularly frustrated minorities,” Choper notes, “the fight, already lost in the legislative halls, would have only one remaining battleground—the streets.” Nevertheless, there are three problems with Choper’s vision of judicial guardianship of individual rights.

First, he bases his prescription for solicitous judicial review of individual rights on the empirical proposition that it is the Court that most successfully vindicates individual rights. He too quickly dismisses opposing arguments by Henry Steele Commager, Robert Dahl, and Richard Funston, contending that “the evidence does not substantiate their basic thrust.” Funston reexamined and confirmed Dahl’s hypothesis that, except during transitional periods or in critical election years, the Court generally reflects the will of dominant political coalitions; he concluded that “[t]he traditional concept of the Court as the champion of minority rights . . . is largely incorrect.” Funston, however, examined only the Court’s record in reviewing congressional legislation and did not purport, as Choper does, to attend to the broader patterns of judicial vindication of constitutional rights. Turning to the grander picture, Choper cannot document his argument convincingly. Empirical studies of the Court’s record and the impact of its decisions are few and methodologically uneven. The problem of quantitatively measuring the societal effects of judicial rulings is so enormous that it is futile even to make a pretense, which Choper wisely does not do, of demonstrating causal relationships or predicting that decisions on individuals’ rights will perforce engender compliance. At best, Choper impressively but impressionistically shows that since (and, I would emphasize, only since) 1937, “the Court’s accomplishments for individual rights have been substantial.”

The second problem is that, assuming the Court should adopt a course of rigorous vindication of individual rights, there is no way of guaranteeing—or empirically showing—that jurisdictional retreat from federalism and separation of powers conflicts will make the Court’s task easier or more efficient. The Federalism and Separation Proposals, Choper maintains, “will shield [the Court]
from hostile public and official reactions." But the Court still runs the risk of self-inflicted wounds when it goes too far, too fast on issues of individual rights, and the risks actually may escalate if the Court completely withdraws from other activities. In other words, the Federalism and Separation Proposals may undercut rather than enhance judicial prestige and legitimacy if the Court comes to be perceived solely as a power organ bent on the enforce-
m-ent of civil liberties and civil rights. Public disfavor may grow and compliance diminish.

Although Choper aims at the prudent and principled exercise of judicial review, the Court seems ill- advised not "to treat public reaction as a significant element of substantive constitutional inter-
-pretation." With respect to individual rights, but not conflicts over states' rights or between Congress and the President, Choper asserts that "[a]cceptance is not the Court's responsibility, but the obligation of the people; execution not its onus, but the duty of the political branches." Though principled, Choper's four proposals may not always prove prudent precisely because they neglect the commendable ways the Court traditionally has avoided serious po-
- litical controversies by denying justiciability, for example, through assertion of standing requirements.

There is a third troublesome aspect of the Individual Rights Proposal: it provides no guidance for the persistently vexing issue of when and to what extent the Court should delineate and enforce the contours of constitutional rights. Choper recognizes this problem when he notes that claims to constitutional rights are "seem-
ingly boundless" and admits that he "does not attempt to re-
solve what . . . Ely [sees as a critical question]: development of 'a principled approach to judicial enforcement of the Constitution's open-ended provisions' securing individual rights." With that invi-
tation we turn to Ely's work.

136 Id. at 233. See also id. at 2, 379.
137 Id. at 167.
138 Id. at 168.
140 J. CHOPER, supra note 9, at 75.
141 Id. at 79 (footnote omitted) (quoting Ely, Constitutional Interpretivism: Its Allure and Impossibility, 53 Ind. L.J. 399, 448 (1978)).
III. A THEORY OF JUDICIAL REVIEW

Ely’s subtitle, *A Theory of Judicial Review*, should be taken seriously: it indicates Ely’s modest goal of providing a theory of judicial review. Specifically, Ely, a former law clerk to Chief Justice Earl Warren, strives for a jurisprudence based on the political philosophy that he ascribes to the Warren Court. Down-playing clear instances of judicially imposed values, he characterizes the underlying framework of Warren Court interventionism as process-oriented. The Warren Court’s extension of first amendment freedoms and its supervision of reapportionment and voting rights reveals the legitimate judicial function as that of policing the political process. Accordingly, Ely proposes that democratic distrust of judicial review may be alleviated by a general theory “that bounds judicial review under the Constitution’s open-ended provisions by insisting that it can appropriately concern itself only with questions of participation [in the political process], and not with the substantive merits of the political choice under attack.”

