

Interpretivism, Freedom of Expression, and Equal Protection

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I.

A.

We in the United States are philosophically committed to the political principle that governmental policymaking—by which I mean simply decisions as to which values among competing values shall prevail, and as to how those values shall be implemented¹—ought to be subject to control by persons accountable to the electorate.² As a general matter, a person is accountable to

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This Article is part of a larger work-in-progress, which will be published as a book by the Yale University Press in 1982, and which is tentatively titled THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY. Another part will be published in another symposium on judicial review. See Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U.L. REV. ____ (1981).

1. Cf. Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 2 (1978):

By a "legislature," I mean a body whose chief function in government is to formulate general rules of law that primarily reflect the notions of utility and value held by its members. Such a body is to be distinguished from a trial court, which applies law received from legally superior sources; from an administrative agency, which, in its rule-making capacity, formulates policy only within the limits of its organic statute; and from a "traditional" appellate court, which, in formulating law, is guided primarily by precedent. By "policy," I mean the specific social purposes that a legislative body seeks to fulfill through its enactments. These definitions are not watertight

2. "Democracy" is a freighted term. Some constitutional theorists have tried to resolve the tension between constitutional policymaking by the Supreme Court and our societal commitment to democratic government more at the level of definition than of theory. They define democracy in terms of certain substantive ideals and then contend that because (or to the extent that) the Court's constitutional policymaking serves to effectuate those ideals, it is democratic. But that strategem cannot work unless the audience to which it is addressed accepts, or can be persuaded to accept, the controversial claim that the concept of democracy entails the particular substantive ideals stipulated by the theorist and the further claim, also controversial, that the particular exercise(s) of constitutional policymaking in question serves to effectuate one or more of those ideals. Moreover, the definitional argument simply overlooks the fact that, whatever the character of particular decisions rendered by the Court in the course of constitutional policymaking, the Court itself is plainly not an electorally accountable institution; that fact is precisely what gives rise to the debate about the legitimacy of the Court's constitutional policymaking in the first place. Consequently, the definitional argument is destined to exert, and in fact has exerted, very little influence in current constitutional debate. For a recent example of the definitional strategem, see Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099 (1977).

The notion of democracy on which I rely is primarily procedural, not substantive. With Brian Barry, I follow . . . those who insist that "democracy" is to be understood in procedural terms. That is to say, I reject the notion that one should build into "democracy" any constraints on the content of the outcomes produced, such as substantive equality, respect for human rights, concern for the general welfare, personal liberty or the rule of law.

Barry, *Is Democracy Special?*, in PHILOSOPHY, POLITICS AND SOCIETY (FIFTH SERIES) 155, 156 (P. Laslett & J. Fishkin eds. 1979). But see H. THOMAS, A HISTORY OF THE WORLD 388 (1979): "Winston Churchill is believed to have said, 'Democracy means that if the door bell rings in the early hours, it is likely to be the milkman.'" Barry adds: "The only exceptions . . . are those required by democracy itself as a procedure." Barry, *supra*, at 156. Barry, therefore, probably would not deny, and in any event I readily concede, that the concept of democracy entails the principle of freedom of expression; after all, for government to manipulate the flow of information is for it to manipulate, to some extent, the choices people make in casting their ballots. But that concession has very limited consequences, as we'll see.

The following rough definition captures the procedural notion of democracy I have in mind:

A democracy is rule by the people where "the people" includes all adult citizens not excluded by some

the electorate *directly* if he holds elective office for a designated, temporary period and can remain in office beyond that period only by winning reelection; accountability is *indirect* if he holds appointive office and can remain in office only at the discretion of his appointer (who in turn is electorally accountable)³ or, if his office is for a designated, temporary period, by securing reappointment after that period has expired. (I do not for a moment suppose that electorally accountable policymaking invariably generates policies supported by a majority of the electorate. Frequently it is difficult to know whether a particular policy choice enjoys such support, and not infrequently safe to say that it does not.⁴) If judicial review does not run counter to the principle of electorally accountable policymaking, it is at least in serious tension with it.⁵ In constitutional cases, the Supreme Court, which designedly is not accountable to the electorate,⁶ stands ready to strike down policy choices made by electorally accountable persons—officials of the legislative or executive branches of government, whether federal or state. The problem thus arises whether, given the principle of electorally accountable policymaking, judicial review is legitimate. In our political culture, the principle of electorally ac-

generally agreed upon and reasonable disqualifying factor, such as confinement to prison or to an asylum for the mentally ill, or some procedural requirement, such as residency within a particular electoral district for a reasonable length of time before the election in question. "Rule" means that public policies are determined either directly by vote of the electorate or indirectly by officials freely elected at reasonably frequent intervals and by a process in which each voter who chooses to vote counts equally . . . and in which a plurality is determinative.

J. PENNOCK, *DEMOCRATIC POLITICAL THEORY* 7 (1979). For a similar definition, see H. MAYO, *AN INTRODUCTION TO DEMOCRATIC THEORY* 70 (1960). See also J. PENNOCK, *supra*, at 14:

As has been shown, it is at least arguable that the same substantive concept of democracy will fit both West and East. A formal or procedural definition of democracy that would fit our Western-style democracy, however, clearly would rule out Communist regimes and so-called peoples' democracies.

Because the word "democracy" is so freighted and misused, suggestive of vague substantive ideals as well as procedural forms, I use it only sparingly. In its stead I use a different term: "electorally accountable policymaking."

It is not uncommon for judges who are not electorally accountable to engage in policymaking by fashioning "common law" or by "interpreting" vague statutory provisions. But judges engage in such policymaking as delegates of the legislature, and whatever policy choices they make are subject to revision by the legislature. Thus, nonconstitutional policymaking by the judiciary is consistent with the principle in the text.

3. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 29 (1980) [hereinafter cited as CHOPER].

4. See R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 106, 108, 131, 132, 133 (1956). See also Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099, 1107 (1977). In his recent book, Jesse Choper stresses the fact that policymaking by Congress—the electoral accountability of whose members is, of course, direct—does not "result in the automatic translation of the majority will into detailed legislation." CHOPER, *supra* note 3, at 12. See also *id.* at 12–25. But that state of affairs is somewhat beside the point, since the political principle to which we are philosophically committed demands only that policymaking be electorally accountable, not that it necessarily generate policies supported by a majority of the electorate—although, to be sure, one important reason we value electorally accountable policymaking is that we think it more sensitive to the sentiments of majorities than is policymaking that is not electorally accountable.

5. Whether and to what extent judicial review—or at least *some* judicial review—runs counter to that principle is the subject of the work of which this Article is a part.

6. Nor are the lower federal courts electorally accountable. Under article III, § 1 of the Constitution, "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." See also THE FEDERALIST NO. 78 at 464, 465–66 (A. Hamilton) (Mentor ed. 1961). That the Supreme Court is not accountable to the electorate does not mean that the Court is altogether immune to political influence or even exempt from political control.

countable policymaking is axiomatic,⁷ it is judicial review, not that principle, that requires justification.⁸

Of course, one could begin the effort to justify judicial review by rejecting the principle of electorally accountable policymaking. (Every year I have several students who refuse to take the principle seriously.⁹) The justificatory enterprise is certainly much simpler if one begins that way. However, any constitutional theory predicated on a rejection of the principle of electorally accountable policymaking is destined to have little currency, since, so far as I can tell, the vast majority of the audience to whom theories of judicial review are directed regard the principle as axiomatic. Therefore, my strategy is not to reject the principle but, on the contrary, to accept it as a given and then to defend judicial review—in particular, constitutional policymaking—as not inconsistent with the principle.¹⁰

Let's begin with a fundamental distinction. There are two basic sorts of judicial review. Following Tom Grey and John Ely, I will refer to them, respectively, as interpretive review and noninterpretive review.¹¹ The legitimacy of noninterpretive review is the central problem of contemporary constitutional theory. The distinction between interpretive and noninterpretive review can best be elaborated in terms of a particular conception of the United States Constitution. The Constitution consists of a complex of value

7. See J. ELY, *DEMOCRACY AND DISTRUST* 5, 7 (1980) [hereinafter cited as ELY]:

We have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government.

Moral absolutists and moral relativists alike have embraced and defended democracy on their own terms—the former on the ground that it is a tenet of natural law, the latter as the most natural institutional reaction to the realization that there is no moral certainty.

[W]hatever the explanation, and granting the qualification, rule in accord with the consent of a majority of those governed is the core of the American governmental system.

Cf. R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 125 (1956) (quoted in text accompanying note 69 *infra*).

8. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 19 (1962):

[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.

9. Morton Horowitz seems not to take the principle seriously, but then Horowitz is not trying to justify judicial review. See Horowitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 *HARV. C.R.-C.L. L. REV.* 599 (1979). See also Parker, *The Past of Constitutional Theory—And Its Future*, 42 *OHIO ST. L.J.* 223 (1981).

10. If I were unable to defend constitutional policymaking by the judiciary as consistent with the principle of electorally accountable policymaking, then, given my commitment to constitutional policymaking by the judiciary, I would have to question the axiomatic character of the principle of electorally accountable policymaking. Cf. Fiss, *Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1, 42 (1979):

I realize that it may not be appropriate to demand justification of an axiom, for it is offered as a starting point, a proposition that you cannot look behind. Yet there must be more that can be said about it. Acceptance of an axiom must turn on something more than a momentary flash of intuition. . . . [T]he axiom can be assessed in terms of its consequences and its underlying social vision. An axiom might at first glance seem attractive enough, but its appeal may decline radically once its full implications are understood.

11. See Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975). See also ELY, *supra* note 7, at 1.

judgments the Framers wrote into the text of the Constitution and thereby constitutionalized.¹² The important such judgments fall into two categories. One category of judgments defines the structure of American government by specifying the division of authority, first, between the federal government and the governments of the states and, second, among the three branches of the federal government—legislative, executive, and judicial. The other category defines the limits of governmental authority vis-à-vis the individual; this category of value judgments specifies certain aspects of the relationship that shall exist between the individual and government.¹³

The Supreme Court engages in *interpretive* review when it ascertains the constitutionality of a given policy choice by reference to one of the value judgments of which the Constitution consists—that is, by reference to a value judgment embodied, though not necessarily explicitly, either in some particular provision of the text of the Constitution or in the overall structure of government ordained by the Constitution.¹⁴ Such review is “interpretive” because the Court reaches decision by interpreting—deciphering—the textual provision (or the aspect of governmental structure) that is the embodiment of the determinative value judgment. Interpretive review is a hermeneutical enterprise; the effort is to ascertain, as accurately as available historical materials will permit, the character of a value judgment the Framers constitutionalized at some point in the past. The Court engages in *noninterpretive* review when it makes the determination of constitutionality by reference to a value judgment other than one constitutionalized by the Framers. Such review is “noninterpretive” because the Court reaches decision without really interpreting, in the hermeneutical sense, any provision of the constitutional text (or any aspect of governmental structure)¹⁵—although, to be sure, the

12. The so-called “unwritten” constitution is a different matter, consisting of value judgments not plausibly attributable to the Framers but nonetheless constitutionalized by the Supreme Court. *See Grey, Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). The unwritten constitution is the constitution generated by noninterpretive review. Hence, if noninterpretive review is illegitimate, in whole or in part, then the unwritten constitution, as the tainted fruit of such review, is illegitimate too, in whole or in part.

13. *See CHOPER, supra* note 3, at 2 n.*: “Most other constitutional clauses concern ‘housekeeping’ matters. These deal with details of the federal departments (for example, the minimum ages for elected national officials) or with relations among the states (for example, the extradition clause).”

14. *See Grey, Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 n.9 (1975):

The interpretive model . . . certainly contemplates that the courts may look through the sometimes opaque text to the purposes behind it in determining constitutional norms. Normative inferences may be drawn from silences and omissions, from structures and relationships, as well as from explicit commands. . . . What distinguishes the exponent of the pure interpretive model is his insistence that the only norms used in constitutional adjudication must be those inferable from the text—that the Constitution must not be seen as licensing courts to articulate and apply contemporary norms not demonstrably expressed or implied by the framers.

For an influential discussion of governmental “structure” as a source of decisional norms in constitutional cases, *see* C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

15. *See ELY, supra* note 7, at 1 (defining “interpretivism” as the position “that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution,” and “noninterpretivism” as “the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document”) (emphasis added).

Court may explain its decision with rhetoric designed to create the illusion that it is merely "interpreting" or "applying" some constitutional provision.¹⁶

"Interpretivism" refers to constitutional theory that claims that only interpretive judicial review is legitimate and, in particular, that all noninterpretive review is illegitimate. "Noninterpretivism" describes constitutional theory that claims that at least *some* noninterpretive review—noninterpretive review with respect to at least some categories of constitutional questions, with the categories specified by the noninterpretivist theory in question—is legitimate too. (No contemporary constitutional theorist, for reasons explored elsewhere in the work of which this Article is a part, seriously disputes the legitimacy of interpretive review.)

That the Court rarely acknowledges that it exercises noninterpretive review¹⁷ is presently beside the point. What matters is that many, indeed most constitutional decisions and doctrines of the modern period (concerning human rights issues), as we'll later see, cannot fairly be understood as the products of anything but noninterpretive review,¹⁸ and therefore cannot be deemed legitimate unless the noninterpretive review that generated them can be justified. It is also beside the point that one can imagine cases in which there would be room for a reasonable difference of opinion as to whether the Framers constitutionalized a particular value judgment,¹⁹ thereby making it impossible to say that the Court's decisions (in such cases), striking down challenged governmental policy choices, must be explained in terms of noninterpretive rather than interpretive review.²⁰ The decisions in virtually all modern constitutional cases of consequence, again, cannot plausibly be explained except in terms of noninterpretive review, because in virtually no such case can it plausibly be maintained that the Framers constitutionalized the determinative value judgment.²¹

16. For a comment on why "the Court has always, when plausible [and, indeed, even when not plausible], tended to talk an interpretivist line" (*id.* at 3), see *id.* at 3-5. The fundamental reason, of course, is the suspect legitimacy of a noninterpretivist line.

17. For a recent example of a rare acknowledgement to that effect, see *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

18. See, e.g., CHOPER, *supra* note 3, at 137 (it is "virtually impossible to justify the Court's actions [in providing "vigorous protection for the constitutional rights of minorities"] on the ground that it is doing no more than 'finding' the law of the Constitution and fulfilling the intention of its framers."); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 234 (1980) ("if you consider the evolution of doctrines in just about any extensively-adjudicated area of constitutional law . . . explicit reliance on [interpretivist] sources has played a very small role compared to the elaboration of the Court's own precedents. It is rather like having a remote ancestor who came over on the Mayflower."); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1193 (1977) ("the evolving content of constitutional law is not controlled, or even significantly guided, by the Constitution, understood as an historical document."). See also LUSKY, *Public Trial and Public Right: The Missing Bottom Line*, 8 HOFSTRA L. REV. 273 (1980).

19. Or even cases in which there would be room for a reasonable difference of opinion as to whether a value judgment concededly constitutionalized by the Framers calls for a decision sustaining or for one striking down the challenged governmental policy choice.

20. Cf. ELY, *supra* note 7, at 186 n.10 (noting that even an interpretivist approach generates debatable decisions).

21. Which is not to say that in such cases the Court does not try to maintain that the Framers constitutionalized the determinative value judgment. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

B.

Is noninterpretive review, whether of state or federal action, authorized by the constitutional text? (Although we are committed to the principle of electorally accountable policymaking, we are also committed to the principle that such policymaking is constrained by the value judgments embodied in the constitutional text.) The bare text is equivocal with respect even to most interpretive review.²² No one has claimed, or could claim, that by itself the text authorizes and thereby legitimates noninterpretive review—the enforcement of value judgments *other than* those the Framers constitutionalized.

Does any provision (or provisions) of the constitutional text read in the light of history authorize noninterpretive review? That is, did the Framers—*any* Framers, whether those of the 1789 Constitution, the Bill of Rights (1791), or, for example, the fourteenth amendment (1868)—intend that state or federal action be subject to noninterpretive review, in particular by the Supreme Court? Bear in mind what it means to claim that the Framers authorized noninterpretive review; the claim is necessarily that at some point (or points) in American history governmental officials delegated to the judiciary, in particular to the Supreme Court, authority to enforce against government, not particular value judgments the Framers had deliberated and constitutionalized, but unspecified value judgments not constitutionalized or even always foreseen by the Framers. That would have been a remarkable delegation for politicians to grant to an institution like the Supreme Court, given their commitment to policymaking—to decisions as to which values shall prevail, and as to how those values shall be implemented—by those accountable, unlike the Court, to the electorate. It is difficult enough to defend even interpretive review by reference to the intentions of the Framers. It is impossible to defend noninterpretive review in that manner.

Nonetheless, many have tried, and some still try. One of the more notable recent efforts to establish the pedigree of noninterpretive review by reference to the intentions of the Framers of the 1789 Constitution and the Bill of Rights is that of Thomas Grey.²³ Grey examines the antecedents and character of the politico-legal theory of the American colonists in the period preceding the Revolution and concludes that many subscribed to the notion of “fundamental” or “natural” law, superior even to legislative authority, and enforceable by the judiciary. (The reference here and the next few pages is to “natural law” in its primitive sense, by which law is understood not as a manmade artifact, but as a set of norms that preexist, that are independent of, man’s creative activity—norms perhaps, but not necessarily, writ by a Deity.²⁴) Grey stops well short of contending that this notion of natural law was implicit in either the 1789 Constitution or the Bill of Rights and wisely leaves open the

22. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 11–14 (1962).

23. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843 (1978).