Ely will delight most devotees of an active, aggressive judiciary. Even his critics will praise this short, readable, and scholarly book, for its great merit lies in its refreshing return to basics: the Constitution’s text and structure, its bearing on judicial review, and its implications for the political process.

A. Somewhere Between Interpretivism and Noninterpretivism

At least since *Calder v. Bull*, members of the Supreme Court have debated the nature of judicial review. Court watchers typically characterize that debate in terms of judicial behavior manifesting either self-restraint or activism. The more important inquiry centers on the judiciary’s creativity and its posture toward the text of the Constitution. Jurists and commentators alike fre-

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145 J. Ely, supra note 12, at 181.
146 3 U.S. (3 Dall.) 386, 388 (Chase, J.), 399 (Iredell, J.) (1796).
Judicial Review

**quently face an interpretive dilemma.** Those who embrace strict constructionism—interpretivism—often search in vain for the intent of the Framers and ratifiers and with mauvaise foi persuade themselves that they definitively have discovered the intent of constitutional provisions. In doing so they underestimate the onus of their enterprise and the difficulties of historical proof, and they overestimate the Founding Fathers’ ability to anticipate present crises. They invite charges of thwarting the popular will by imposing their visions of an eighteenth-century document. Alternatively, others would go beyond the Constitution to rationalize their value impositions, adopting some version of noninterpretivism. They fall prey to the dual charge of manifesting complete infidelity to parchment guarantees and impermissibly substituting their value choices for those of popularly elected representatives.

Ely goes a long way toward resolving this dilemma and providing a viable theory of judicial review compatible with constitutional democracy. Narrow, clause-bound interpretivism is impossible because the most controversial provisions of the Constitution and Bill of Rights have an open texture that defies literal interpretation and thus induces judicial injection of content. Recourse to legislative history does not always provide a definitive guide. The history of the Thirty-Ninth Congress, for example, reveals no intention by which to judge with complete confidence the meaning of the fourteenth amendment’s privileges or immunities clause. At best the congressional history discloses different and distinct understandings of the amendment. Even if statements by such congressional leaders as John Bingham, Thaddeus Stevens, and Jacob Howard actually registered their intentions and were not simply rhetoric meant for public consumption, there is no way of ascertaining which, if any, of their views were accepted by the other representatives who voted but did not make public statements. As Ely concludes about the incorporation debate that has raged on and off the bench, “the legislative history argument is one neither side can win.”

If the constitutional letter is indefinite and at times cryptic,

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147 U.S. Const. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).


149 J. Ely, supra note 12, at 27 (footnote omitted).
the notion of a brooding constitutional spirit is especially seductive. Since Chief Justice Marshall's time, jurists and commentators have acknowledged the necessity of addressing both "the spirit and letter of the Constitution." Divining the spirit of constitutional guarantees, however, typically invites a quest for fundamental values that ends with Justices imposing their own values either explicitly or covertly through the use of natural law teachings, "neutral principles," the "voice of reason," "tradition," or consensus revealing "conventional morality" or "constitutional morality," or by sagely prefiguring the future and proclaiming some value in the name of the idea of progress. With wit and intelligence, Ely disposes of these touchstones of noninterpretivism.

The conceit of Justices expressly imposing their own values rests on the mistaken notion that because judges do make law, they ought to do so. A result-oriented jurisprudence does not follow inexorably from the insights of legal realism. Unlike Choper, Ely thinks the contemporary Court can intervene whenever and wherever it wants and get away with it. But, again unlike Choper, Ely thinks that it is constitutionally improper, and not merely imprudent, for the Court to do so.

Perhaps too quickly, Ely dismisses natural law teachings, arguing that it is illegitimate for the Court to invoke natural law and moral standards for its decisions. He claims they have "all but disappeared in American discourse" and that "our society does not,
rightly does not, accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives.”

Although Ely rejects the import of natural law discourse, he astutely perceives that Herbert Wechsler’s much maligned advocacy of neutral principles is of no help. Wechsler aimed at illuminating the formal requirements of principled judicial decision making and consequently did not purport to set forth substantive principles. Ely also casts aside “reason” as a source of fundamental values. This is not surprising after the 1970s, the “Me-decade,” when it was better to feel than to think and when reason seemed no longer capable of accounting for itself. Like John Dewey, Ely takes a pragmatic, instrumental view of reason: “it can only connect premises to conclusions.” As Ely notes, academic philosophers have not reached general agreement on a theory of justice, and it is of little help to tell the Justices simply to base their decisions on John Rawls’s *A Theory of Justice* or Robert Nozick’s *Anarchy, State and Utopia*. As Ely cleverly puts it: “The Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?” Given the problematic nature of translating the philosophical axioms of Rawls or Nozick into judicial opinions, the Justices ultimately may conclude: “We like Rawls, you like Nozick. We win, 6-3. Statute invalidated.” The more disturbing problem to which Ely draws attention lies with writing into the Constitution whatever moral theory happens to appeal to a majority of the Court, just as the Court notoriously wrote a particular economic theory into the Constitution in the late nineteenth and early twentieth centuries.

Tradition provides no surer guide for judicial decision making. Like natural law and reason, tradition can be invoked in support of a majority’s preconceived approval or disapproval of some political practice or result. Likewise, the search for consensus does not yield a reliable basis for deciding hard cases. Even if Justices discovered

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159 Id. at 54. Compare Ely’s views with Murphy, supra note 151, at 139-42.
160 J. Ely, supra note 12, at 55. See also O’Brien, supra note 45, at 17-18.
161 J. Ely, supra note 12, at 56.
164 J. Ely, supra note 12, at 58.
165 Id.
166 See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”).
consensual values, it would be wrong for the Court to impose them on a pluralistic democracy. And if the Justices are ill-equipped to ascertain contemporary consensual values, they emphatically are unqualified as prophesiers of evolving moral standards. Justice Thurgood Marshall's opinions in the death penalty cases amply illustrate the predicament of Justices who try to discern the prevailing or future moral consensus.\footnote{Ely's crucial insight is that the Court must give meaning to open-ended guarantees, but in doing so it must look first to the constitutional language, and then to—but not beyond—the general themes and structure of the Constitution itself.}

While showing the errors of interpretivism and noninterpretivism, Ely develops a theory midway between these approaches to constitutional interpretation. Whether his theory amounts to a broad version of interpretivism or a modest brand of noninterpretivism does not matter. Ely's crucial insight is that the Court must look first to the constitutional language, and then to—but not beyond—the general themes and structure of the Constitution itself.

Ely predicates his reconciliation of constitutional adjudication with democratic governance on three arguments. First, the Constitution's premises are democratic. Second, the constitutional structure is "overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capably be designated process writ large—with ensuring broad participation in the processes and distributions of government."\footnote{Third, Justices' legal expertise qualifies them to supervise matters of procedural fairness—process writ small. This expertise, combined with the Justices' political isolation, also makes the Court the appropriate institution to referee the political process—process writ large. The Court should concentrate on facilitating popular participation in the governing process and ensuring that majorities do not systematically disadvantage minorities "out of simple hostility or prejudiced refusal to recognize commonalities of interest."}

Forcefully arguing against judicial imposition of values and for a process-oriented mode of judicial review, Ely nonetheless points to three constitutional provisions that he argues permit the kind of review associated with \textit{Lochner}'s\footnote{Lochner v. New York, 198 U.S. 45 (1905).} substantive due process analysis. He asserts the Court was wrong to read substance into the

\footnote{J. Ely, supra note 12, at 87 (footnotes omitted).}
\footnote{Id. at 103.}
fourteenth amendment's due process clause, because there was
general agreement that the clause only denoted the demands of
procedural fairness—process writ small. Besides, he notes, "'sub-
stantive due process' is a contradiction in terms—sort of like
'green pastel redness.'" In Ely's view, however, the Court
wrongly rendered the fourteenth amendment's privileges or immu-
nities clause meaningless. The legacy of the Slaughter-House
Cases notwithstanding, Ely claims "a significant chunk of legis-
lative history" buttresses the claim that

the most plausible interpretation of the Privileges or Immuni-
ties Clause is, as it must be, the one suggested by its lan-
guage—that it was a delegation to future constitutional decision-makers to protect certain rights that the document
neither lists, at least not exhaustively, nor even in any specific
way gives directions for finding.