24. See note 28 and accompanying text *infra*.

crucial questions whether the notion, even *if* accepted to a significant extent in the prerevolutionary period, was widespread in 1787–91 (the formative constitutional period), and whether “[t]he new practice of establishing a written constitution, drawn up by a representative convention and ratified by the people” didn’t displace the notion of judicially enforceable natural, but unwritten, law.²⁵

Grey’s and similar efforts are quixotic. The historical record simply does not support the proposition that the Framers constitutionalized natural law. John Ely’s recent comments to that effect are quite sound.²⁶ Moreover, even if the Framers of the 1789 Constitution and the Bill of Rights had somehow incorporated into those documents the judgment that natural law exists and the judiciary ought to enforce it against government, it is not at all clear how the judgment could have any normative force today, or sufficient force to justify noninterpretive review,²⁷ since today the idea that natural law exists has very limited currency. “Law, good or bad,” says H.L.A. Hart, “is a

25. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 893 (1978).

26. The historical record . . . is not so uncomplicated as it is sometimes made to appear. Some of our nation’s founders did not find the concept [of natural law] intelligible in any context, and even those who did “were seldom, if ever, guilty of confusing law with natural right.” It therefore seems no oversight that the Constitution at no point adverts to the concept. Of course the Declaration of Independence *had* spoken in such terms. Part of the explanation for the difference is undoubtedly that intellectual fashions had changed somewhat over that eventful decade and a half. But surely that can’t be all there was to it—ideas do not come and go so fast—and a more important factor seems to have been the critical difference in function between the two documents. The Declaration of Independence was, to put it bluntly, a brief (with certain features of an indictment). People writing briefs are likely, and often well advised, to throw in arguments of every hue. People writing briefs for revolution are obviously unlikely to have apparent positive law on their side, and are therefore well advised to rely on natural law. This the argument for our Revolution did, combining natural law concepts with reference to positive law, both English and colonial, to the genuine “will of the people,” to the “rights of Englishmen”—in short, with references to anything that seemed to help. “It was the quarrel with Britain that forced Americans to reach upward and bring natural law down from the skies, to be converted into a political theory for use as a weapon in constitutional argument; in that capacity it was directed against British policies and was never intended as a method of analysing the rights and wrongs of colonial life.” The Constitution was not a brief, but a frame of government. A broadly accepted natural law philosophy surely would have found a place within it, presumably in the Bill of Rights. But such philosophies were not that broadly accepted. Since the earlier impetus that had moved the Declaration, the need to “make a case,” was no longer present, these controversial doctrines were omitted, at least in anything resembling explicit form, from the later document.

ELY, *supra* note 7, at 48–49, quoting respectively, R. COVER, JUSTICE ACCUSED 27 (1975); J. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 11 (1978). See also Berns, *The Constitution and the Adversarial Society*, in THE ROLE OF THE JUDICIARY IN AMERICA (forthcoming 1981, American Enterprise Institute); Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 936–37 (1978).

27. See Levinson, *Self-Evident Truths in the Declaration of Independence*, 57 TEX. L. REV. 847, 856–57 (1979) (reviewing M. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION (1978), and G. WILLS, INVENTING AMERICA (1978)):

[B]oth White and Wills, in their own ways establish the equally moribund nature of the secular structures of thought that they examine. It is simply not open to an intellectually sophisticated modern thinker to share Jefferson’s world; in this sense, both authors could embrace the title of Daniel Boorstin’s brilliant work, *The Lost World of Thomas Jefferson* [1948].

It is a tribute to the hold of the Declaration over our consciousness that even today the most widely discussed book in jurisprudence is [Ronald Dworkin’s] *Taking Rights Seriously* [1977]. Contemporary discussions of rights are, however, often like dazzling high-wire acts in which the acrobats have not yet discovered that the pole on which they depend for balance has disappeared. One may mumble the words of the Jeffersonian legacy, just as one may attend church in order to enjoy the ritual and ceremony. One may even be thrilled by the recent Chinese rediscovery of the importance of

manmade artifact which men create and add to the world by the exercise of their will; it is not something already in the world that men discover through the exercise of their reasoning powers."²⁸ One might try to argue that the judiciary should attempt at least to approximate the Framers' value judgment²⁹ by substituting for the outmoded idea of natural law the modern idea of an evolving societal morality and by searching out that morality and enforcing it against government. But such an argument is fanciful at best. In searching out and enforcing an evolving societal morality, even *assuming* such a thing exists, indisputably the judiciary would be involved in creatively shaping—not passively discovering and applying—fundamental law, and it is as plain as such things can ever be that the Framers did not mean for the judiciary to undertake such a function. As William Nelson has written:

[T]he Founders did not foresee that the Supreme Court would be an institution that would change the Constitution. The Court was to be an agency of permanence and stability. When opponents of the Constitution argued that "the power of construing the laws according to the *spirit* of the constitution [would] enable that court to mould them into whatever shape it may think proper," Hamilton answered in the *Federalist* [#81] that such an argument was "made up altogether of false reasoning upon misconceived fact"—a conclusion which could "be inferred with certainty, from the general nature of the judicial power. . . ." Contemporary commentators were almost unanimous in assuming that it was "the duty of judges to conserve the law, not to change it. . . ." Judges were "no more than the mouth that pronounces the words of the law, mere passive beings" sworn to decide cases "according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." They had no power to repeal, to amend, to alter . . . or to make new laws [for] in that case they would become legislators . . . , and "a knowledge of mankind, and of Legislative affairs . . . [could not] be presumed to belong in a higher . . . degree to the Judges than to [legislators]." The special skill of judges lay in their knowledge of the "strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . ." Trained in an era when rapid social change was only beginning to occur, lawyers belonging to the Revolutionary generation could find plausible what is for us a naive theory of the judicial function and could imagine that the role of the Supreme Court under the Constitution would be "to ascertain its meaning," not to fit it to new conditions as they arose.³⁰

individual rights. But, just as sooner or later the acrobat must try to reach the security of the platform, the conscientious thinker must ask what is the basis for his beliefs. And at this moment terror strikes.

[T]here is no reason to believe that we can share the Founder's premises. There has been a notable lack of success in constructing a contemporary foundation on which to build those rights we ought to take seriously.

28. Hart, *Law in the Perspective of Philosophy: 1776-1976*, 51 N.Y.U. L. REV. 538, 540 (1976). See also ELY, *supra* note 7, at 50-54; Frankel, *The Moral Environment of the Law*, 61 MINN. L. REV. 921, 946-49 (1977).

29. Assuming *arguendo* that the Framers made the judgment that natural law exists and the judiciary ought to enforce it against government.

30. Nelson, *Book Review*, 78 YALE L.J. 500, 508-09 (1969). See also Berger, "The Supreme Court as a Legislature": A Dissent, 64 CORNELL L. REV. 988, 990-99 (1979); R. DAHL, A PREFACE TO DEMOCRATIC THEORY 142 (1956):

Whether the men at the Convention anticipated judicial review is an issue that will probably never be settled; but there is not a single word in the records of the Convention or in the "Federalist Papers" to suggest that they foresaw the central role the Court would from time to time assume as a policy-maker and legislator in its own right.

Note, however, that to say that the Framers did not intend the judiciary to undertake a noninterpretive function is not necessarily to say that the Framers intended the judiciary not to undertake such a function.³¹ Raoul Berger argues that the Framers of the 1789 Constitution intended the judiciary not to undertake policymaking in constitutional cases. His rationale is that the Framers specifically rejected a proposal that the judicial branch of the federal government participate in a Council of Revision, the responsibility of which would have been "to examine every act of Congress and by its dissent to constitute a veto."³² According to Berger, the Framers "drew a line between the judicial reviewing function, that is, *policing* grants of power to insure that there were no encroachments beyond the grants, and legislative policymaking *within* those bounds."³³ The historical record Berger examines does in fact establish that the Framers decided against giving the judiciary any part of a certain sort of veto over acts of Congress, a negative to be used, like the Presidential veto, on any ground whatsoever. Nonetheless, Berger's argument must be rejected. Noninterpretive review need not constitute such an all-purpose veto, and if it does not, if instead its character is much more circumscribed, and if further the Framers did not even contemplate noninterpretive review thus circumscribed, of course it cannot be said that the Framers intended the judiciary not to exercise such review.³⁴

Some theorists have attempted to justify noninterpretive review of *state* action by reference to the intention of the Framers of the fourteenth amendment, which was added to the Constitution in 1868 so as to establish certain limits on the policymaking prerogatives of the states, in particular the former slave states.³⁵ One claim is that the Framers were imbued with the natural (or "fundamental") law views of the abolitionists, embodied those views in section one of the amendment, and intended that the judiciary enforce natural law against the states.³⁶ A similar claim is that the due process clause of

31. If the Framers intended that the judiciary not undertake noninterpretive review of any sort, the exercise of noninterpretive review by the modern Supreme Court would be not merely *extraconstitutional*—beyond any value judgment the Framers constitutionalized—which it is, but *contraconstitutional*—contrary to one of those judgments. For an example of reliance on this distinction, see CHOPER, *supra* note 3, at xvii–xviii: "At various points throughout this book, I have made reference to statements by the framers of the Constitution. . . . I have not used these materials to suggest that the major propositions advocated in the book were originally ordained. Rather, . . . I mean only to show that my proposals are not at war with original intent [not, *i.e.*, *contraconstitutional*]." For other examples, see ELY, *supra* note 7, at 123 & 236 n.37.

Arguably, the Supreme Court's decision in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934), was *contraconstitutional* and so poses a problem of legitimacy distinct from the problem posed by constitutional policymaking that generates (merely) *extraconstitutional* decisions. My concern in this Article, however, is the legitimacy of *extraconstitutional* policymaking, not *contraconstitutional* policymaking. Virtually none of the modern Court's constitutional policymaking is *contraconstitutional*.

32. R. BERGER, *GOVERNMENT BY JUDICIARY* 300 (1977).

33. *Id.* at 302.

34. *Cf.* Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 4–5 (1978). By the same token, if the Framers did not contemplate noninterpretive review thus circumscribed—and certainly they did not contemplate anything like the noninterpretive review exercised by the modern Supreme Court—it cannot be said that the Framers intended that the judiciary exercise such review. The justification for the practice must be sought elsewhere.

35. See text accompanying note 50 *infra*.

36. See, *e.g.*, Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 716 (1975).

section one was intended to constitutionalize natural law or some functional equivalent, such as norms "implicit in the concept of ordered liberty."³⁷ However, recent, exhaustive research confirms the conclusion that the Framers intended the fourteenth amendment to have a very narrow scope and that neither section one in its entirety nor the due process clause in particular was meant to be a vehicle for the constitutionalization of natural law.³⁸

One of the most distinctive recent efforts to justify noninterpretive review by reference to the intentions of the Framers is that of John Ely.³⁹ Interpretivists argue that the judiciary should enforce, as constitutional constraints against government, only value judgments constitutionalized by the Framers, and therefore must not enforce constraints the Framers did not specify. But, says Ely, two constitutional provisions—the ninth amendment

37. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). See also *Adamson v. California*, 332 U.S. 46, 61, 67 (1947) (Frankfurter, J., concurring) (due process protects "ultimate decency in a civilized society"; due process subsumes "those canons of decency and fairness which express the notions of justice of English-speaking peoples").

38. See generally R. BERGER, *GOVERNMENT BY JUDICIARY* 1-245 (1977). See also ELY, *supra* note 7, at 49-50:

Natural law was also part of the rhetoric of antislavery, but again it was just one arrow in the quiver. As suited their purposes, the abolitionists, like the revolutionaries before them, argued both positive law, now in the form of existing constitutional provisions, and natural law. And for them too, the latter reference was virtually unavoidable, since it took a purity of spirit that transcended judgment not to recognize that the original Constitution, candidly considered, not only did not outlaw slavery, but deliberately protected it. "When it was the fashion to speak and write of 'natural' law very few stopped to consider the exact significance of that commonplace of theological, economic, literary, and scientific, as well as political, thought. Particularly is this true of the use of theories of natural law in the heat of controversies. At such times, it is the winning of a cause, not the discussion of problems of ontology, which occupies men's minds." *Justice Accused* [1975], Robert Cover's fine recent book on antislavery and the judicial process, corroborates the conclusion that for early American lawyers, references to natural law and natural rights functioned as little more than signals for one's sense that the law was not as one felt it should be. This is not to say that "natural law" was entirely without perceived legal significance. It was thought to be invocable interstitially, when no aspect of positive law provided an applicable rule for the case at hand. But it was subordinate to applicable statutes and well-settled precedent as well as to constitutional provisions, and not generally perceived as a source of values on whose basis positive law could be constitutionally upset.

Quoting B. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* 332-33 (1931). With respect to the due process clause in particular, see R. BERGER, *GOVERNMENT BY JUDICIARY* 193-220 (1977); ELY, *supra* note 7, at 14-22.

39. Noninterpretive review with respect to both freedom of expression and equal protection issues (among others) Ely terms "participational review." The other he terms "substantive" review. See, e.g., ELY, *supra* note 7, at 182. Ely expresses doubt as to whether his theory "is properly regarded as a form of interpretivism or instead is more comfortably described as sitting somewhere between an interpretivist and a noninterpretivist approach"—"a question," says Ely, "that seems neither answerable nor important." *Id.* at 12. (On the distinction between "interpretivism" and "noninterpretivism," see text following note 16 *supra*.) See also *id.* at 88 n*: "I don't think this terminological question is either entirely coherent or especially important." Mindful of Ely's expressed doubt, I have chosen to label Ely's theory noninterpretivist. That is, I have chosen to label the constitutional policymaking Ely defends—"participational review"—a species of noninterpretive review, as Ely himself once did. See Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399 (1978). I want to emphasize, however, that nothing in my critique of Ely's theory depends on the label I have affixed to it. Nonetheless, in terms of the distinction between interpretive and noninterpretive review I marked out earlier in this Article (see text accompanying notes 11-16 *supra*), Ely's "participational" review seems to me clearly a species of noninterpretive review (policymaking as opposed to an authentically hermeneutical enterprise). See also Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 *OHIO ST. L.J.* 3, 9 (1981) (explaining why "[t]he form of noninterpretivism that is closest to pure interpretivism, a form that I label 'neo-interpretivism,' is represented by Ely."). The reader, of course, can decide what label seems apt.

and the privileges or immunities clause of the fourteenth amendment—disclose the Framers' judgment that individuals shall be deemed to have constitutional rights beyond merely those specified by the Framers.⁴⁰ The ninth amendment, which, like the rest of the Bill of Rights, was intended to constrain only the federal government,⁴¹ provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The privileges or immunities clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Neither the language nor the legislative history of the ninth amendment, nor the language, nor, according to Ely,⁴² the legislative history of the fourteenth amendment, indicates what those unspecified rights might be. Thus, concludes Ely, if the judiciary should enforce, as interpretivists argue it should, value judgments constitutionalized by the Framers, it must enforce the value judgments disclosed by the ninth amendment and the privileges or immunities clause and therefore must somehow define and enforce constraints the Framers did not specify—the unenumerated norms to which the ninth amendment and the privileges or immunities clause refer.⁴³ For that reason, says Ely, interpretivism—the theory that the judiciary may not enforce constraints not specified by the Framers—is an impossible position to maintain.⁴⁴

It bears emphasis that unlike most other efforts to establish the pedigree of noninterpretive review by reference to the intentions of the Framers, Ely's argument is not predicated on the inaccurate notion that the Framers constitutionalized natural law. Indeed, as we've seen, Ely vigorously and effectively rejects that notion. Nonetheless, Ely's claims must themselves be rejected. Consider first Ely's ninth amendment point. Even if the ninth amendment discloses the judgment that individuals shall be deemed to have rights against the federal government beyond those specified by the Framers, that judgment does not itself authorize noninterpretive review of federal action—it does not authorize the judiciary to define what those rights shall be and enforce them. Ely anticipates this criticism, but his response is flawed:

It would be a cheap shot to note that there is not legislative history specifically indicating an intention that the Ninth Amendment was to receive judicial enforcement. There was at the time of the original Constitution little legislative history indicating that *any* particular provision was to receive judicial enforcement: the Ninth Amendment was not singled out one way or the other.⁴⁵

40. ELY, *supra* note 7, at 22–30, 34–38.

41. *See* *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

42. *See* ELY, *supra* note 7, at 22–30. *But see* R. BERGER, *GOVERNMENT BY JUDICIARY* 20–51 (1977).

43. *See* ELY, *supra* note 7, at 11–41. *See also* Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 502 (1979).

44. *See* ELY, *supra* note 7, at 13:

[I]nterpretivism runs into trouble—trouble precisely on its own terms, and so serious as to be dispositive. For the constitutional document itself, the interpretivist's Bible, contains several provisions whose invitation to look beyond their four corners—whose invitation, if you will, to become at least to that extent a noninterpretivist—cannot be construed away.

45. *Id.* at 40.

But, as I suggest elsewhere in the work of which this Article is a part, even if the Framers did not authorize interpretive review of federal action—judicial enforcement of norms specified by the Framers—it matters little, for there is a compelling functional justification for such review. Ely's response, however, completely overlooks the fact that the functional considerations that explain and justify *interpretive* review of federal action under the first or fourth amendment, say, have utterly no force with respect to *noninterpretive* review under the ninth amendment.

The justification for interpretive review of federal action is that without it, constraints specified by the Framers would not have the status of "supreme law" that the Framers plainly intended them to have. But that cannot be the justification for noninterpretive review under the ninth amendment. Unlike interpretive review, noninterpretive review does not secure the status of *existing* constraints—constraints not previously specified by the Framers—as supreme law, but entails judicial creation of *new* constraints—constraints not previously specified or, for the most part, even foreseen by the Framers. There is, after all, a radical difference between judicial enforcement of existing constitutional constraints, which is interpretive review, and judicial creation of new ones, which is noninterpretive review. If the judiciary does not exercise noninterpretive review under the ninth amendment, the status of existing constraints as supreme law is not imperiled; the judiciary simply declines to fashion new constitutional constraints. Thus, not only does the legislative history of the ninth amendment disclose no judgment by the Framers that the judiciary should exercise noninterpretive review of federal action, but, significantly, the functional considerations that justify interpretive review of federal action under other constitutional provisions simply have no force with respect to noninterpretive review under the ninth amendment.⁴⁶

Of course, if the ninth amendment had been intended to constitutionalize a determinate set of constraints on the federal government, albeit unenumerated constraints, it would then be possible to maintain that judicial enforcement of the ninth amendment *does* secure the status of existing constraints—constraints previously constitutionalized (but not enumerated or otherwise

46. See Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 21 (1980): "[Madison explained] that the Bill of Rights would impel the judiciary 'to resist encroachments upon rights expressly stipulated for . . . by the declaration of rights,' and reinforces the conclusion that the courts were not empowered to enforce the retained and unenumerated rights." Quoting 1 ANNALS OF CONGRESS 457 (Gales & Seaton eds. 1836)(print bearing running title "History of Congress").

In his recent Holmes Lectures, Charles Black has argued that the ninth amendment authorizes noninterpretive review of state as well as federal action. By itself the ninth amendment constrains only federal action. See note 41 and accompanying text *supra*. Black's claim is that section one of the fourteenth amendment, which constrains state action, should be taken to incorporate the ninth no less than the other amendments of the Bill of Rights that have been declared applicable against the states. C. BLACK, DECISION ACCORDING TO LAW 23–27 (Apr. 1979) (unpublished lectures in Oliver Wendell Holmes series, delivered at Harvard Law School). For an opposing view, see R. BERGER, GOVERNMENT BY JUDICIARY 134–65 (1977). Black's claim must, however, be rejected. The legislative history of the fourteenth amendment simply does not support the proposition that the Framers intended the fourteenth amendment to incorporate any or all of the Bill of Rights. See text accompanying notes 101–05 and note 105 *infra*.

specified) by the Framers—as supreme law. But history does not disclose that the Framers intended to incorporate by reference into the ninth amendment a determinate set of constraints. (If it did disclose such an intention, there would still remain the problem that history does not disclose what those constraints might be.)⁴⁷ Certainly Ely does not claim that history discloses any such intention; indeed, Ely expressly rejects the notion, for example, that the ninth amendment was intended to incorporate by reference constraints derived from “natural law.”⁴⁸

Consequently, an interpretivist can easily reply to Ely that while functional considerations fairly compel the judiciary to enforce constraints specified by the Framers, those same considerations do nothing to underwrite judicial creation of constraints not specified or even foreseen by the Framers. So far as the ninth amendment is concerned, Ely is wrong: interpretivism is *not* an impossible position to maintain.⁴⁹

The fatal problem with Ely’s privileges-or-immunities-clause point is that it rests on an inaccurate reading of the intentions of the Framers of the fourteenth amendment. Substantial evidence supports the conclusion that the Framers, in using the phrase “privileges or immunities of citizens of the United States,” meant only to protect, against state action discriminating on the basis of race, a narrow category of “fundamental” rights: those pertaining to the physical security of one’s person, freedom of movement, and capacity to make contracts (including contracts to work), and to acquire, hold, and transfer chattels and land—“life, liberty, and property” in the original sense.⁵⁰ But if that historical conclusion is controversial—indeed, if I am

47. For one view of what history discloses, or doesn’t disclose, about the ninth amendment, see Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980).

48. See ELY, *supra* note 7, at 39.

49. “There is a difference,” writes Ely, “between ignoring a provision, such as the First Amendment, because you don’t like its substantive limitations and ignoring a provision, such as the Ninth Amendment, because you don’t like its institutional implications. But it’s hard to make it a difference that should count.” *Id.* at 38. It’s not at all hard to make it a difference that should count. For a court to ignore a provision like the first amendment is to ignore a constraint specified by the Framers and intended by them to have the status of supreme law. But for it to ignore the ninth amendment is not to ignore any constraint specified by the Framers. See also Maltz, *Federalism and the Fourteenth Amendment: A Comment on Democracy and Distrust*, 42 OHIO ST. L.J. 209, 209 n.7 (1981):

The ninth amendment . . . is relatively easy to deal with from an interpretivist perspective. On its face, the language of the amendment does not create any rights; it simply states that the Constitution by its own terms does not take away any rights which citizens might already have. Nothing in the amendment addresses the question of whether Congress or the states can abridge such rights.

50. The Framers of the fourteenth amendment meant also to prohibit any state from discriminating on the basis of race with respect to judicial protection of those fundamental rights. See text accompanying note 100 *infra*. (A careful reading of Justice Washington’s opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), which figures in so many discussions of the original understanding of the privileges or immunities clause of the fourteenth amendment, see, e.g., ELY, *supra* note 7, at 28–30, discloses only one “privilege or immunity” not subsumed by the description of “fundamental” rights in the text accompanying this note (or by judicial protection of those rights): the right to vote. And everyone agrees that Washington was in error in listing that right.) Moreover, the Framers did not differentiate the functions of the three main clauses of section one of the fourteenth amendment: the privileges or immunities, due process, and equal protection clauses. See R. BERGER, *GOVERNMENT BY JUDICIARY* 18 (1977); Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 15 (1977). Ely, discussing the original understanding of the three clauses, presupposes a functional differentiation among them, see ELY, *supra* note 7, at 14–32, and in that respect too his discussion is historically unsound.

wrong in believing that the original understanding of the fourteenth amendment was so narrow—no matter. My error would in no way strengthen Ely's position. Even if the original understanding was somewhat broader, the fact remains that there is simply no credible evidence to support Ely's claim that "the Privileges or Immunities Clause . . . was a delegation to future constitutional decision-makers [*i.e.*, the judiciary] to protect certain rights that the [Constitution] neither lists, at least not exhaustively, nor even in any specific way gives directions for finding."⁵¹ It was simply not the intention of the Framers of the fourteenth amendment to authorize the judiciary to exercise noninterpretive review under any "open-ended" provision.⁵²

At the close of his effort to root noninterpretive review in the language and original understanding of both the ninth amendment and the privileges or immunities clause, Ely sounds a curious note. He suggests that the legitimacy of noninterpretive review

is a question on which history cannot have the last word, at least not the last affirmative word. If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them.⁵³

First, Ely is wrong. History could have had the last affirmative word. If in fact the Framers had authorized the judiciary to exercise (some sort of) noninter-

51. ELY, *supra* note 7, at 28. See also *id.* at 30.

52. See Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695, 697-98:

In the first place, not even a scintilla of evidence supports the argument that the framers and the ratifiers of the various amendments intended the judiciary to develop new individual rights, which correspondingly create new disabilities for democratic government. Although we do not know precisely what the phrase "privileges or immunities" meant to the framers, a variety of explanations exist for its open-endedness other than that the framers intended to delegate to courts the power to make up the privileges or immunities in the clause.

The obvious possibility, of course, is that the people who framed the privileges-or-immunities clause did have an idea of what they meant, but that their idea has been irretrievably lost in the mists of history. If that is true, it is hardly a ground for judicial extrapolation from the clause.

Perhaps a more likely explanation is that the framers and ratifiers themselves were not certain of their intentions. Although the judiciary must give content to vague phrases, it need not go well beyond what the framers and ratifiers reasonably could be supposed to have had in mind. If the framers really intended to delegate to judges the function of creating new rights by the method of moral philosophy, one would expect that they would have said so. They could have resolved their uncertainty by writing a ninth amendment that declared: "The Supreme Court shall, from time to time, find and enforce such additional rights as may be determined by moral philosophy, or by consideration of the dominant ideas of republican government." But if that was what they really intended, they were remarkably adroit in managing not to say so.

It should give theorists of the open-ended Constitution pause, moreover, that not even the most activist courts have ever grounded their claims for legitimacy in arguments along those lines. Courts closest in time to the adoption of the Constitution and various amendments, who might have been expected to know what powers had been delegated to them, never offered argument along the lines advanced by Professor Michelman. The Supreme Court, in fact, has been attacked repeatedly throughout its history for exceeding its delegated powers; yet this line of defense seems never to have occurred to its members. For these reasons I remain unpersuaded that the interpretivist argument can be escaped.

53. ELY, *supra* note 7, at 41.

pretive review, there would be no problem of legitimacy. To the contrary, there would be a serious question concerning the legitimacy of the judiciary's forsaking that office. Again, our societal commitment is not simply to the principle of electorally accountable policymaking; we are committed as well to the coequal principle that such policymaking shall be constrained by the value judgments the Framers constitutionalized, including judgments about what practices the various institutions of government may or must undertake.

But, second, what difference does it make that in fact the Framers did not authorize the judiciary to exercise noninterpretive review, "[i]f a principled approach to [noninterpretive review] can . . . be developed, one that is not . . . inconsistent with our nation's commitment to representative democracy"? For in that case the problem of legitimacy will have been solved: it will have been shown that noninterpretive review need not be inconsistent with our commitment to the principle of electorally accountable policymaking. Therefore, given that in his book Ely argues that a principled approach, consistent with the commitment to representative democracy, *can* be developed,⁵⁴ it is puzzling why Ely even tries (struggles?) to establish the implausible historical proposition that the intentions of the Framers ordain (at least some) noninterpretive review. The contrary proposition—that the intentions of the Framers do not warrant noninterpretive review—should be, for Ely, inconsequential.

There is no plausible textual or historical justification for constitutional policymaking by the judiciary—no way to avoid the conclusion that noninterpretive review, whether of state or federal action, cannot be justified by reference either to the text or to the intention of the Framers of the Constitution. The justification for the practice, if there is one, must be functional: if noninterpretive review serves a crucial governmental function that no other practice realistically can be expected to serve, and if it serves that function in a manner that somehow accommodates the principle of electorally accountable policymaking, then that function constitutes the justification for noninterpretive review. Those who seek to defend noninterpretive review—"judicial activism"—do it a disservice when they resort to implausible textual or, more commonly, historical arguments; nothing is gained but much credibility is lost when the case for noninterpretive review is built upon such frail and vulnerable reeds.

C.

I now want to set forth the essential position of those who argue that only interpretive review is legitimate—that the judiciary may not legitimately enforce any values not constitutionalized by the Framers. For the interpretivist, as for others, it is axiomatic that governmental decisions as to which values, among competing values, shall prevail, and as to how those values shall be

54. *See id.* at 73–183.

implemented, should be subject to control by persons accountable, directly or indirectly, to the electorate. The interpretivist does not overlook the fact that there are constitutional constraints on electorally accountable policymaking. But those limits consist solely of the value judgments constitutionalized by the Framers. The will and judgment of persons accountable to the electorate should be limited not by the countervailing will and judgment of the judiciary, but only by the will and judgment of the Framers, which it is the judiciary's office to enforce.⁵⁵ Interpretivism reflects a popular—"civics book"—understanding of the division of governmental authority in the American political system, and that, of course, is part of its appeal: In the United States, the basic function of the legislature is to make policy, sometimes in conjunction with the other electorally accountable branch of government, the executive; the basic function of the executive is to administer policy; and the sole function of the judiciary, in constitutional cases, is to police policymaking and administration by keeping it within constitutional bounds.⁵⁶ According to interpretivism, it is illegitimate, in terms of the "democratic" norms of American political culture, for legislative policymaking and executive policy administration to exceed constitutional bounds. But it is also illegitimate for the judiciary to engage in constitutional *policymaking*—noninterpretive judicial review—as opposed to constitutional *interpretation*. The question of the precise constitutional bounds that legislative policymaking and executive policy administration may not exceed must be answered by interpretation, not

55. Ely's characterization of the interpretivist position is flawed. He writes:

[T]he interpretivist takes his values from the Constitution, which means, since the Constitution itself was submitted for and received popular ratification, that they ultimately come from the people. Thus the judges do not check the people, the Constitution does, which means the people are ultimately checking themselves.

Id. at 8. That argument, says Ely,

is largely a fake. Given what it takes to amend the Constitution, it is likely that a recent amendment will represent, if not necessarily a consensus, at least the sentiment of a contemporary majority. The amendments most frequently in issue in court, however—to the extent that they ever represented the "voice of the people"—represent the voice of people who have been dead for a century or two. . . .

[J]udges are [not] simply applying the people's will. Incompatibility with democratic theory is a problem that seems to confront interpretivist and noninterpretivist alike.

Id. at 11–12. But sophisticated interpretivists, like Robert Bork, don't proffer the argument Ely rejects. Rather, they argue that the (only) value judgments that legitimately constrain electorally accountable policymaking are those constitutionalized by the Framers. (They do not address the issue *whether those judgments now represent or indeed ever represented "the people."*) That argument creates no problems for interpretivists, however, since they are committed not merely to the principle of electorally accountable policymaking, but also to the principle that such policymaking is constrained by the value judgments the Framers constitutionalized.

56. In nonconstitutional cases, of course, the judiciary exercises concededly legitimate policymaking functions, those of legislating the "common law" and of fleshing out, or filling in the interstices of, statutory law. (There is no sharp line between those two functions. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 770 (1973).) Both functions, however, are undertaken by the judiciary in its role as delegate of the legislature; whatever policy choices the judiciary makes in nonconstitutional cases are subject to revision by the ordinary processes of electorally accountable policymaking. In that sense, nonconstitutional policymaking by the judiciary is electorally accountable, even if the judges themselves are not. *See* CHOPER, *supra* note 3, at 132; ELY, *supra* note 7, at 4; Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1166 (1977). *Cf.* ELY, *supra* note 7, at 68: "All too often commentators working in fields other than constitutional law, fields where appeals to this sort of filtered consensus may make sense, seek to transfer their analytical techniques to the constitutional law area without dropping a stitch."

policymaking—that is, answered by reference to the value judgments constitutionalized by the Framers. When the judiciary invokes the Constitution to invalidate challenged governmental action not contrary to any of those judgments, it frustrates the will of electorally accountable officials acting within their constitutional bounds and, moreover, exceeds its own constitutional bounds and thus acts lawlessly.

Interpretivism has many proponents and many more adherents. Among the better known contemporary proponents are a Justice of the United States Supreme Court, William Rehnquist,⁵⁷ and a legal scholar, Raoul Berger.⁵⁸ Perhaps the most able and articulate proponent of interpretivism—and therefore opponent of noninterpretivism—is Robert Bork, former Solicitor General of the United States and now Alexander M. Bickel Professor of Public Law at Yale. Throughout this Article I take Bork's views to constitute an exemplar of contemporary interpretivism.⁵⁹ Therefore, I want to quote some key passages of Bork's provocative lecture on "the proper role of the Supreme Court under the Constitution":⁶⁰

Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.

. . . [I]t follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court . . . abets the tyranny either of the majority or of the minority.

[N]o argument that is both coherent and respectable can be made supporting a Supreme Court that "chooses fundamental values" because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.

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

Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy.

. . . Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.

57. See Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

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

59. See Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695, 695: "I represent that school of thought which insists that the judiciary invalidate the work of the political branches only in accordance with an inference whose underlying premise is fairly discoverable in the Constitution itself."

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

There is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is required. These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions.⁶¹

Using Professor Wechsler's requirement of neutral principles⁶² as a point of departure, Bork continues:

Recognition of the need for principle is only the first step, but once that step is taken much more follows. Logic has a life of its own, and devotion to principle requires that we follow where logic leads.

We have not carried the idea of neutrality far enough. We have been talking about neutrality in the *application* of principles. If judges are to avoid imposing their own values upon the rest of us, however, they must be neutral as well in the *definition* and the *derivation* of principles.

It is easy enough to meet the requirement of neutral application by stating a principle so narrowly that no embarrassment need arise in applying it to all cases it subsumes, a tactic often urged by proponents of "judicial restraint." But that solves very little. It certainly does not protect the judge from the intrusion of his own values.⁶³

Bork suggests that his view is the professed (though not the actual) view of the Supreme Court,⁶⁴ and he seizes on that profession as evidence that his view is—or that the Court thinks it is—the prevailing popular view:

The Supreme Court regularly insists that its results, and most particularly its controversial results, do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises tells you what it thinks its customers demand.⁶⁵

D.

Critics of interpretivism—who typically, of course, are defenders of non-interpretivism—achieve nothing by pretending that interpretivism is not a forceful theory. Several lines of attack on interpretivism, which I'll briefly mention now, should be rejected outright. Interpretivism posits a commitment to the principle of "majoritarian" policymaking in the sense of policymaking that is electorally accountable. The anti-interpretivist claim that, in the United States, policymaking is not all that majoritarian, in the sense that often it is not nearly as reflective of the sentiments of actual majorities as

61. *Id.* at 3, 6, 8, 10–11, 12.

62. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). See also Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

63. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6–7 (1971).

64. Bork is wrong: The Court does not invariably profess an interpretivist view. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

65. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3–4 (1971).

some persons think, is beside the point even if true—and doubtless it is true.⁶⁶ For example, Geoffrey Hazard has recently written that

most legislation emanating from legislatures in modern times is chiefly the product of committees and experts, and sometimes committees of experts. The same is true of administrative agencies, which produce the bulk of contemporary legislation. . . . [I]f . . . neither Congress nor the agencies adequately express public sentiment, it is hard to see why the Supreme Court should be subject to special criticism because it also does not express that sentiment.⁶⁷

But Hazard is wrong. It is not at all hard to see why. What is crucial about majoritarian policymaking, unlike constitutional policymaking by the Supreme Court, is that policy decisions are made by those *accountable*, even if not always *responsive*, to electoral majorities. True, that accountability may be only indirect. But it is electoral accountability nonetheless, and that fact, which has crucial theoretical significance,⁶⁸ has great practical importance as well. As Robert Dahl has put it in his classic study:

[T]he radical democrats who, unlike Madison, insist upon the decisive importance of the election process in the whole grand strategy of democracy are essentially correct. To be sure, if the social prerequisites of polyarchy do not exist, then the election process cannot mitigate, avoid, or displace hierarchical government. But if the social prerequisites of polyarchy do exist, then the election is the critical technique for insuring that governmental leaders will be relatively responsive to non-leaders; other techniques depend for their efficacy primarily upon the existence of election and the social prerequisites.⁶⁹

Professor Hazard also notes that “it can be said that through various mechanisms internal to legislatures and external to administrative agencies, the ‘general will’ is somehow made to infuse statutes and administrative regulations so that they are withal the product of a democratic process.”⁷⁰ “But,” he says, “even if that is so, it has to be demonstrated why, by some comparable mechanism, the ‘general will’ does not also infuse decisional lawmaking in courts.”⁷¹ Again Hazard misses the point. What is crucial is electoral accountability, not degree of responsiveness to majority sentiments. Beyond that, as a presumptive matter electoral accountability makes for greater responsiveness; certainly the burden is on Hazard to demonstrate the contrary. And, if the forgoing passage by Dahl is accurate, it makes for greater responsiveness as an experiential, real-world matter as well.⁷²

66. See note 4 and accompanying text *supra*.

67. Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 9 (1978).