The fourteenth amendment's equal protection clause necessi-
tates judicial "free-lancing" as well, but such freelancing, Ely as-
sures, is "bounded, 'limited' to the subject of equality." Still, be-
cause all laws discriminate against some group, the Court may do
more free-wheeling than free-lancing under the equal protection
clause. This is particularly troublesome when a majority of the
Court becomes activated upon a political program, such as Ely's
judicial egalitarianism, or some economic or moral theory. The
Warren Court's constitutional free-wheeling was evident in Bolling
v. Sharpe, which struck down segregated schooling in the Dis-
trict of Columbia on the same day that Brown v. Board of Educa-
tion struck it down in the states. Ely properly criticizes the "gib-
berish" of his mentor, Chief Justice Warren, in holding that the
due process clause of the fifth amendment in some sense incorpo-
rates the equal protection clause of the fourteenth amendment.

To make Bolling constitutionally intelligible, Ely resurrects the

171 J. Ely, supra note 12, at 18 (footnote omitted).
172 U.S. Const. amend. XIV, § 1. See note 147 supra.
173 83 U.S. (16 Wall.) 36 (1873).
174 J. Ely, supra note 12, at 28.
175 U.S. Const. amend. XIV, § 1 ("nor shall any State . . . deny to any person within
its jurisdiction the equal protection of the laws").
176 J. Ely, supra note 12, at 32.
179 J. Ely, supra note 12, at 32.
forgotten ninth amendment.\textsuperscript{180} To Ely, "the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution . . . ."\textsuperscript{181} The ninth amendment reinforces the privileges or immunities clause and, when coupled with the equal protection clause, justifies rulings such as Bolling.

Together the ninth amendment and the fourteenth amendment's privileges or immunities and equal protection clauses permit extensive judicial intervention \textit{cum construction} of new constitutional rights when policing the political process. Before turning to the contours and details of Ely's participation-oriented, representation-reinforcing mode of judicial review, it is appropriate to comment on his presuppositions about constitutional politics.

Ely's jurisprudence embellishes the Constitution with an egalitarian political philosophy that, albeit not foreign, was unacceptable to the Founding Fathers. Whereas he presumes a democratic foundation, the Framers worried about "the excesses of democracy"\textsuperscript{182} and established a mixed form of government on republican principles. Of the distinctive features of republican government, Madison noted:

\begin{quote}
It is \textit{essential} to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it . . . . It is \textit{sufficient} for such a government that the persons administering it be appointed, either directly or indirectly, by the people.\textsuperscript{183}
\end{quote}

Acknowledging the representative nature of government, Ely infuses into the Constitution and judicial politics an overriding egalitarianism. The Constitution, he asserts, is "a strategy of pluralism, one of structuring the government, and to a limited extent society

\textsuperscript{180} U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

\textsuperscript{181} J. Ely, \textit{supra} note 12, at 38. Ely bases his argument on correspondence between James Madison and Thomas Jefferson during 1788 and 1789. See note 126 \textit{supra}. Whereas Ely concludes that the ninth amendment provides a textual basis for the Court's construction of constitutionally unenumerated rights, the history of that amendment and its constitutional interpretation indicates to the contrary that it properly serves only as a rule of construction for ensuring the requisite latitude of enumerated rights. For a further discussion, see D. O'Brien, \textit{Privacy, Law, and Public Policy} 182-87 (1979).

\textsuperscript{182} 1 \textit{The Records of the Federal Convention of 1787}, at 48 (M. Farrand ed. 1914) (remarks of Elbridge Gerry). \textit{See also id.} at 26 (remarks of Elbridge Gerry), 51 (remarks of Edmund Randolph), 123 (remarks of Elbridge Gerry), 132 (remarks of Elbridge Gerry); \textit{The Federalist} No. 39, \textit{supra} note 1, at 244 (J. Madison).