68. See also Holland, *American Liberals and Judicial Activism: Alexander Bickel's Appeal from the Old to the New*, 51 IND. L.J. 1025, 1041 (1976). The problem, after all, is one of constitutional theory, not political science.

69. R. DAHL, A PREFACE TO DEMOCRATIC THEORY 125 (1956). One reason for insisting on electorally accountable policymaking is precisely the difficulty of knowing, with respect to many issues, just what the sentiments of an actual majority are.

70. Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 9 (1978).

71. *Id.*

72. See also CHOPER, *supra* note 3, at 29–38.

The anti-interpretivist claim that nonjudicial policymakers are not always accountable in any very meaningful sense⁷³—a lame-duck or second-term President, for example, or the members of the Federal Reserve Board—is very weak. First, the principal such policymakers, legislators, are meaningfully accountable—at least, the vast majority, all those seeking reelection, are. Second, whatever nonjudicial policymakers are not meaningfully accountable hold office only for comparatively short periods of time and so (1) are not likely to be out of touch with dominant political sentiments and in any event (2) can frustrate such sentiments only for short periods; moreover—and this is crucial—their decisions are subject to revision by the ordinary processes of electorally accountable policymaking.⁷⁴ Finally, and most importantly, given our commitment to the principle of electorally accountable policymaking, the claim that not all nonjudicial policymakers are meaningfully accountable counts less as a reason to applaud the existence of electorally unaccountable judicial policymakers, than to make nonjudicial policymakers who are not meaningfully accountable, truly accountable.⁷⁵ (The claim that the judiciary is not significantly less accountable than many other governmental policymakers is simply not true. The Supreme Court and the lower federal courts, which are the chief constitutional policymakers in the United States, are not *electorally* accountable at all.)

Nor will it do to attack interpretivism by confusing it with what is essentially a straw man, “literalism,” and then demonstrating the obvious infirmity of the latter. No notable constitutional theorist, to my knowledge, has ever contended that the judiciary should enforce constitutional provisions according to their “plain meaning” and should studiously ignore all else, including the original understanding of the provisions. First, many important provisions—*e.g.*, “due process of law,” “equal protection of the laws,” “freedom of speech”—have no *plain* meaning. Second, even the most ardent interpretivists recognize that what has priority is not the particular configuration of words the Framers used in drafting a constitutional provision, but rather the value judgment the Framers meant to embody in those words.⁷⁶ Ascertaining the precise character of the Framers’ value judgments often requires reference to historical materials that disclose the Framers’ intentions.⁷⁷

73. See, *e.g.*, Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099, 1110 (1977).

74. See McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354, 361–62 (1966):

One would do well . . . by recalling that the status of . . . officials [of independent agencies] has not escaped criticism. . . . Congress can define their powers, limit their policy discretion, overcome their decisions and actions by ordinary legislation, and speed their removal from office by granting dismissal authority to the President or to its own officers.

75. Cf. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 18 (1962): “[I]mpurities and imperfections, if such they be, in one part of the system are no argument for total departure from the desired norm in another part.” See also R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 141 (1977); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 131 n.66 (1978).

76. See, *e.g.*, Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L.J. 87 (1981).

77. See note 14 *supra*. See also Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205–09 (1980).

Similarly, so far as I am aware, no theorist has ever argued that the judiciary should invalidate only political practices that were present to the minds of the Framers and that the Framers meant to ban. The interpretivist concedes that the judiciary may, even should, strike down political practices that were not present to the minds of the Framers and that, therefore, the Framers could not have specifically intended to ban. But invalidation of such a political practice is legitimate, according to interpretivism, only if the practice is the analogue of a practice the Framers did contemplate and meant to ban, different in no constitutionally significant respect from the practice the Framers specifically intended to ban.⁷⁸ After all, enforcing value judgments the Framers constitutionalized certainly requires invalidation of practices different in no significant respect from those the Framers banned.⁷⁹ Thus, for example, the interpretivist need not oppose Supreme Court decisions subjecting wiretaps and electronic surveillance to the same fourth amendment standards as physical "searches and seizures."⁸⁰ On the other hand, the interpretivist must oppose the Court's decisions invalidating racially segregated public schooling and antimiscegenation laws,⁸¹ because those practices were present to the minds of the Framers but the Framers chose not to ban them; those decisions cannot fairly be characterized as enforcing value judgments the Framers constitutionalized.⁸² At any rate, interpretivism is not literalism of any sort; to demonstrate the patent inadequacy of the latter is not to attack the former.⁸³

78. The matter of analogues is discussed in text at page 301 *infra*.

79. See ELY, *supra* note 2, at 13:

[T]he job of the person interpreting [a constitutional] provision, [interpretivists would say], is to identify the *sorts of evils* against which the provision was directed and to move against their contemporary counterparts. Obviously this will be difficult, but it will remain interpretivism—a determination of "the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into the constitutional text."

Quoting Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 254 (1972). See also Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 221 (1980); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873):

We do not say that no one else but the negro can share in [the protection of the Civil War Amendments]. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.

80. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967). (Of course, interpretivists may disagree among themselves as to whether or not a challenged political practice is in fact an analogue of a practice the Framers contemplated and meant to ban. See, e.g., *id.* at 364 (Black, J., dissenting). No one ever claimed that an interpretivist approach avoided debatable answers.) See also White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the "Lessons" of History*, 63 JUDICATURE 162, 168 (1979):

Protecting a couple's right to sexual intimacy, for example, requires a different technique of judicial interpretation from protecting persons against electronic eavesdropping. In the latter, judges merely extrapolate the original meaning of "search and seizure" to a 20th century technological context; in the former, judges create a constitutional right of privacy by "discovering" an unenumerated value of privacy in the design of the Constitution.

81. See *Loving v. Virginia*, 388 U.S. 1 (1967) (antimiscegenation laws); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (segregated public schooling).

82. See text accompanying notes 150-67 *infra*.

83. Other lines of attack on interpretivism are considered below.

The final anti-interpretivist claim I want to consider at this point posits that generally constitutional provisions should be construed broadly, generously, because, as Chief Justice Marshall declared in one of the most frequently quoted statements in all of constitutional law, "we must never forget that it is *a constitution* we are expounding."⁸⁴ The Constitution, said Marshall, is "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. . . . It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."⁸⁵ The very nature of the Constitution, an *organic* charter of government, the argument runs, is not congenial to interpretivism, which would confine all later generations of Americans to the value judgments of the Framers' generation. Moreover, the argument continues, the Framers doubtless did not mean to confine posterity to their own late-eighteenth century vision, for that would have been a cautious, conservative intention, not at all characteristic of the Framers, who were bold men, architects of an ambitious new government.⁸⁶

Although in some respects that argument has merit, as a response to interpretivism it is wholly inadequate. It is one thing to construe broadly a constitutional provision granting a particular power to government, in the sense and with the consequence of sustaining an electorally accountable—typically, a legislative—policy choice that the Framers might not have contemplated government would make or need to make. That is what Marshall did in *McCulloch v. Maryland*, in which he made the statements quoted above. It is a radically different thing to construe broadly a constitutional provision limiting the power of government, in the sense and with the consequence of striking down an electorally accountable policy choice on the basis of no value judgment fairly attributable to the Framers. Interpretivism opposes the latter, not the former.⁸⁷ The latter is countermajoritarian and thus poses the problem of legitimacy, which, in the interpretivist's view, is insoluble. The former is not countermajoritarian; in fact it does not even involve the judiciary's broad construction of a power-granting provision of the Constitution so much as the judiciary's deference to the electorally accountable policymaker's impliedly broad construction of the provision. Listen again to Marshall in *McCulloch*, sustaining a congressional act by reasoning that the new federal government could not hope to function effectively without some latitude under the power-granting provisions of the Constitution:

The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure . . . their beneficial execution. This could not be done by con-

84. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

85. *Id.* at 415.

86. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 103-10 (1962).

87. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* 284 (1977).

finding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision⁸⁸ is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.⁸⁹

Quite likely, then, for the compelling reason Marshall suggested, the Framers did design the power-granting provisions of the Constitution to be, to some extent, organic. The Framers likely expected that posterity, in the sense of later generations acting through the processes of electorally accountable policymaking, would give shape to certain aspects of the constitutional order that were, in 1789, somewhat indeterminate.⁹⁰ If one accepts such premises—and I see no reason not to—it is appropriate, for example, for the Supreme Court to defer to *Congress'* impliedly expansive reading of the commerce clause⁹¹ by sustaining modern federal regulatory legislation.⁹² But, again, to sustain is one thing, to strike down quite another. There is no historical evidence that the Framers expected, much less intended, that the Supreme Court would frustrate electorally accountable policymaking by rendering its own expansive readings of the *power-limiting* provisions of the Constitution. Nor can the organic nature of the *power-granting* provisions explain such a practice. To invoke, in support of such a practice, and therefore in opposition to interpretivism, the organic nature of those provisions, or the intentions of the Framers, or Marshall's statements in *McCulloch*, is to betray a fundamental confusion of one mode of judicial activity—invalidation of challenged policy choices on the basis of expansive judicial readings of power-limiting provisions—with a palpably different mode—validation of challenged policy choices on the basis of judicial deference to impliedly expansive nonjudicial (electorally accountable) readings of power-granting provisions.⁹³ And it is an evasive confusion, one that begs a central question:

It is no answer to argue . . . "we cannot have our government run as if it were stuck in the end of the eighteenth century when we are in the middle of the

88. Marshall was referring to the necessary and proper clause, which provides: "The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U.S. CONST., art. I, § 8, cl. 18.

89. 17 U.S. (4 Wheat.) 316, 415 (1819). See Marshall, *A Friend to the Constitution*, in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 185 (G. Gunther ed. 1969).

90. Of course, the Framers also expected that posterity would, from time to time, amend the Constitution. See U.S. CONST., art. V.

91. The commerce clause provides that "Congress shall have power . . . to regulate commerce . . . among the several states." U.S. CONST., art. I, § 8, cl. 3.

92. Which, with one exception, *National League of Cities v. Usery*, 426 U.S. 833 (1976), is precisely what the modern Court has done.

93. Remarkably, the confusion is quite common. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 103-10 (1962).

twentieth," because . . . the real issue is *who is to make the policy choices* in the twentieth century: judges or the combination of legislature and electorate that makes constitutional amendments.⁹⁴

II.

In the remainder of this Article, I shall examine the implication of interpretivism—of the claim that all noninterpretive review is illegitimate—for two of the most important areas of constitutional doctrine: freedom of expression and equal protection. I shall also examine a prominent and, in my view, unsuccessful attempt to defend, against interpretivism, the noninterpretive review the Supreme Court has exercised in formulating the bulk of constitutional doctrine regarding both freedom of expression and equal protection.

A.

The first amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁹⁵ It was intended as a limitation only on action of the federal government,⁹⁶ but since 1925,⁹⁷ the Supreme Court has reviewed action of state governments under the first amendment on the theory that first amendment norms were made applicable to the states by the fourteenth amendment, which was intended as a constraint on state action.⁹⁸ That theory, however, is wrong. The history of the fourteenth amendment is not something from which we can escape—although some constitutional theorists, in the spirit of Joyce's Stephen Dedalus, persist in trying.⁹⁹ The Framers of the fourteenth amendment did not intend to make applicable to the states the first amendment or any other provision of the Bill of Rights. Recent,

94. R. BERGER, *GOVERNMENT BY JUDICIARY* 315 (1977). For an example of the sort of question-begging answer Berger protests, see L. LEVY, *JUDICIAL REVIEW AND THE SUPREME COURT* 143 (1967): "[T]he dead hand of the past need not and should not be binding. . . ." See also Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 229 n.96 (1980): "[T]here is no justification for binding the present to the compromises of another age." Paul Brest writes that "the fact that a [constitutional] provision was drafted by an unrepresentative and self-interested portion of the adopters' society weakens its moral claim on a different society one or two hundred years later." *Id.* at 230. But that fact, even if it justifies ignoring certain value judgments constitutionalized by the Framers two hundred years ago, does not justify judicial action striking down challenged governmental policy choices in the name of value judgments *not* constitutionalized by the Framers.

95. The amendment also provides that Congress shall make no law "respecting an establishment of religion, or prohibiting the free exercise thereof."

96. No one disputes the fact that the first amendment and the rest of the Bill of Rights were not intended as limitations on state governments. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). See generally L. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 64-79 (1972).

97. See *Gitlow v. New York*, 268 U.S. 652 (1925).

98. See, e.g., ELY, *supra* note 7, at 24-28.

99. See J. JOYCE, *ULYSSES* 40 (Penguin ed. 1922): "History, Stephen said, is a nightmare from which I am trying to awake."

exhaustive research confirms that proposition, which was already firmly established by Charles Fairman and others.

The original understanding of section one of the fourteenth amendment was that it forbade any state to discriminate against any of its residents on the basis of race with respect to certain sorts of rights (and the protection of those rights)—those pertaining to physical security, freedom of movement, and capacity to contract and own property. Raoul Berger's conclusion to that effect is quite sound.¹⁰⁰ In particular, his finding that the fourteenth amendment was not intended to make the Bill of Rights, *including the first amendment*,¹⁰¹ applicable to the states—which is confirmatory of earlier findings to

100. For examples of commentary generally accepting Berger's history—though not necessarily the constitutional theory Berger marries to that history—see Abraham, "Equal Justice Under Law" or "Justice at Any Cost"?—*The Judicial Role Revisited: Reflections on Government By Judiciary: The Transformation of the Fourteenth Amendment*, 6 HAST. CONST. L.Q. 467 (1979); Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HAST. CONST. L.Q. 603 (1978); Beloff, *Book Review*, London Times Higher Educ. Supp., April 7, 1978, at II, col. 1; Bridwell, *Book Review*, 1978 DUKE L.J. 907; Gunther, *Book Review*, Wall St. J., November 25, 1977, at 4, col. 4; Kay, *Book Review*, 10 CONN. L. REV. 801 (1978); Kommers, *Book Review*, REV. OF POL. 409, 413 (July, 1978); Lynch, *Book Review*, 63 CORNELL L. REV. 1091, 1091-93 (1978); Nathanson, *Book Review*, 56 TEX. L. REV. 579, 581 (1978); Perry, *Book Review*, 78 COLUM. L. REV. 685 (1978). See also Bridwell, *The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule*, 31 S. CAR. L. REV. 617 (1980). For generally effective rebuttals by Berger to criticisms of his history, see Berger, "Government By Judiciary": Judge Gibbons' Argument Ad Hominem, 59 B.U.L. REV. 783 (1979) (responding to Gibbons, *Book Review*, 31 RUTGERS L. REV. 839 (1978)); Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HAST. CONST. L.Q. 527 (1979) (responding to various articles in a Symposium, 6 HAST. CONST. L.Q. 403 (1979)); Berger, *Government By Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1979) (responding to Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978)); Berger, *The Scope of Judicial Review and Walter Murphy*, 1979 WIS. L. REV. 341 (1979) (responding to Murphy, *Book Review*, 87 YALE L.J. 1752 (1978)); Berger, *Government by Judiciary: Some Countercriticism*, 56 TEX. L. REV. 1125, 1136-45 (1978) (responding to Clark, *Book Review*, 56 TEX. L. REV. 947 (1978)). Berger's rebuttals to criticisms of his constitutional theory are much less effective in my view.

Aviam Soifer, in his *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979), claims that Berger's "Government by Judiciary contains very poor history. . . . [T]he history [Berger] offers . . . is misleading and frequently internally inconsistent in the most crucial areas." *Id.* at 654, 655. However, Soifer does "not dispute Berger's assertion that the fourteenth amendment simply constitutionalized the guarantee of civil rights contained in the Civil Rights Act of 1866." *Id.* at 657. Rather, Soifer argued that, "[a]ssuming for the sake of argument that the fourteenth amendment merely constitutionalized the statutory rights guaranteed by the Civil Rights Act of 1866, Berger is simply wrong about how broad those rights were." *Id.* at 658. Yet nowhere in his entire essay does Soifer take issue with Berger's central claims that neither the 1866 Act nor the fourteenth amendment were intended to affect suffrage or segregation.

Berger is probably correct in arguing that suffrage was not deemed a civil right in 1866. After all, women were citizens but they did not have the vote. The continued separation of the races in the schools of the District of Columbia and in a few Northern states indicates that a majority of the 39th Congress, if they gave any thought to it at all, might not *then* have included a right to integrated schooling in their definition of civil rights. *Id.* at 705. What, then, is Soifer's critique of Berger? Soifer says essentially only this: "[T]he members of the 39th Congress did not carefully limit and specify the civil rights with which they were concerned, nor did they indicate that they hoped to set those rights in 1866, as in Devonian amber." *Id.* Soifer's critique of Berger's history is, in the end, not all that consequential. Moreover, nowhere does Soifer take issue with the conclusion that the fourteenth amendment was *not* intended to make the Bill of Rights applicable to the states.

101. See Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 N.W. U.L. REV. 311, 346-47 (1979):

Striking confirmation [that the fourteenth amendment did not incorporate the Bill of Rights] is furnished by an amendment proposed by James Blaine in 1875, in a Congress which included twenty-three members of the Thirty-ninth Congress, among them Blaine. Prior thereto he had written a letter published by the *New York Times* indicating that the fourteenth amendment did not forbid states from establishing official churches or maintaining sectarian schools. Consequently he proposed that "No

the same effect by such eminent historians as Charles Fairman¹⁰² and, more recently, Leonard Levy¹⁰³—is amply documented¹⁰⁴ and widely accepted.¹⁰⁵ Given the fact that the Framers of the fourteenth amendment did not intend to make the limitations on federal action specified by the Bill of Rights also

state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof."

Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the [fourteenth] amendment ratified just seven years earlier. . . . Remarks of Randolph, Christaincy, Kernan, White, Bogy, Eaton and Morton give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.

To cling to the Bingham-Howard remarks on which Justice Black relied for his incorporation doctrine [see *Adamson v. California*, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting)] is obstinately to ignore the facts showing they were not generally shared and were untenable.

Quoting J. MCCLELLAN, *JUSTICE STORY AND THE AMERICAN CONSTITUTION* 154 (1971); F. O'BRIEN, *JUSTICE REED AND THE FIRST AMENDMENT* 116 (1958).

102. See VI C. FAIRMAN, *THE HISTORY OF THE SUPREME COURT 1292-93* n.275 (1971); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 *STAN. L. REV.* 5 (1949). See also Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Judicial Interpretation*, 2 *STAN. L. REV.* 140 (1949).

103. See L. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 70 (1972) (agreeing with Fairman that "there is very little evidence either that [the] framers [of the fourteenth amendment] intended [that the amendment make the Bill of Rights applicable to the states] or that the country understood that intention"). Cf. Perry, *Book Review*, 78 *COLUM. L. REV.* 686, 689-90 (1978):

The historian Leonard Levy, in an assessment of the "incorporation" debate between Justice Black and Charles Fairman, argued that:

Though the palm must be awarded to Fairman as the better historian by far. . . . Fairman's findings were basically negative. He did not disprove that the Fourteenth [Amendment] incorporated the Bill of Rights; he proved, rather, that there is very little evidence either that its framers intended that result or that the country understood that intention. Fairman himself criticized Black for relying too heavily on negative evidence, yet he followed Black's example by drawing conclusions from silence or the absence of proof positive. In short, the historical record . . . is inconclusive.

Berger's response to Levy's analysis is, in my view, persuasive:

The proposition that "the Fourteenth Amendment incorporated the Bill of Rights" constitutes an invasion of rights reserved to the States by the Tenth Amendment, an invasion of such magnitude as to demand proof that such was the framers' intention. Levy would shift the burden of proof and require Black's critics to prove the negative [that the framers did not intend the Fourteenth Amendment to incorporate the Bill of Rights] before he proved the intention to incorporate.

Quoting L. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 70 (1972), in R. BERGER, *GOVERNMENT BY JUDICIARY* 137 n.17 (1977). Berger's response to Levy constitutes an adequate response to John Ely as well. See ELY, *supra* note 7, at 25-28 & 195 n.56.

104. See R. BERGER, *GOVERNMENT BY JUDICIARY* 134-56 (1977). See also Berger, *Government by Judiciary: John Hart Ely's "Invitation"*, 54 *IND L.J.* 277, 299-302 (1979); note 100 *supra*.

105. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 102 (1962) (Charles Fairman "conclusively disproved [Justice] Black's contention, [in *Adamson v. California*, 332 U.S. 46, 68-92 (1947) (dissenting)] that the fourteenth amendment was intended to make the Bill of Rights applicable to the states, at least, such is the weight of opinion among disinterested observers"); Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 711-12 (1975) (referring to Justice Black's "flimsy historical evidence" in *Adamson*); Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 *HAST. CONST. L.Q.* 603, 607 (1978). ("it is all but certain that the Fourteenth Amendment was not intended to incorporate the Bill of Rights"); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 *VILL. L. REV.* 3, 9-10 (1978-79) ("nothing in the history of the fourteenth amendment suggests that [it was intended to make the religion clauses of the first amendment applicable to the states]. The transmogrification occurred solely at the whim of the Court. An attempt to pass a constitutional amendment providing for the application of the religion clauses to the states, the Blaine Amendment, failed in 1876, eight years after effectuation of the fourteenth amendment."); Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U.L. REV.* 204, 224 (1980) (even a "moderate" interpretivist "would have serious difficulties justifying . . . the incorporation of provisions of the Bill of Rights into the fourteenth amendment"). See also *Duncan v. Louisiana*, 391 U.S. 145, 174 n.9 (1968) (Harlan, J., joined

applicable to state action, enforcement of the first amendment by the Court against the states is not interpretive review and is legitimate only if noninterpretive review of state action under first amendment norms can be justified.

Put aside for the moment the fact that the Framers of the fourteenth amendment did not intend to make the first amendment applicable to the states; assume, for the sake of argument, that they did indeed intend the first amendment to constrain state action in the same way it was intended to constrain federal action and that consequently there is no need to distinguish between state and federal action for purposes of the first amendment. Even so, very little constitutional doctrine regarding freedom of expression fashioned in this century¹⁰⁶ could be understood as the product of interpretive review, *because very little of that doctrine reflects any value judgment concerning freedom of expression constitutionalized by the Framers of the first amendment*. Although we cannot say with certainty precisely what effect the Framers of the Bill of Rights intended the first amendment to have with respect to freedom of expression, we can say that *at most* they intended it to prohibit any system of prior restraint¹⁰⁷ and to modify the common law of seditious libel¹⁰⁸ by making truth a defense and by permitting the case to be tried to a jury.¹⁰⁹ In his masterful study of the original understanding of the

by Stewart, J., dissenting). *But see* Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980). Berger's reply to Curtis will be forthcoming in the *Ohio State Law Journal*.

106. No first amendment doctrine of consequence was fashioned before this century. *See generally* 1 N. DORSEN, P. BENDER & B. NEUBORNE, EMERSON, HABER, & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 14-39 (4th ed. 1976).

107. A system of prior restraint consists of administrative censorship under which nothing can be printed until a license is first issued by the appropriate functionary. Such a system "had expired in England in 1695, and in the colonies by 1725." Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 18 (1941). Apparently a system of prior restraint flourishes in the Soviet Union. *See* Lifshitz-Losev, *What It Means to be Censored*, THE NEW YORK REVIEW, June 29, 1978, at 43-50.

108. "Seditious libel" has been defined as "the intentional publication, without lawful excuse or justification, of written blame of any public man, or of the law, or of any institution established by law." Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 19 (1941). According to Chafee, "[t]here was no need to prove any intention on the part of the defendant to produce disaffection or excite an insurrection. It was enough if he intended to publish the blame, because it was unlawful of him merely to find fault with his masters and betters." *Id.* *See also* L. LEVY, LEGACY OF SUPPRESSION 10 (1960):

[Seditious libel] can be defined in a quite elaborate and technical manner in order to take into account the malicious or criminal intent of the accused, the bad tendency of his remarks, and their truth or falsity. But the crime has never been satisfactorily defined, the necessary result of its inherent vagueness. Seditious libel has always been an accordion-like concept. Judged by actual prosecutions, the crime consisted of criticizing the government: its form, constitution, officers, laws, symbols, conduct, policies, and so on. In effect, any comment about the government which could be construed to have the bad tendency of lowering it in the public's esteem or of disturbing the peace was seditious libel, subjecting the speaker or writer to criminal prosecution.

109. With respect to the possibility that the first amendment was intended to prohibit any system of prior restraint—or, more accurately, to prohibit Congress from instituting such a system—*see* Levy, *Liberty of the Press from Zenger to Jefferson*, in L. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 115, 136 (1972). *But see* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 18 (1941):

If we apply Coke's test of statutory construction, and consider what mischief in the existing law the framers of the First Amendment wished to remedy by a new safeguard, we can be sure it was not the [system of prior restraint]. This had expired in England in 1695, and in the colonies by 1725. They knew from books that it destroyed liberty of the press; and if they ever thought of its revival as within

first amendment, Leonard Levy has written that "the generation which adopted the Constitution and Bill of Rights did not believe in a broad scope for freedom of expression, particularly in the realm of politics. . . . [L]ibertarian theory from the time of Milton to the ratification of the First Amendment substantially accepted the right of the state to suppress seditious libel."¹¹⁰

the range of practical possibilities, they must have regarded it as clearly prohibited by the First Amendment. But there was no need to go to all the trouble of pushing through a constitutional amendment just to settle an issue that had been dead for decades. What the framers did have plenty of reason to fear was an entirely different danger to political writers and speakers [—namely, prosecution for seditious libel].

With respect to the possibility that the first amendment was intended to modify the common law of seditious libel in the respects indicated, see L. LEVY, *LEGACY OF SUPPRESSION* ix (1960):

Take . . . the two major libertarian propositions of the later eighteenth century, that truth is a defense against a charge of criminal libel, and that the jury should have the power of deciding the questions that judges reserved to themselves: whether the defendant's intent was malicious and whether his words had the seditious tendency alleged. That these libertarian propositions were "in the air" is beyond doubt. But most of the scraps of evidence that can be gathered on the subject tend to show that it was not the intention in America to modify the common law by incorporating these propositions within the meaning of free-press guarantees. Yet I am certain that if the American people at any time between the Zenger case and ratification of the First Amendment would have held a referendum, they would have overwhelmingly cast their ballots in favor of the two propositions. Working with the "evidence," however, leads to the conclusion that this certainty on my part is utterly unprovable; according to the evidence, the issue was, at best, unsettled.

It is provable, however—and Levy's book, *id.*, supplies the proof:

Freedom of speech and press . . . was not understood to include a right to broadcast seditious words. The security of the state against libelous advocacy or attack was always regarded as outweighing any social interest in open expression, at least through the period of the adoption of the First Amendment. The thought and experience of a lifetime, indeed the taught traditions of law and politics extending back many generations, supplied an a priori belief that freedom of political discourse, however broadly conceived, stopped short of seditious libel.

Id. at 237. See also note 110 and accompanying text *infra*.

In a later piece, Levy has written that the injunction of the first amendment—"Congress shall make no law . . ."—was intended to prohibit any Congressional regulation of the press, whether by means of a licensing act, a tax act, or a seditious act. The framers meant Congress to be totally without power to enact legislation regarding the press." Levy, *Liberty of the Press from Zenger to Jefferson*, in L. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 115, 136 (1972). As Levy explains:

We have noted that a constitutional guarantee of a free press did not per se preclude a seditious act, but the prohibition on Congress did, although it left the federal courts free to try [common law] cases of seditious libel. It . . . appears that the prohibition on Congress was motivated far less by a desire to give immunity to political expression than by a solicitude for states' rights and the federal principle.

The primary purpose of the First Amendment was to reserve to the states an exclusive authority, as far as legislation was concerned, in the field of speech and press.

Id. at 137-38. But surely Levy does not mean to suggest—at any rate it beggars belief to suggest—that in the first amendment the Framers constitutionalized a value judgment that would preclude Congress from outlawing, for example, any publication calling for the assassination of a federal official, or disclosing troop movements in time of war. Therefore, it seems safest to conclude that *at most* the first amendment was intended to prohibit Congress from instituting any system of prior restraint and perhaps from discriminating against the press as press (as, for example, by levying a special tax on the press), and to require Congress, if it later chose to make seditious libel a crime, to make truth a defense and to permit the case to be tried to a jury. With respect to the latter point, the Sedition Act, 1 STAT. 596 (July 14, 1798), which is virtually contemporaneous with the first amendment, tends to bear me out. In section three of the Act, Congress provided:

[I]f any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

The Sedition Act expired on March 3, 1801, but prior to that time its constitutional validity "was sustained by the lower federal courts and by three Supreme Court Justices sitting on circuit." I N. DORSEN *et al.*, *EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 22 (4th ed. 1976).

110. L. LEVY, *LEGACY OF SUPPRESSION* vii (1960).

Given the narrowness of the original understanding, we must conclude that even if the first amendment was intended (by the Framers of the fourteenth amendment) to constrain state and federal action in the same way, very little if any modern constitutional doctrine regarding freedom of expression—for example, the protection extended subversive advocacy,¹¹¹ defamatory utterances,¹¹² vulgar¹¹³ and pornographic expression,¹¹⁴ commercial speech,¹¹⁵ and campaign expenditures¹¹⁶—could be defended as the product of interpretive review. Such doctrine goes far beyond any value judgment constitutionalized by the Framers of the first amendment. Hence, most constitutional doctrine regarding freedom of expression is not legitimate unless non-interpretive review of state and federal action under free-speech and free-press norms—which alone explains most such doctrine—can be justified. That proposition is true with respect to *state* action even if the first amendment was intended to constrain state and federal action in the same way; it is doubly true when we retrieve the fact, put aside a moment ago, that the Framers of the fourteenth amendment plainly did not intend to make the first amendment applicable to the states at all. (I could make similar claims about constitutional doctrine regarding freedom of religion.¹¹⁷)

Therefore, one cannot be an interpretivist—a consistent interpretivist, at any rate—and at the same time approve the Court imposing *any* first amendment limitations on state action (or imposing most of the limitations it has applied to federal action). Raoul Berger is a consistent interpretivist. Opposing judicial review of state action under free-speech and free-press norms, he writes:

One may agree with Justice Cardozo that free speech is “the matrix, the indispensable condition, of nearly every other form of freedom,” but the fact remains that the one time the American people had the opportunity to express themselves on whether free speech was “so rooted in the tradition and conscience of our people as to be ranked as fundamental” was in the First Congress, which drafted the Bill of Rights in response to popular demand. There they voted down interference with State control.¹¹⁸

111. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)(government may not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

112. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (discussing constitutional privileges against liability for defamation of public and private figures).

113. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (government may not punish act of wearing, in public, jacket with “Fuck the Draft” emblazoned on back).

114. See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (discussing protection afforded pornographic expression).

115. See, e.g., *Virginia State Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)(discussing protection afforded commercial speech).

116. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (discussing protection afforded campaign expenditures).

117. See Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978-79).

118. R. BERGER, *GOVERNMENT BY JUDICIARY* 272 (1977), quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 327 (1937)(Cardozo, J.). See note [22 *infra*].

William Rehnquist, on the other hand, is not a consistent interpretivist to the extent he supports judicial review of state action under free-speech and free-press norms. But then, perhaps it is too much to expect a sitting Supreme Court Justice to tilt quixotically at such a firmly established and, as a practical matter, invulnerable practice.¹¹⁹

What about our exemplary interpretivist, Robert Bork? Bork explains his support for judicial review of state action under free-speech and free-press norms—and for judicial review of federal action under free-speech and free-press norms not constitutionalized by the Framers¹²⁰—in the following fashion:

[T]he entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment. [The Framers] wrote a Constitution providing for representative democracy, a form of government that is meaningless without open and vigorous debate about officials and their policies.¹²¹

Whatever the merits of his claim that “representative democracy” requires “open and vigorous debate about officials and their policies”—a claim I am not inclined to dispute—Bork’s explanation does not mitigate the inconsistency between his interpretivist constitutional theory and his support for judicial review of state and federal action under free-speech and free-press norms never constitutionalized by the Framers. Recall the essential argument of interpretivism—that all noninterpretive review is illegitimate, that the Court may enforce against electorally accountable policymakers only norms constitutionalized by the Framers. Bork tries to avoid inconsistency by asserting that the Framers, in the Constitution, established a certain form of government and that that form of government requires constitutional protection for political speech beyond the limited protection against federal action specifically authorized by the Framers of the first amendment. He asserts, in effect, that freedom of political speech is a value judgment *implicitly* constitutionalized by the Framers, in that it is a value judgment implicit in the form of government they established.

The fatal problem with Bork’s explanation is that the Framers did not

119. Then too, perhaps Justice Rehnquist subscribes to Robert Bork’s attempt to explain away the inconsistency between interpretivism and support for judicial review of state action under free-speech and free-press norms. See text accompanying notes 120–28 *infra*.

Henry Monaghan has suggested, though I am not persuaded, that a Justice ought not to tilt at firmly established constitutional practice. “I do not think that an individual appointed to the Court could responsibly base his vote, in relevant cases, on the theory that only the national government is bound to respect free expression. . . . History has its claims, at least where settled expectations of the body politic have clustered around constitutional doctrine.” Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 7 (1979).

120. Bork accepts Levy’s “demonstration” in *LEGACY OF SUPPRESSION* (1960) that at best the Framers of the first amendment intended it to have an exceedingly narrow scope. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971).

121. *Id.* at 23, 26.

establish a government in the abstract, called “representative democracy,” that requires constitutional, and therefore judicial, protection for political speech beyond the protection they specifically authorized. Rather, they adopted a Constitution that provided, in the first amendment, for *limited* protection against *federal* action abridging freedom of expression; moreover, *they specifically rejected a proposal under which state action abridging freedom of expression would have been subject to federal constitutional limitations.*¹²² Consequently, the Constitution the Framers adopted (the value judgments they constitutionalized) is far from congenial to Bork’s abstract notion of “representative democracy”; the Framers did *not* establish a representative democracy in anything like Bork’s sense.¹²³ Recall, in that regard, Levy’s documented conclusion, which Bork has accepted,¹²⁴ that “the generation which adopted the Constitution and Bill of Rights did not believe in a broad scope for freedom of expression, *particularly in the realm of politics.*”¹²⁵

In extending constitutional protection for political speech (or speech of any other sort) beyond the limited protection, against federal action, authorized by the Framers, the Supreme Court is not engaging in interpretive review; it is not simply enforcing a value judgment constitutionalized, implicitly or otherwise, by the Framers. Instead, it is making and enforcing value judgments of its own—judgments about what sorts of speech *ought* to be protected, and, at least inferentially, about what sort of government we *ought*

122. See R. BERGER, *GOVERNMENT BY JUDICIARY* 134–35 n.4 (1977):

It has been little noticed that, as Egbert Benson, speaking with reference to freedom of speech and press, said, all the Committee of Eleven to whom the amendments had been referred “meant to provide against was their being infringed by the [federal] Government.” 1 *Annals of Congress* 732. Madison urged that “the State governments are as liable to attack these invaluable privileges as the General Government is, and therefore ought to be as cautiously guarded against.” *Id.* 441. But his attempt failed. Charles Warren, “The New ‘Liberty’ under the Fourteenth Amendment,” 39 *Harv. L. Rev.* 431, 433–35 (1926). . . . The view that prevailed was that of Thomas Tucker: “It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do.”