\textsuperscript{183} \textit{The Federalist} No. 39, \textit{supra} note 1, at 241 (J. Madison) (emphasis in original).
generally, so that a variety of voices would be guaranteed their say and no majority coalition could dominate."¹⁸⁴ Judicial intervention necessarily becomes more frequent, and judicial politics become more prominent and vigorous when grounded on an elusive egalitarian ideal. By contrast, under the Madisonian view of free government, majorities are constantly in flux and constrained by constitutional checks and balances, so that "[a] dependence on the people is . . . the primary control on the government" and judicial review only one of several auxiliary precautions.¹⁸⁵

The Warren Court displayed Ely's egalitarian political philosophy in its reapportionment revolution. Ironically, after criticizing others for urging that moral philosophies be injected into the Constitution, Ely does not take very seriously the second Justice John Marshall Harlan's characterization of one man, one vote as nothing but "a piece of political ideology"¹⁸⁶ and "an experiment in venturesome constitutionalism."¹⁸⁷ Similarly, Justice Hugo Black cautioned that "when a 'political theory' embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country."¹⁸⁸ Ely neither acknowledges the unmistakably ideological character of Warren Court interventionism nor prescribes clear, convincing boundaries for his judicial egalitarianism. Instead, Justice Harlan simply got "hung up"¹⁸⁹ on the intentions of the Framers, and one man, one vote was the only judicially "administrable" standard available.¹⁹⁰

Ely aims to provide "a theory to get us where the Court has gone."¹⁹¹ He does so through constitutional reconnaissance, reconstructing our understanding of the Constitution and the Bill of Rights. Contrary to the traditional civil libertarian view, the general strategy of the Bill of Rights was not to document a set of substantive rights. The first eight amendments to the Constitution function as equality provisions or regulatory principles. The first

¹⁸⁴ J. Ely, supra note 12, at 80 (footnote omitted).
¹⁸⁵ The Federalist No. 51, supra note 1, at 322 (J. Madison).
¹⁸⁷ Id. at 625.
¹⁸⁹ J. Ely, supra note 12, at 119 (footnote omitted).
¹⁹⁰ Id. at 121.
¹⁹¹ Id. at 105.
amendment's guarantee of free speech and press, for instance, was
designed primarily to ensure open and informed discussion about
political issues. And although the fourth through the eighth
amendments are concerned principally with procedural fairness, or
process writ small, the fourth and the eighth amendments were
harbingers of the fourteenth amendment's equal protection clause
in prohibiting "indefensible inequities in treatment." Even the
first amendment's substantive protection for religious freedom, Ely
thinks, is akin in its protection of religious minorities to the pro-
tection afforded by the equal protection clause. The constitutional
language and the practice of rights thus are eclipsed by the con-
cept of equality. Judicial review becomes compatible with demo-
cratic governance only when divorced from the rich tradition of
American political and constitutional thought.

B. Judicial Review Process-Style

As an instructive, workable theory for judicial behavior, Ely's
participation-oriented, representation-reinforcing mode of judicial
review is both too exclusive and too inclusive. Important areas of
constitutional law are disregarded. Federalism and separation of
powers questions, as earlier noted, are not resolved by Ely's theory.
Nor does his theory assist the Court in interpreting the fourth
amendment's prohibition of unreasonable searches and seizures,
for example, or the fifth amendment's privilege against self-incrim-
ination. Indeed, much of the import of the language, tradition,
and value of civil liberties and civil rights is diluted, and may be
lost, on Ely's teaching that these categories of constitutional adju-
dication are best thought of in terms of equality and the elimina-
tion of government officials' discretionary injustice. Ely's tutorial
in applying equal protection analysis to matters of process writ
small is unpersuasive for those who take rights seriously. Fur-
thermore, his judicial egalitarianism leads at times to recommen-
tations that run counter to the Constitution's text and history. For
example, he argues that both the eighth amendment's ban against
cruel and unusual punishment, which functions as a "prophylactic
equal protection" measure, and the fourteenth amendment's

\[192\] Id. at 97.


\[194\] J. Ely, supra note 12, at 176.
equal protection clause prohibit imposition of the death penalty.\textsuperscript{195}

A central concern for any theory of judicial review lies with elucidating the boundaries that divide permissible judicial creativity in construing constitutional guarantees from impermissible judicial fabrication of novel, unenumerated constitutional rights. In tackling this problem, Ely distinguishes between different kinds of judicially created penumbral rights. In doing so, he once again emphasizes the controlling influence of the democratic premises of his constitutional politics. Whereas the Founders and such later jurists as Justice Louis Brandeis\textsuperscript{196} thought that the Constitution embodies both substantive values and procedural norms, the document for Ely addresses only the latter. Process-oriented judicial review is defensible in a democracy because substantive values are determined by the unrelenting interplay of the political process. Hence, the Court properly found a right of association essential to the democratic process and within the "shadows"\textsuperscript{197} of the first amendment, but it improperly proclaimed a constitutional right of privacy in Griswold and Roe.

Though there is considerable merit in Ely's differentiation between legitimate and illegitimate penumbral rights, his theory remains too inclusive and too abstract. The scope of judicial intervention appears virtually unlimited when vindicating freedoms of speech, association, and access to the political process, for Ely provides no guidance for judicial line-drawing in this area. Under the first amendment, for instance, judicial construction and enforcement of a right of access\textsuperscript{198} or the public's "right to know"\textsuperscript{199} appears acceptable—despite the facts that such penumbral rights

\textsuperscript{195} Id. at 174-76.

\textsuperscript{196} Dissenting in Olmstead v. United States, 277 U.S. 438, 478 (1928), Justice Brandeis observed:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. \ldots They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

\textsuperscript{197} Whalen v. Roe, 429 U.S. 589, 598-99 n.23 (1977) (Justice Stevens refers to the theory that constitutional guarantees have penumbras or "shadows").


have no basis in either the text or the history of the amendment and that the Court undeniably would assume a super-legislative posture comparable to that displayed in *Lochner* and *Roe*. Substantive and procedural values thereby are confused and not easily disentangled. Without further fine-tuning, Ely’s process-oriented mode of judicial review seems indistinguishable from unadorned policy making by judges bent on imposing their vision of an open, democratic political system and egalitarian society.

The imprecision of Ely’s theory of judicial review creates other problems as well. Democratic distrust of judicial review turns out not to be the fundamental political problem, for he harbors a deep suspicion of majoritarianism. The judiciary must be taught to distrust the operation of precisely those processes of majoritarian democracy that it otherwise respects and maintains. The Court should do more than simply ensure popular participation in governance, because “[n]o matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise to refuse to take their interests into account.”200 As J. Roland Pennock recently argued, “‘one person, one vote,’ under these circumstances, makes a travesty of the equality principle.”201 To facilitate minority representation and the right to equal treatment, Ely proposes enhanced judicial scrutiny of legislative and administrative decision making.

The fourteenth amendment’s equal protection clause does not, and cannot, mean that everyone is entitled to exactly the same treatment. Instead, individuals similarly situated, *ceteris paribus*, are entitled to treatment as equals. Because all legislation discriminates, particular enactments typically leave some individuals relatively better off than others. Over the years the Supreme Court has evolved a three-tiered approach to equal protection challenges to legislation. Traditionally, and especially since 1937 when reviewing economic legislation, the Court presumes the reasonableness of legislative classifications: the *minimal scrutiny test* requires only that a classification “be reasonable, not arbitrary.”202 The Warren Court developed a second, more rigorous standard: the *strict scrutiny test* applies when legislation either infringes on a “fundamen-
tal right" or involves a "suspect classification" such as race or nationality. This test requires that the government demonstrate a "compelling interest" that could not be accomplished by a less discriminatory classification.

Together these tests are not unproblematic, for they promote judicial rigidity when consistently applied to particular areas of litigation. As Gerald Gunther put it, the tests are "'strict' in theory, and fatal in fact." They also foster ambiguity in judicial selection of "fundamental rights" and "suspect classifications." The Burger Court consequently has interjected a third approach, an "intermediate analysis" or strict rationality test. When confronted with discrimination not based on a traditionally suspect category, there must be more than "rational" but less than "compelling" justification for the legislation. In other words, classifications and their concomitant disadvantages must bear some substantial relationship in fact to important legislative interests.