See also *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 538 (1922) (The Constitution “imposes upon the States no obligation to confer upon those within their jurisdiction . . . the right of free speech . . .”).

123. Indeed, the Framers established a government whose principal constituency were propertied white males, many of whom were slaveholders. Some “representative democracy” that!

Note that article IV, § 4 of the Constitution—which provides in relevant part that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government”—does not lend support to Bork’s argument, as Bork himself would seem to acknowledge. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 19 (1971): “[James] Madison’s writing on the republican form of government specified by the guarantee clause suggests that representative democracy may take many forms, so long as the forms do not become ‘aristocratic or monarchical.’” *Quoting THE FEDERALIST NO. 43* (Obviously the guarantee clause cannot explain judicial review of *federal* action under free-speech and free-press norms never constitutionalized by the Framers.).

124. See note 120 *supra*.

125. L. LEVY, *LEGACY OF SUPPRESSION* vii (1960) (emphasis added). Note that the presence in state constitutions of provisions corresponding to the first amendment does nothing to explain judicial review of state action by *federal* courts under *federal* free-speech and free-press norms. If anything, the existence of such provisions in the late eighteenth century or the nineteenth century suggests that freedom of expression, as a constraint on *state* action, is properly the business of state courts enforcing state constitutions, not federal courts enforcing the federal Constitution.

to have. In short, the Court is engaging in noninterpretive review,¹²⁶ albeit noninterpretive review aimed more at defining the processes of governmental policymaking than at evaluating particular policy choices generated by those processes.

I can readily understand why Professor Bork is anxious to support constitutional protection for political speech beyond the exceedingly limited protection established by the Framers. But the notion that the Supreme Court—in addition to the representatives of the people acting through the processes of constitutional amendment—may provide that protection is fundamentally at odds with his constitutional theory. It is possible, I believe, to justify noninterpretive review of governmental action under free-speech and free-press norms,¹²⁷ but Bork, given his commitment to interpretivism and, so, his rejection of all noninterpretive judicial review, doesn't have that "out." Bork can't have his theory and ignore it too—ignore its implications. Indeed, one reason for rejecting interpretivist constitutional theory and trying to develop an alternative theory that accepts at least some noninterpretive review is precisely that the implications of interpretivism are so severe. Interpretivism necessitates the conclusion, given the original understandings of the first and fourteenth amendments, that most "first amendment" doctrine—much of which is revered¹²⁸ even by those quick to criticize most other constitutional doctrines wrought by the modern Court—is the tainted fruit of noninterpretive review and thus illegitimate.

Even more painfully perhaps, interpretivism requires the conclusion, as we're about to see, that *Brown v. Board of Education*,¹²⁹ the 1954 case in which a unanimous Supreme Court ruled that racially segregated public schooling contravenes the fourteenth amendment guarantee of equal protection of the laws—the case that, in Charles Black's words, "opened our era of judicial activity"¹³⁰—is illegitimate too. Let's turn to the matter of interpretivism and equal protection.

With respect to the seminal case of *Brown* and its progeny in particular, the legislative history of the fourteenth amendment clearly discloses that the Framers did not mean for the amendment to have any effect on segregated public schooling or on segregation generally.¹³¹ To argue, as I have elsewhere,

126. That the Court's review is noninterpretive rather than interpretive in most freedom of expression cases should not be surprising. After all, "one can better protect . . . the integrity of democratic processes by protecting them than by guessing how other people meant to govern a different society a hundred or more years ago." Brest, *The Misconceived Quest for the Original Understanding*, 50 B.U.L. REV. 204, 208 (1980).

127. Indeed, I believe it is possible to justify noninterpretive review in human rights cases generally. At least, I try to do so in the work of which this Article is a part.

128. But not all of it, least of all, perhaps, that protecting pornography. *see, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28–30 (1971), and commercial speech, *see, e.g.*, Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

129. 347 U.S. 483 (1954).

130. C. BLACK, DECISIONS ACCORDING TO LAW 7 (1979).

131. *See* R. BERGER, GOVERNMENT BY JUDICIARY 117–33 (1977). Even Berger's critics seem not to dispute this point. *See, e.g.*, Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651, 705 (1979).

that the equal protection clause can fairly be taken to radiate the principle of the moral irrelevance of race¹³² is not to deny that to take it so is to read into the fourteenth amendment a principle that, for whatever reasons, the Framers did not constitutionalize. In reading that principle into the amendment the Court does not enforce a value judgment the Framers made but, instead, makes and enforces a value judgment of its own. Consider Paul Brest's recent comments to that effect:

Consider the relationship between the original understanding of the fourteenth amendment and current doctrine prohibiting gender-based classifications. . . . [T]o what extent have [the text or original understanding of the equal protection clause] guided the evolution of [that] doctrine? The text is wholly open-ended; and if the [Framers] had any intentions at all about [the] issue, their resolution was probably contrary to the Court's. At most, the Court can claim guidance from the general notion of equal treatment reflected in [the equal protection clause]. I use the word "reflected" advisedly, however, for the equal protection clause does not establish a principle of equality. . . . Indeed, because of its indeterminacy, the clause does not offer much guidance even in resolving particular issues of discrimination based on race.¹³³

The modern Court, in equal protection cases, has been an active, persistent policymaker.¹³⁴ One cannot be a logically consistent interpretivist and accept equal protection doctrine banning, for example, racial segregation.¹³⁵ Raoul Berger is a consistent interpretivist to the extent he contends that the Court's seminal decision in *Brown v. Board of Education* was illegitimate. The Court's decision in *Brown* was unwarranted, says Berger, because segregated public schooling does not offend equal protection as originally under-

132. See Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1028-32 (1979). See also Perry, *The Principle of Equal Protection*, 32 HASTINGS L.J. ____ (1981).

133. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 231-32 (1980). See *id.* at 231-34.

134. See generally Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979).

135. It is tempting to say that one cannot be an interpretivist and accept any equal protection constraints on federal action, because the fourteenth amendment was intended as a constraint only on state action. John Ely has argued to that effect. ELY, *supra* note 7, at 32-33. See also Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 224 (1980). But is it implausible to think that one *can* be an interpretivist and at the same time accept application of section one of the fourteenth amendment, as originally understood, to federal action? The Framers of the fourteenth amendment constitutionalized the judgment that it is wrong to discriminate on the basis of race with respect to certain sorts of rights. The distinction between action by state government and action by the federal government would seem to be irrelevant to—make no sense with respect to—that judgment. (I do not mean to suggest that the Framers of constitutional provisions are somehow obligated to constitutionalize only "sensible"—coherent, internally consistent—value judgments. But surely we ought not to *presume* that a particular value judgment constitutionalized by the Framers is not sensible. True, the Framers were focused on state action, in particular the infamous Black Codes. See Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1026 n.15 (1979). But they had no occasion to focus on federal action, since the federal government did not discriminate on the basis of race *with respect to the sorts of rights that concerned the Framers*. (Indeed, at that time the federal government had little to do with those sorts of rights; such rights—regarding "life, liberty, and property" in the narrow original sense—were almost wholly the states' concern.) The important point is that the value judgment the Framers constitutionalized—that racial discrimination regarding certain rights is wrong—was at bottom a judgment about what government in general should not do, and not simply about what state government should not do. (Of course one cannot be an interpretivist and accept any equal protection constraints on either federal or state action beyond those established by the Framers).

stood, which, for Berger, is the determinative norm.¹³⁶ For Berger, the Court's policymaking under equal protection is illegitimate no matter how sound the substance of the policymaking might be,¹³⁷ because in the hands of the judiciary the policymaking constitutes an usurpation of the legislative function of determining what value judgments, beyond those constitutionalized by the Framers, shall inform the activities of the political community.¹³⁸

But Berger stops short of contending that *Brown* should be overruled:

It would . . . be utterly unrealistic and probably impossible to undo the past in the face of the expectations that the segregation decisions . . . have aroused in our black citizenry—expectations confirmed by every decent instinct. That is more than the courts should undertake and more, I believe, than the American people would desire.¹³⁹

Apparently even Berger can't bring himself to accept all the implications, some of them obviously quite enormous, of interpretivist constitutional theory. Berger has sought to defend his failure to call for the overruling of *Brown*, in his view a fundamentally illegitimate decision, by asserting that "[i]t is not a failure of analysis to acknowledge that eggs cannot be unscrambled."¹⁴⁰ But judicial precedent *can* be unscrambled—overruled—as indeed Berger himself emphasizes in his book:

Why should "adherence to precedent" rise above effectuation of the framers' clearly expressed intention, which expresses the value choices of the sovereign people, not merely of judicial predecessors?¹⁴¹

I assert the right to look at the Constitution itself, stripped of judicial incrustations, as the index of the constitutional law and to affirm that the Supreme Court has no authority to substitute an "unwritten Constitution" for the written Constitution the Founders gave us and the people ratified.¹⁴²

To the extent the implications of a political theory count as a reason for accepting or rejecting the theory, Berger's seeming failure of nerve with respect to a basic implication of interpretivism—that *Brown* and its progeny ought to be overruled—is instructive.

Robert Bork has suggested that the result in *Brown* can be salvaged in terms consistent with his interpretivist premises. We do not know, says Bork, just what sorts of racial inequality the Framers of the fourteenth amendment meant to attack. Yet, we cannot permit the Court to function like a policymaker and simply pick and choose what sorts of racial inequality shall be deemed improper and what sorts shall not. Rather, we must constrain the

136. See note 131 *supra*.

137. Berger of course opposes the result in *Brown* on constitutional, not moral, grounds.

138. See generally R. BERGER, *GOVERNMENT BY JUDICIARY* 249-418 (1977).

139. *Id.* at 412-13.

140. Berger, *Letter to the Editor*, *THE NEW REPUBLIC*, February 11, 1978, at 7.

141. R. BERGER, *GOVERNMENT BY JUDICIARY* 281 (1977). Compare Monaghan, *Taking Supreme Court Opinions Seriously*, 39 *MD. L. REV.* 1, 7 (1979).

142. R. BERGER, *GOVERNMENT BY JUDICIARY* 297-98 (1977).

Court, which cannot be allowed to exercise the discretion of a policymaker, by insisting that it strike down *all* racial inequalities, *including* segregated public schooling.¹⁴³ The fatal problem with Bork's convenient argument—convenient in that it spares Bork the embarrassment of acknowledging that his constitutional theory, interpretivism, and the Court's decision in *Brown* are fundamentally at odds—is that, as Berger insists, we *do* know that the Framers did not intend to prohibit segregated public schooling.¹⁴⁴ If one accepts interpretivist constitutional theory, as Bork, like Berger, does, it follows, given the fact that the Framers did not mean to prohibit segregated schooling, that *Brown* must be deemed illegitimate. Berger's logic is quite sound in that respect. As Bork himself emphasizes:

The words [of the equal protection clause] are general but surely that would not permit us to escape the framers' intent if it were clear. If the legislative history revealed a consensus about segregation in schooling . . . , I do not see how the Court could escape the choice revealed and substitute its own, even though the words are general and conditions have changed.¹⁴⁵

The unavoidable problem for Bork and other interpretivists understandably anxious to avoid condemning *Brown* and its progeny as illegitimate is that the legislative history of the fourteenth amendment *does* reveal a consensus—a tragic, morally indefensible consensus—about segregation in schooling (and, indeed, about segregation generally). And so Bork's convenient argument simply won't work.

It is doubtless true that our reading of the original understandings of constitutional provisions such as the free speech and free press clauses of the first amendment and the equal protection clause is not perfectly accurate. After all, it is impossible to uncover the intentions of *each* of the *many* Framers of a provision—those who drafted the provision and then those in the state conventions or legislatures who ratified it.¹⁴⁶ Moreover, historical inquiry is inevitably subjective; to some extent our vision of the past is ir-

143. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14–15 (1971). Bork's argument is a strange one for an interpretivist to make. If in fact we do not know just what sorts of racial inequality the Framers of the fourteenth amendment meant to ban, then the proper office for an interpretivist court is not to pick and choose what sorts of racial inequality shall be banned and what sorts shall not. Nor, contrary to what Bork argues, is it to ban all racial inequalities. Rather its proper office is to ban only those sorts of racial inequalities which we *do* know the Framers meant to ban. In short, a court may not, consistently with interpretivism, ban any political practice unless it can say that the practice is of the sort the Framers meant to ban; if it cannot say that, the court must, consistently with interpretivism, sustain the practice. Discretion of the sort Bork wants to constrain doesn't even enter into the matter.

144. I should note, in fairness to Bork, that he was writing some six years before Berger made it painfully clear that the Framers of the fourteenth amendment did not mean to prohibit segregated public schooling (or segregation generally).

145. *Id.* at 13.

146. See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 209–17 (1980). But see Dellinger, *School Segregation and Professor Avin's History: A Defense of Brown v. Board of Education*, 38 MISS. L.J. 248, 251 n.6 (1967): "[W]hatever the congressional debates establish should constitute a rebuttable presumption, since 'it is not unrealistic, in the main, to assume notice of congressional purpose in the state legislatures.'" Quoting Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV L. REV. 1, 7 (1955).

remediably colored—distorted—by our vision in the present.¹⁴⁷ But if not perfectly accurate, our reading is sufficiently accurate—accurate enough to justify the conclusion that the Court's decisions regarding human rights in most modern constitutional cases of note, and particularly in most freedom of expression and equal protection cases, cannot plausibly be explained as "interpretations" or "applications" of any value judgments constitutionalized by the Framers, whatever the precise character of those various value judgments might be.¹⁴⁸ They can be explained only as products of noninterpretive review. In the same vein, the fact that Berger's reading of the original understanding of the fourteenth amendment is not free from doubt in every detail has a very limited significance for present purposes. For it is nonetheless true that precious little fourteenth amendment doctrine—including the notion that various provisions of the Bill of Rights, like the first amendment, constrain state action by virtue of the fourteenth amendment—can be explained by reference to the original understanding of the fourteenth amendment, *even if the original understanding is somewhat broader than Berger acknowledges*. Henry Monaghan's sound observations about the contemporary debate over the original understanding of the fourteenth amendment are relevant here:

Even if its architects intended § 1 [of the fourteenth amendment] to transcend the [Civil Rights Act of 1866], the question persists of how sweeping a change in the governmental structure § 1 authorized. Those who attack [Raoul] Berger frequently slip into a comfortable *non sequitur* at this point: they assume that if Berger is in error, § 1 perforce has a dynamic content. Logically, however, their demonstration that Berger's list of § 1 rights is too narrow is not proof that it is proper to measure the content of the fourteenth amendment by other than *some* closed set of rights as they were understood in 1868. In other words, their attack does not dispose of a limited conception of the fourteenth amendment, with the judge's function being essentially historical—to enter a time machine, return to the

147. See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 221–22 (1980).

148. By the "Framers," I mean, primarily, those persons—sitting in the original Constitutional Convention or, in the case of amendments to the Constitution, in Congress—who voted to propose the relevant constitutional provision(s) and, secondarily, those persons in the individual state conventions or legislatures who voted to ratify the provision. The Framers' understanding of a particular provision is what I mean by the "original understanding" of the provision. Ascertaining the *precise* contours of the original understanding of any given provision may be difficult, sometimes even impossible. See P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 139–45 (1st ed. 1975); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 209–17 (1980); tenBröek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CAL. L. REV. 399, 405–06 (1939). Still, it is usually possible to ascertain the rough contours of that understanding. And once the rough contours have been ascertained, it is frequently possible to say: Although we don't know exactly what the Framers thought this provision *would* accomplish, there is strong evidence they thought it would *not* accomplish X; or strong evidence they did not think it would accomplish X; or no evidence, or wholly inadequate evidence, they thought it would accomplish X. The historian's ability to ascertain the rough contours of the original understanding of the various constitutional provisions discussed or mentioned in this work is sufficient for purposes of the claims about the original understanding on which I rely. Cf. ELY, *supra* note 7 at 16: "I [am not] endorsing for an instant the nihilist view that it is impossible ever responsibly to infer from a past act and its surrounding circumstances the intentions of those who performed it."

year 1868, and scrutinize "contemporary" sources to determine the extent to which the assertedly expansive language of § 1 would prohibit only what fell within those objectives, however conceptualized, and "their twentieth century counterparts."¹⁴⁹

B.

Earlier we considered—and dismissed—a number of anti-interpretivist claims. This is an appropriate point at which to consider another one, which, like the claims discussed earlier, is fundamentally flawed. In the preceding several pages, I have sought to explain why an interpretivist cannot accept most modern constitutional doctrine regarding freedom of expression and equal protection. The reason, in brief, is that the Framers' intentions with respect to the first and fourteenth amendments—which intentions, for the interpretivist, are determinative—were extremely limited. Some commentators contend that interpretivists conceive of the original understanding of many important constitutional provisions too narrowly. For example, Ronald Dworkin has argued that the Framers of the equal protection clause did not mean to constitutionalize their particular "conception" of equality, which happened to be quite narrow, but rather the "concept" of equality, which is quite broad,¹⁵⁰ and that they intended posterity to honor the concept of equality by abiding its own conception of equality, which might be broader than the Framers'.¹⁵¹ The sort of claim Dworkin makes is really quite common.