Ely rejects this conventional three-tiered approach for two reasons. First, because the excesses of democracy frequently bode ill for minorities, the Court must examine intensively both the legislative classification and the process that generated it to discover whether the classification was "rooted in 'stereotypes' [that] should be regarded as suspicious," and "whether there exist[ed] widespread hostility" toward some disadvantaged minority. Second, in a pluralistic society discrimination does not occur only against discrete and insular minorities defined on the basis of some immutable characteristic such as race or alienage. Immutability, therefore, cannot be the touchstone for suspect classification and heightened judicial scrutiny. Judicial review must be more egalitarian and extensive than under the conventional approach.

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See Gunther, supra note 205, at 33-37.


J. Ely, supra note 12, at 155 (footnote omitted).

Id. at 154.
Court should guard against "unusual deprivation on the basis of race, religion, or politics, or even simply because the official doing the choosing doesn't like [some individual or group]."\textsuperscript{210}

A process-oriented mode of judicial review is more extensive than conventional equal protection analysis. Ely proposes that the Court inquire whether an "unconstitutional motivation" animated legislative or administrative actions. In motivational analysis, he notes that the "most important ingredient by far must be the actual terms of the law or provision in issue, read in light of its foreseeable effects and a healthy dose of common sense, and not, though it can help occasionally, its legislative history."\textsuperscript{211} Accordingly, the Court should go beyond considering whether classifications disadvantage some group out of societal prejudice or because the group lacks political power and proceed to an examination of the subjective motivations underlying governmental actions.

Ely's analysis leaves unclear the meaning of "unconstitutional motivations." Under his analysis, inquiry into public officials' motives would reveal that legislation discriminating against blacks, as opposed to burglars, is impermissible.\textsuperscript{212} But this is an easy case; the nature and limits of motivational analysis are more disturbing when hard cases are entertained. Consider the problem posed by racial quotas, the essential device in many reverse discrimination programs. This vexing moral-political issue, Ely argues, does not generate a difficult constitutional question. Equal protection challenges to reverse discrimination programs\textsuperscript{213} do not create a constitutional problem, however, only because Ely withdraws his prescription for judicial inquiry into the motivational basis for legislation. There is, he says, "nothing constitutionally suspicious about a majority's discriminating against itself."\textsuperscript{214} But why should reverse discrimination programs be exempted from judicial review cum inquiry into unconstitutional motivations? Why should motivational analysis not apply when legislative majorities discriminate on a racial basis either to confer a benefit or to impose a burden on a minority? In response to such questions, Ely maintains that the equal protection clause functions only to ensure "that those who

\textsuperscript{210} Id. at 137 (footnotes omitted) (emphasis added).
\textsuperscript{211} Id. at 130.
\textsuperscript{212} Id. at 154.
\textsuperscript{214} J. Ely, supra note 12, at 172.
would harm others must at the same time harm themselves."

Legislative majorities may deny their constituents the constitutional right to equal treatment, but they may not discriminate against or otherwise burden minorities.

Judicial employment of motivational analysis appears arbitrary, a reflection of Ely's distinctively egalitarian understanding of the Constitution. Under his theory, egalitarian political ends justify any legislative means and preempt the exercise of judicial review, regardless of the clear commands of the Constitution. The contrary and sounder view of the Constitution was expressed eloquently by the first Justice John Marshall Harlan: "Our Constitution is color-blind and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." If constitutional rights indeed are taken seriously, then when balancing competing demands for liberty and equality, the Court must ensure each individual's entitlement to treatment as an equal. Individual liberties may neither be sacrificed by simple majoritarian prejudice nor be eclipsed by the excesses of a well-meaning egalitarian majority. As Justice William Douglas wrote in his dissenting opinion in *DeFunis v. Odegaard*:

The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington [School of Law] cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans . . . .

Racial quotas, notwithstanding Ely's egalitarian constitutional politics, are constitutionally irredeemable.

Consider also the practical problems and consequences of motivational analysis applied, for example, to an administrator's decision to segregate prisons. Segregation in prisons may be occasioned by an administrator's racial prejudice or may be required because of past racial violence among the inmates. In principle, Ely's prescription might yield less judicial invalidation, for the

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215 Id. at 170.
courts most likely would find it more onerous to discover bad, prejudiced motives than to find bad, mistaken judgments. But in practice there is no way to ascertain how and how far judges would proceed when their inquiries focus on actual subjective motivations; identical administrative or legislative decisions presumably would give rise to conflicting judicial decisions in different situations, states, and localities. This in turn indicates that a process-oriented *cum* motivational inquiry might produce more ad hoc, capricious judicial rulings, thereby undermining consistency and coherence in the equal protection of the laws.