[Dworkin employs] a strategy that, in one or another form, is common to all efforts to derive from the Constitution principles relevant to a world that could not have

149. Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 126-27 (1978).

150. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134 (1975):

Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples, for two reasons. First, I would expect my children to apply my instruction to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness that I might have had in mind.

(Emphasis in original). See also Mauzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1037 (1977):

The object of the [concept-conception] distinction is to justify the claim that the core meaning of the Constitution remains unchanged even when judges diverge from the specific content that the framers would have found there. To appeal to a conception is to appeal to a specific understanding or account of what the words one is using mean. To appeal to a concept is to invite rational discussion and argument about what words used to convey some general idea mean. Concepts are not tied to the author's situation and intention in the way that conceptions are. Broad phrases such as "cruel and unusual punishment," "freedom of speech," "due process," and "equal protection" tend to be vague and abstract. While Dworkin is apparently not committed to thinking of the concepts denoted by these phrases as utterly lacking in content, their content is not usually specific enough to decide troubling cases involving issues such as capital punishment. They are "contested" concepts; their proper content is always disputable. Even though people may agree on some paradigm cases of what is and is not cruel and unusual punishment, the boundaries of this concept are always open to dispute.

151. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-36 (1975).

been anticipated when the document was adopted. He reads the language of the Constitution at a very high level of abstraction, in effect as a license to interpret its provisions as the embodiment of the evolving moral conceptions of successive generations.¹⁵²

There is a fatal problem with this sort of claim.¹⁵³ Evidence supporting the proposition that the Framers of constitutional provisions such as the free speech, free press, and equal protection clauses intended to constitutionalize broad "concepts" rather than particular "conceptions" is wholly lacking. Significantly, Dworkin offers absolutely no evidence whatsoever in support of the proposition.¹⁵⁴ Moreover, the proposition is implausible. As Henry Monaghan has written:

Excessive generalization as to "intent" seems at war with any belief that a constitutional amendment is a *conscious* alteration of the frame of government whose major import should be reasonably apparent to those who gave it life. . . . I am unable to believe that in light of the then prevailing concepts of representative democracy, the framers . . . of § 1 [of the fourteenth amendment] intended the courts . . . to weave the tapestry of federally protected rights against state government.¹⁵⁵

On the other side, the evidence is compelling that the Framers of the first and fourteenth amendments thought they were constitutionalizing—and therefore were constitutionalizing—particular and, by contemporary lights, narrow value judgments about certain (sorts of) political practices.

In claiming, inaccurately, that interpretivists conceive of the original understanding of many provisions too narrowly, proponents of the concept-conception claim and of similar claims concede, implicitly if not explicitly, the interpretivist's premise that the original understanding of a constitutional provision is determinative. Such claims serve as little more than a device for avoiding the truly difficult question, which is *whether* the original understandings of important power-limiting provisions like the first and fourteenth amendments—the plainly *narrow* original understandings—ought, as a matter of constitutional theory, to be deemed determinative.¹⁵⁶ Constitutional theorists would stay closer to that crucial question, which, after all, is the heart of the matter, if they would bear in mind that power-limiting constitutional provisions—as opposed to power-granting ones¹⁵⁷—typically represent and em-

152. Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1168 (1977).

153. For a (typical) variation on the sort of claim Dworkin makes, see Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049, 1090-91 (1979).

154. Professors Munzer and Nickel are quite properly critical of Dworkin in that regard. See Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1040-41 (1977). For further criticism of reliance on the concept-conception distinction in constitutional theory, see Saphire, *Professor Richards' Unwritten Constitution of Human Rights: Some Preliminary Observations*, 4 U. DAY. L. REV. 305 (1979).

155. Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 128-29 (1978). See also Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1040 (1977). See also note 158 *infra*.

156. See also Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1041 (1977).

157. See text accompanying notes 80-94 *supra*.

body, as Monaghan's comments suggest, discrete, determinate value judgments (if not always easily discoverable at this late date) about what particular sorts of political practices government ought to forswear.

I want to take a moment at this point to set forth the various possible relationships between the original understanding of any power-limiting constitutional provision and any present-day political practice claimed to violate the provision. By so doing I hope to make clear that, contrary to the sort of anti-interpretivist claim Dworkin and others have made, a judicial decision striking down in the name of a particular constitutional provision a political practice that (1) was not present to the minds of the Framers of the provision and (2) is not analogous to any practice that was present to their minds, cannot plausibly be understood as a mere "interpretation" or "application" of the provision in question. (Dworkin's concept-conception claim, of course, is simply a variation on the interpretation/application theme.) Let the equal protection clause be the power-limiting provision, and let *P* stand for the present-day political practice. If the Framers of the equal protection clause did not have occasion to contemplate *P*—i.e., if *P* was not present to their minds, as it could not have been if *P* did not exist at all or in anything like its present form¹⁵⁸—they could not have intended that the clause prohibit *P*. They might have intended that the clause serve as an "open-ended" provision, leaving for resolution in the future the issue whether the clause should be deemed to prohibit any given political practice not forbidden or even foreseen by them. But it is as clear as such things can be that the important power-limiting provisions, and in particular the equal protection clause, were not intended to serve as open-ended norms.¹⁵⁹

If the Framers did contemplate *P*—and note that if *P* was not foreseen by the Framers but is simply a modern analogue of a practice they did contemplate, different in no constitutionally significant respect from the contemplated practice, it is *as if* they contemplated *P*¹⁶⁰—either they intended that the clause prohibit *P* or they did not. If they did not, either they left for resolution in the future the issue whether the clause should be deemed to prohibit *P* or they intended that the clause not prohibit *P*. But, again, there is no evidence that the Framers of important power-limiting provisions intended them to serve as open-ended norms. In particular, if *P* is segregated public schooling, the conclusion is inescapable that the Framers intended that the equal protec-

158. Or with anything like its present significance. Cf. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 220-21 (1980) (suggesting that in the pervasively Christian American society of the late 18th century, in which belief in an afterlife was the norm, the death penalty could not have had anything like the significance it has today).

159. See R. BERGER, *GOVERNMENT BY JUDICIARY* 99-116 (1977). See also Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 127-28 (1978) (quoted in part in text accompanying note 155 *supra*); Monaghan, *Professor Jones and the Constitution*, 4 VT. L. REV. 87, 91 (1979): "[N]o satisfactory evidence exists to show that judicial development of a *lex non scripta* reflects the purpose of either the drafters or ratifiers of the eighteenth century Constitution or of the Civil War Amendments."

160. See also Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HAST. CONST. L.Q. 603, 620 (1979).

tion clause not prohibit *P*: segregated public schooling was present to the minds of the Framers; they did not intend that the clause prohibit it; and no historical evidence suggests that they meant to leave open the question whether the clause should be deemed to prohibit the practice.¹⁶¹

This is not to say, however, that in *Brown* the Court's decision invalidating segregated public schooling was contraconstitutional.¹⁶² A contraconstitutional decision would be one that decreed a result contrary to a state of affairs that is constitutionally required—or one reached in the exercise of a mode of judicial review that the Framers intended to foreclose. No one suggests that the Framers meant to require segregated public schooling. Nor did the Framers—whether of the original Constitution and Bill of Rights or of the fourteenth amendment—intend that the Supreme Court invalidate only political practices inconsistent with value judgments attributable to the Framers; *no historical materials suggest that any group of Framers ever constitutionalized any theory of the proper scope of judicial review, whether narrow, like interpretivism, or broad.*¹⁶³

Of course, to say that the Court's decision in *Brown* or in any other constitutional case was not contraconstitutional is not to justify the decision (although to say that it was contraconstitutional might be to condemn it¹⁶⁴). Any effort to justify a decision that, like *Brown*, cannot be explained as an application of a value judgment that the Framers constitutionalized must rely on a theory that holds it proper, at least under some circumstances, for the Court to engage in noninterpretive review—to invalidate political practices on the basis of value judgments not constitutionalized by the Framers. Claims that decisions such as *Brown* involve merely "interpretation" of the Constitution and therefore pose no problem of legitimacy must be rejected. Such decisions are predicated on value judgments not constitutionalized by the Framers and that is precisely what gives rise to the problem of legitimacy, and what interpretivists, who contend that electorally accountable policymaking should not be constrained by any value judgments save those the Framers constitutionalized, condemn.

161. See generally R. BERGER, *GOVERNMENT BY JUDICIARY* 99-133 (1977).

162. See note 31 *supra*.

163. But see Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049, 1092 (1979): "[T]he intent of some legislators, without whose votes the fourteenth amendment could not have been passed, may have been to erect the Supreme Court as a body with continuing authority to put content into the fourteenth amendment's general phrases." That suggestion is wholly speculative; no historical materials lend credence to it. Compare Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 220 (1980): "Perhaps [the Framers of any given constitutional provision limiting governmental power] wanted to bind the future as closely as possible to their own notions. Perhaps they intended [the] provision to be interpreted with increasing breadth as time went on. Or—more likely than not—[they] may have had no intentions at all concerning these matters." (Emphasis added).

Concededly, the proposition that the Framers intended the equal protection clause not to prohibit segregated public schooling is equivalent to the proposition that they intended such schooling not be proscribed in the name of the particular, narrow value judgment they embodied in the clause. But in *Brown* the Court avoided acting contrary to that intent by not relying on the claim that its invalidation of segregated public schooling merely represented enforcement of the Framers' intentions. Rather, the Court suggested that no one could tell whether the Framers meant to prohibit segregated public schooling. *Brown v. Board of Educ.*, 347 U.S. 483, 489 (1954).

164. See note 31 *supra*.

In the preceding discussion I make reference to present-day political practices not foreseen by the Framers but different in no constitutionally significant respect from practices they did contemplate and mean to ban—practices that are simply modern analogues of banned practices. A fair question, therefore, is: When is a present-day political practice no more than a modern analogue of a past, constitutionally banned practice? The answer, I think, is fairly straightforward. A present-day political practice, *P'*, is simply an analogue of a past, constitutionally banned practice, *P*, when a person—one who aspires to logical consistency and moral coherence—who would endorse the political-moral proposition that *P* ought to be banned could point to no difference between *P* and *P'* that could count as a principled reason for failing to endorse the distinct proposition that *P'* ought to be banned. Obviously there will be occasional differences of opinion as to whether a given political practice is simply the analogue of another political practice.¹⁶⁵ But that fact—which simply illustrates what no one denies: that even an interpretivist approach to constitutional adjudication can generate debatable answers—is largely irrelevant, since, again, most political practices banned by the Supreme Court in human rights cases, including freedom of expression and equal protection cases, cannot *plausibly* be characterized as simply modern analogues of past, constitutionally banned practices.

Relatedly, some constitutional theorists argue that by constitutionalizing value judgment *V*, the Framers *necessarily* constitutionalized *V'*, the most attractive general normative principle that explains *V*, and that *V'* justifies, even requires, invalidation of present-day political practices that are *not* simply analogues of past, constitutionally banned practices.¹⁶⁶ But it is rarely if ever the case that a single general normative principle is required to explain a value judgment constitutionalized by the Framers. Any of several different, competing political-moral visions might dispose one to subscribe to a given value judgment the Framers constitutionalized.¹⁶⁷ And constitutional theorists who contend to the contrary are in truth importing into the Constitution's power-limiting provisions whatever political-moral philosophy *they* find most congenial.

C.

In the remainder of this Article, I want to examine a recent, very prominent attempt, in my view quite unsuccessful, to defend noninterpretive review in both first amendment and equal protection cases against the challenge of interpretivism. Many constitutional theorists sympathetic to both first amendment and equal protection doctrine recognize what I have sought to demonstrate—the impossibility of defending either of those two areas of constitu-

165. See note 80 *supra*.

166. For a critique of such arguments, see Bayles, *Morality and the Constitution*, 1978 ARIZ. ST. L. REV. 561.

167. See *id.*

tional doctrine without resort to a noninterpretivist theory of constitutional adjudication. But several of those theorists are loathe to go too far, or what they think is too far, in accepting noninterpretivism, for then they would be hard put to reject constitutional policymaking with respect to norms other than freedom of expression or equal protection—in particular they feel they would be hard put to reject modern “substantive due process,” a doctrine with which they are most uncomfortable.¹⁶⁸ They therefore attempt to articulate a *limited* noninterpretivist constitutional theory, one that justifies the particular species of constitutional policymaking they want to salvage from an interpretivist attack—usually policymaking with respect to the norms of freedom of expression, equal protection, and procedural fairness¹⁶⁹—and, at the same time, that condemns species of policymaking for which they have no sympathy—in particular policymaking with respect to modern substantive due process norms.¹⁷⁰

John Ely’s *Democracy and Distrust*¹⁷¹ represents the principal contemporary effort in that regard. I want to explain why Ely’s particular constitutional theory—his limited noninterpretivist theory—which purports to justify noninterpretive review in both first amendment (*i.e.*, freedom of expression) and equal protection cases but not in substantive due process cases,¹⁷² does not succeed in justifying noninterpretive review in either first amendment or equal protection cases.

The sort of noninterpretive review Ely seeks to justify he labels “participational,” as opposed to the “substantive” review he decries.¹⁷³ Participational review, according to Ely, is aimed at serving the norm of political participation—participation by persons in the political process—and it does this by “clearing the channels of political change on the one hand, and [by] correcting certain kinds of discrimination against minorities on the other.”¹⁷⁴ Those two endeavors are predicated, in Ely’s view, on “a coherent theory of representative government.”¹⁷⁵ Ely’s “general theory is one that bounds [noninterpretive review] by insisting that it can appropriately concern itself

168. See, e.g., ELY, *supra* note 7, at 14–15 (the old, early 20th century substantive due process cases, “conventionally referred to under the head of *Lochner v. New York*, [198 U.S. 45 (1905),] one of the earlier ones, . . . are now universally acknowledged to have been constitutionally improper—for obvious reasons by interpretivists, for somewhat less obvious ones by noninterpretivists.”).

169. See note 244 *infra*.

170. Of course, to accept constitutional policymaking by the judiciary with respect to a given norm, like freedom of expression, is not necessarily to accept every decision and doctrinal development fashioned by the judiciary in the course of that policymaking. On the other hand, to reject constitutional policymaking with respect to a given norm is necessarily to reject every decision and doctrinal development fashioned by the judiciary in the course of that policymaking. Therefore, one who wants to accept even one decision handed down by the judiciary in the course of policymaking with respect to a given norm must accept judicial policymaking with respect to that norm. For example, to salvage the Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), from an interpretivist attack, one must salvage the judicial policymaking—with respect to equal protection—that generated the decision.

171. ELY, *supra* note 7.

172. See *id.* at 43–72.

173. *Id.* at 182. See also note 39 *supra*.

174. ELY, *supra* note 7, at 74.

175. *Id.* See also *id.* at 77 (“a coherent political theory”).

only with questions of participation, and not with the substantive merits of the political choice under attack."¹⁷⁶ We can best explore Ely's meaning by considering his efforts to justify constitutional policymaking with respect to freedom of expression and equal protection.

Let's first consider Ely's effort to justify noninterpretive review in first amendment cases. According to Ely, there is a radical difference between noninterpretive review in first amendment cases and that in substantive due process cases: the former consists of judicial policymaking aimed at maintaining the processes of democratic government, while the latter consists of judicial policymaking aimed at revising policy choices generated by those processes.¹⁷⁷ The latter sort of noninterpretive review is illegitimate, says Ely, because it is undemocratic for the judiciary, in constitutional cases, to revise policy choices generated by the democratic processes (except on the basis of value judgments constitutionalized by the Framers).¹⁷⁸ But the former sort is not illegitimate; first amendment rights, whether or not constitutionalized by the Framers, "must nonetheless be protected [by the judiciary], strenuously so, because they are critical to the functioning of an open and effective democratic process."¹⁷⁹ "[I]mpediments to free speech, publication and political association"¹⁸⁰ impair operation of the democratic process,¹⁸¹ and, according to Ely, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about."¹⁸² The judiciary, rather than an electorally accountable institution of government, should make the ultimate, critical choices in defining rights of speech and press, says Ely, because "we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out."¹⁸³ Policymaking that determines the character of rights of speech and press "cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo."¹⁸⁴

176. *Id.* at 181. See also Freund, *The Judicial Process in Civil Liberties Cases*, 1975 U. ILL. L.F. 493. 177. See also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 13 (1970):

In considering the role of the judiciary in a system of freedom of expression it is essential to narrow the issues and establish a fundamental distinction. We are not dealing here with any general function of our judicial institutions to foster the whole range of freedoms in a democratic society. Nor are we dealing with any broad power to supervise or review all major actions of the legislative and executive branches. We are concerned with the specific function of the judiciary in supporting a system of freedom of expression. This involves the application of general principles of law to assure that the basic mechanisms of the democratic process will be respected. It does not involve supervision over the decisions reached or measures adopted as a consequence of employing democratic procedures. Responsibility for this is primarily that of the legislature. In other words, the judicial institutions are here dealing essentially with the methods of conducting the democratic process, not with the substantive results of that process. In this differentiation of function lies a generic distinction between the role of the judiciary and the role of the legislature.

178. Or except to the extent authorized by Ely's limited noninterpretivist theory.

179. ELY, *supra* note 7, at 105.

180. *Id.*

181. See, e.g., Freund, *The Judicial Process in Civil Liberties Cases*, 1975 U. ILL. L.F. 493, 495: "[I]t is by virtue of speech and assembly that the winds of doctrine blow and the freshets of change can course."

182. ELY, *supra* note 7, at 117.

183. *Id.* at 106.

184. *Id.* at 117. Ely makes essentially the same argument in support of noninterpretive review with respect to issues concerning access to the franchise and the ballot. See *id.* at 116-125.