Finally, recollecting Choper's concern with preserving the scarce institutional capital of the judiciary, Choper's jurisdictional proposals and Ely's prescriptions for process-oriented judicial review render the judicial power at once more limited and more extensive than traditionally has been the case in constitutional politics. Both minimize the import of judicial supervision of governmental powers in areas other than civil liberties and civil rights. In maximizing the Court's custodial responsibility for individual rights, they inflate the finality of judicial rulings and infuse into constitutional interpretation an egalitarian political philosophy. The judicial role thereby becomes akin to that of a social-reform agency. Unwittingly or willfully, Choper and Ely dismiss the political truth of Justice Felix Frankfurter's observation that "[t]he powers exercised by this Court are inherently oligarchic. . . . The Court is not saved from being oligarchic because it professes to act in the service of humane ends."219

There remains the vexatious political *cum* judicial problem of

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218 See text and notes at notes 10-11, 71, 136-137 *supra*.
when and to what extent the Supreme Court should intervene in the national political process. The task of accommodating judicial review with democratic governance is inherently problematic, but it is neither pressing nor necessary. This is so for two reasons that elude Choper and Ely. The Constitution does not prescribe a democracy pure and simple. Instead, a mixed form of government was established in which political power is diffused among institutions that remain dependent on and accountable to the people in a variety of ways. Within a system of free government, the Court fulfills an important albeit limited role as an auxiliary precaution against both the abuse of governmental power by a tyrannical minority and the excesses of majoritarian democracy. Judicial review becomes controversial only when the Court thwarts popular will or goes too far and too fast with its construction of the Constitution. Judicial aggression in constitutional politics is lamentable and objectionable. Yet far from being antithetical, judicial review is essential to the promise and performance of free government.

Misapprehension of judicial review and its relation to the Constitution also misleads Choper and Ely when they approach the complexities of judicial decision making and constitutional interpretation. Although appealing for their simplicity, Choper's jurisdictional proposals neglect crucial factors in the politics of judicial behavior. The Court's internal decision making processes are of a dynamic and at times combative nature. The importance of flexibility, timing, and precision when the Court renders a ruling should not be underestimated. Nor should the subtle and ubiquitous demands of judicial craftsmanship be discounted or replaced by axioms of institutional survival. Both Choper and Ely unjustifiably assume that when vindicating individual rights, the Court is capable of withstanding any political assault occasioned by extensive judicial intervention in legislative and administrative decision making.

The intricacies of judicial politics are not reducible to the science or art of the possible. The craft of constitutional interpretation demands that Justices produce intellectually convincing opinions, internally consistent in their reasoning both for the instant case and for broader principles, that give coherence and consistency to constitutional jurisprudence. If the Court proves incapable of persuasive opinions, over the long run its failure will undermine compliance, just as surely as its institutional prestige suffers when it either severely restricts popular political action or goes off too far and too fast in its own direction.
Constitutional interpretation, as Ely perceives, does not fare well with unqualified judicial attachment either to interpretivism or noninterpretivism. Although the constitutional text must be the principal guide for the Court, the Justices also must accept the responsibility of giving meaning to the open texture of the constitutional language. Thus they should not dismiss out of hand the inspiration of natural law, the utility of inductive and deductive reasoning, and studied reliance on precedent. Nor should they cast aside a critical appreciation for tradition, historical context, and social science revelations about contemporary society. This is not to say that the Constitution's meaning should be revised to suit the shifting tides of political passion. Rather, the onus of the Court lies with infusing constitutional meaning into the resolution of political crises. Informed judicial review elevates political conflict to the level of constitutional intelligibility by bringing political controversies within the language, structure, and spirit of the Constitution.

In constitutional politics there are no simple solutions or easy formulae for when and to what extent the Court should intervene in the political process. The Court's institutional prestige depends on the selection of individuals who exercise the power of judicial review with moderation. Those individuals must display political wisdom, legal craftsmanship, and a sensitivity to the awesome responsibility imposed by judicial independence in a system of free government.