Ely's argument should not be confused with Robert Bork's argument, discussed earlier.¹⁸⁵ Bork's effort was to persuade us that judicial enforcement of a certain norm—freedom of *political* speech—not specifically constitutionalized by the Framers, in particular enforcement of that norm against the states, can be explained in terms of interpretive review—that such enforcement does not involve judicial policymaking, but only judicial application of a value judgment implicit in yet another value judgment, concerning the nature of American government, specifically constitutionalized by the Framers. Ely, by contrast, acknowledges that judicial enforcement of free-speech and free-press norms not constitutionalized by the Framers can be explained only in terms of constitutional policymaking—that such enforcement involves much more than application of value judgments attributable, even indirectly, to the Framers.¹⁸⁶ Bork rejects all noninterpretive review; Ely seeks to justify non-interpretive review of a certain sort—that in first amendment cases.

While Bork attempts to root judicial enforcement of his freedom-of-political-speech norm in a value judgment attributable (in Bork's view) to the Framers, Ely's effort—or so it seems to me¹⁸⁷—is to root judicial policymaking with respect to first amendment norms¹⁸⁸ in a consensus—specifically, a consensus in America as to something called “the democratic process.” Ely's argument seems to be that, given this consensus, some institution of government should be charged with primary responsibility for maintaining the process, and that the judiciary is the institution best adapted to such an enterprise.¹⁸⁹

A principal reason Ely rejects substantive due process is that there is no consensus—certainly no ascertainable consensus—as to the various values the judiciary enforces in substantive due process cases. But—and this is a critical problem with Ely's argument in defense of noninterpretive review in the first amendment cases—neither is there any consensus as to *the sort of* democratic process that ought to prevail in America.¹⁹⁰ The sort of democratic process that prevails at any given point is a function mainly of two factors: first, the number of groups to whom the franchise is extended; second, the

185. See text accompanying notes 120–28 *supra*.

186. See note 189 *infra*.

187. See Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1424 (1979); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1047 (1980). See also Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 235 (1981) (“perhaps [Ely's] book is an exercise in contemporary consensus theory after all”).

188. See ELY, *supra* note 7, at 105. “Virtually everyone agrees that the courts should be heavily involved in reviewing impediments to free speech, publication, and political association.”

189. Ely's discussion is not always clear. Perhaps Ely means to proffer an argument very much like Bork's. Perhaps he means to say that the value—“the democratic process”—was implicitly constitutionalized by the Framers to the extent that “the nature of the United States Constitution,” see *id.* at 88–101, established by the Framers presupposes and even ordains “the democratic process.” If that is indeed Ely's argument, then it is infirm for the same reasons that Bork's is infirm. See text accompanying notes 120–28 *supra*.

190. See Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1047 (1980).

Ely thinks that the society agrees that participation is the primary value; he criticizes natural law on the basis that society does not agree about anything to a degree substantial enough to enable one to rely upon social agreement as the basis for a theory. The empirical claim implicit in Ely's critique contradicts the one implicit in his theory, and the first empirical claim is more plausible.

nature of rights regarding speech, publication, and political association that individuals have against government.¹⁹¹ If there were a consensus as to the nature of speech, publication, and associational rights individuals ought to have, there would be, at least to that extent, a consensus as to the sort of democratic process that ought to prevail. But of course there is no consensus as to the nature of such rights and so, to that extent, no consensus as to "the democratic process."¹⁹² Indeed, if there were anything approaching a consensus as to what speech, publication, and associational rights individuals ought to have, the judiciary would likely have a severely diminished role in defining, and in striking down governmental action in the name of, such rights, because the consensus, if authentic, would presumably be reflected in most if not all legislative and executive action. What Ely overlooks is that the very same social and political fragmentation that prevents any consensus as to the various values the judiciary enforces in substantive due process cases also prevents consensus as to process. Mark Tushnet's comments to that effect are applicable here:

The realist synthesis . . . failed to answer the Holmesian challenge; it simply shifted the locus of the difficulty. Holmes had said that law could not be seen as the product or embodiment of neutral principles of justice because the fragmentation of society precluded agreement. The realist synthesis responded by propounding that process was all [that mattered]. But the absence of the social conditions for agreement on substance was simultaneously an absence of the conditions for agreement on process.¹⁹³

To forestall possible confusion, I want to emphasize what I am and am not claiming. My point is that in America—even in America—there is no authentic consensus as to the nature of the speech, publication, and associational rights individuals ought to have against government, and therefore, in *that* respect, no consensus as to process. But this is not to claim that there is no consensus as to process in any *respect*. Certainly there is a consensus, in part reflected in the Constitution, that the franchise ought to exist, even if there is some residual disagreement as to how broadly it ought to be extended.¹⁹⁴ There is also a consensus—at least I am willing to concede to

191. Cf. R. DAHL, A PREFACE TO DEMOCRATIC THEORY 59 (1956): "[T]he 'key prerequisites to political equality and popular sovereignty' are the right to vote, freedom of speech, freedom of assembly, and freedom of the press."

192. See, e.g., Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 26-27 (1978): [Most] of the people most of the time do not have a binding commitment to the open political process. I would surmise that at any given time an open political process is preferred only by a transient minority. All political parties, like all businesses, strive for monopoly; all interest groups try to drown out their opponents and very likely would seek to stifle them if not legally restrained; all branches and agencies of government seek ascendancy when confronted by opposition; and summary justice for deviants is probably favored by a clear majority.

193. Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1315 (1979).

194. As Ely reminds us: "Excluding the Eighteenth and Twenty-First Amendments—the latter repealed the former—[five of our last ten constitutional amendments] have extended the franchise to persons who had previously been denied it." ELY, *supra* note 7, at 7; see also *id.* at 98-99. Of course, to the extent a consensus as to a value is reflected in the Constitution, it is unnecessary to defend judicial enforcement of the value by reference to the consensus.

interpretivism the claim of a rough consensus—as to the principle of electorally accountable policymaking. All I mean to say at this point is that the particular consensus on which Ely seems to rely—consensus as to a certain sort of democratic process, one constituted in part by a particular conception of freedom of expression—is nonexistent. Ely's argument therefore fails.

But perhaps there is another way of understanding Ely's argument. Perhaps the argument Ely deploys does not rely, even implicitly, on any such consensus. Ely's argument would then be seriously incomplete. If there is no such consensus, by what right does the judiciary impose its particular conception of the ideally functioning democratic process on the political community—that is, by what right does the judiciary substitute its particular conception for the conception of the people's electorally accountable representatives? That is the essential question posed by interpretivism, and the question has very considerable force in light of the fact that *in most first amendment cases of consequence, the proper resolution of the dispute is debatable*. I do not deny that even a minimalist conception of democracy entails some notion of freedom of expression; at least I am not inclined to claim otherwise.¹⁹⁵ But that concession doesn't help Ely, because the representatives of the people aren't out to banish the ideal of freedom of expression from the land, after all; the disagreement is about what the ideal ought to mean, what content it ought to have, how it ought to be "interpreted." As modern, seminal first amendment cases illustrate, there is not just one reasonable conception of how the ideal of freedom of expression ought to operate, of precisely what content it ought to have. There are competing reasonable conceptions (and so Ely must explain why the electorally unaccountable judiciary's particular conception ought to prevail in a society committed to electorally accountable policymaking). The philosopher Thomas Scanlon puts the point well:

Most of us believe that freedom of expression is a right. . . . There is less agreement as to exactly how this right is to be understood—what limits and requirements on decision making authority are necessary and feasible as ways of protecting central participant and audience interests and insuring the required equity in the access to means of expression. . . . This disagreement is partly empirical—a disagreement about what is likely to happen if certain powers are or are not granted to governments. It is also in part a disagreement at the foundational level over the nature and importance of audience and participant interests and, especially, over what constitutes a sufficiently equal distribution of the means to their satisfaction.¹⁹⁶

195. See Dworkin, *Is the Press Losing the First Amendment?*, THE NEW YORK REVIEW, December 4, 1980, at 49, 53:

[James Madison] said that "a popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. . . . [A] people who mean to be their own governors must arm themselves with the power knowledge gives."

196. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 536 (1979). See also Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1113-16 (1979).

The only thing Ely says that could count as an answer to the “by what right” question is his claim that the “ins”—the incumbents—cannot be trusted to resolve first amendment issues impartially. They will, says Ely, resolve such issues in a manner designed to protect their incumbency. There are two problems with that claim. First, the resolution of many first amendment issues one way or another can have no real effect on any incumbent’s chances for reelection.¹⁹⁷ Thus, the fact that the political vision of a typical incumbent is often distorted by considerations of incumbency¹⁹⁸ is simply irrelevant to the resolution of many first amendment issues and certainly does not count as a reason for “trusting” the judiciary rather than incumbents with respect to such issues.

Second, even with respect to first amendment issues that do implicate an incumbent’s reelection chances, it is fanciful to suppose that incumbents would often protect their incumbency by conspiring to deny to the electorate access to that basic store of information and ideas essential to the evaluation of the main features of public policy and performance. It is difficult to imagine such a conspiracy in contemporary American political culture—and among incumbents who have, after all, mutually antagonistic interests.¹⁹⁹ At any rate, the supposition that such a conspiracy is lurking in the dark underside of American politics and would erupt, but for a vigilant judiciary, is simply too thin a predicate for a constitutional theory that seeks to justify noninterpretive review in first amendment cases.²⁰⁰

The fact of the matter—and it is a crucial fact—is that generally incumbents will, and do, resolve issues concerning freedom of expression the way their constituencies—and, in sum, electoral majorities—want them resolved.²⁰¹ Now, concededly that is a strategy designed to protect incumbency. But one searches in vain through Ely’s argument for a single reason why the people shouldn’t be able to choose, through their representatives,²⁰² their own

197. Examples of such issues include the protection to be afforded speech advocating conduct unlawful under a valid statute, *see, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the protection to be afforded pornography, *see, e.g.*, *Miller v. California*, 413 U.S. 15 (1973), or “vulgar” expression, *see, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971), and the protection to be afforded commercial speech, *see, e.g.*, *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976).

198. *See generally* D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

199. Recall that in the *Pentagon Papers Case*—*New York Times Co. v. United States*, 403 U.S. 713 (1971)—the Court did not order the Papers released, but merely refused to enjoin their publication.

200. *See* R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 143 (1956):

To assume that this country has remained democratic because of its Constitution seems to me an obvious reversal of the relation; it is much more plausible to suppose that the Constitution has remained because our society is essentially democratic. If the conditions necessary to polyarchy had not existed, no constitution intended to limit the powers of leaders would have survived. Perhaps a variety of constitutional forms could easily have been adapted to the changing social balance of power. It is worth emphasizing . . . that the constitutional system did not work when it finally encountered, in slavery, an issue that temporarily undermined some of the main prerequisites for polyarchy.

201. Or at least they generally do not resolve them in a way their constituencies do not want them resolved.

202. Certainly the electorally accountable representatives of the people are more likely than the electorally unaccountable federal judiciary to reflect the preferences of the people. *See* ELY, *supra* note 7, at 68: “[T]he theory that the legislature does not truly speak for the people’s values, but the [Supreme] Court does, is ludicrous.”

conception of the ideally functioning democratic process—in particular their own reasonable conception, among competing reasonable conceptions, of freedom of expression—however opposed to the judiciary's conception—or to Ely's, or to mine—that conception might be.²⁰³

The difficulty with the argument that courts should undertake to repair the defects of the democratic processes is that the demonstration of a defect usually consists in pointing to a law that the scholar in question would have vetoed had he been the governor. The process is not really shown to be defective; the result is simply disliked.²⁰⁴

One might try to argue that if the people, through their electorally accountable representatives, are permitted to choose their own conception of the democratic process—or, more narrowly, of freedom of expression—they (in spite of what I said a moment ago) *might* end up emasculating the process, and they simply can't be permitted to do that.²⁰⁵ The first problem with that argument is that in most first amendment cases, the stricken governmental action cannot plausibly be described as even a step towards emasculation of the democratic process. A more fundamental problem is that the argument—even *if* the deep skepticism on which it is predicated is not altogether unfounded—proves too much. The people have a legal right to choose their own

203. Cf. Dworkin, *Is the Press Losing the First Amendment?*, THE NEW YORK REVIEW, December 4, 1980, at 54:

The argument from the structure of democracy requires, by its own internal logic, some threshold line to be drawn between interpretations of the First Amendment that would protect and those that would invade democracy.

There is one evident, if difficult, way to draw that threshold line. It requires the Supreme Court to describe, in at least general terms, what manner of invasion of the powers of the press would so constrict the flow of information to the public as to leave the public unable intelligently to decide whether to overturn that limitation of the press by further legislation. The Court might decide, for example, that a general and arbitrary refusal of some agency of government to provide any information or opportunity for investigation to the press at all, so as to leave the public wholly uninformed whether the practices of that agency required further investigation, fell on the wrong side of that threshold. But it is extremely implausible to suppose that the public would be disabled in this dramatic way if the press were excluded from those few criminal trials in which the defendant requested such exclusion, the prosecution agreed to it, and the judge thought the interests of justice would on balance be served by it. The public of a state that adopted that practice would remain competent to decide whether it disapproved that arrangement and, if so, to outlaw it through the political process. So if Madison's argument from the structure of democracy is applied to particular cases through the idea of a threshold of public competence, [*Richmond Newspapers, Inc. v. Virginia*, 444 U.S. 896 (1980)] should have been decided the other way.

204. Bork, *The Consequences of Judicial Imperialism*, in THE ROLE OF THE JUDICIARY IN AMERICA (forthcoming 1981, American Enterprise Institute). See also White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the "Lessons" of History*, 63 JUDICATURE 162, 165 (1979):

Here one confronts the central dilemma for the intraprofessionalist argument. If one assumes that the Court should be constrained in the exercise of its lawmaking power and that the constraints should be "professionally" derived, and one seeks the derivation of those constraints in the text, history, and original purposes of the Constitution, how can one justify constraints that follow from a contemporary political interpretation of those purposes? In other words, what if an equally plausible or more plausible contemporary interpretation of the purposes of the Constitution can be put forth that would not justify judicial review of legislative malapportionment? Such an interpretation is, of course, relatively easy to advance. If the framers were so fundamentally dedicated to the principle of representativeness, why did they permit so many classes of persons to be denied the right to vote?

205. See Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173 (1956).

conception by adopting a constitutional amendment embodying it. They even have a legal right to abolish the first amendment by adopting a superseding amendment to that effect. Why, then, can't the electorally accountable representatives of the people choose their own conception in the ordinary course of governmental policymaking—so long as they do not contravene any value judgment constitutionalized by the Framers?

I hope I am not misunderstood. It's not that I think there is no answer to the interpretivist's "by what right" question. Rather, my point is simply that nothing Ely says amounts to an adequate answer, perhaps because he does not face the question. Instead he seems to rely on a (nonexistent) consensus that permits him to avoid the question; that is, he seems to take for granted that the particular conception of the democratic process the judiciary imposes on the political community—in the form of a particular conception of freedom of expression, which conception is a principal constituent of the judiciary's vision of the democratic process—is shared by that community. Thus, Ely writes that noninterpretive review in first amendment cases "is not inconsistent with, but on the contrary is entirely supportive of the American system of representative democracy."²⁰⁶ Such a statement implies that there is no real dispute as to what the precise character of "the American system of representative democracy" should be, in particular as to how the ideal of freedom of expression should be developed. Ely also writes that "it is an appropriate function of the Court to keep the machinery of democratic government running as it should."²⁰⁷ That he does not pause to ponder the fact, or the significance of the fact for his theory, that there is no consensus as to how that machinery "should" run is likely because he does not acknowledge the fact; indeed, he seems to posit a contrary fact—that there is a consensus.

If Ely were right, if there were a consensus, there would be no problem of judicial "imposition"; the judiciary would simply be enforcing the people's own conception of the democratic process.²⁰⁸ But there is no such consensus. And so—*whether or not* Ely does in fact rely or instead disclaims reliance on any such supposed consensus—the interpretivist's "by what right" question cannot be avoided:

The suggestion . . . that because First Amendment freedoms are indispensable to effective participation in the political process they therefore deserve special judicial protection, even beyond their clear constitutional scope, likewise begs the question why the Court should exercise independent judgment to enlarge First Amendment freedoms in accordance with the Court's determination of the desired relationship between those freedoms and the political process. After all, to the extent that First Amendment freedoms, or any other freedoms, *are* clearly protected constitutionally [*i.e.*, to the extent they are constitutionalized by the Framers], their judicial enforcement does not depend on the political process

206. ELY, *supra* note 7, at 102; *see also id.* at 88.

207. *Id.* at 76.

208. Of course, as I said a moment ago, if there really were a consensus, there would likely be little need for the judiciary to enforce it.

argument. . . . [T]o the extent that such freedoms are *not* clearly protected constitutionally [not constitutionalized by the Framers], the justification for judicial expansion, or contraction, of their scope depends on whether the Court is empowered to rewrite the Constitution in the service of judicially desired constitutional change.²⁰⁹

Either because it relies on a consensus that is nonexistent or because it fails to deal adequately with the very question that, in the absence of that consensus, must be addressed, Ely's argument does not justify noninterpretive review in first amendment cases. The theory that does succeed (in my view) in justifying noninterpretive review in first amendment cases also serves to justify a sort of noninterpretive review—in substantive due process cases—that many, including Ely, claim is illegitimate.

Let's now consider Ely's effort to justify constitutional policymaking by the judiciary with respect to the norm of equal protection. Just as Ely thinks there is a fundamental difference between noninterpretive review in substantive due process cases, which Ely claims is illegitimate, and noninterpretive review in first amendment cases, he also thinks there is a fundamental difference—indeed, largely the same difference—between noninterpretive review in substantive due process cases and that in equal protection cases. According to Ely, noninterpretive review in equal protection cases, like that in first amendment cases, consists of judicial policymaking aimed at maintaining the process of democratic government. While in first amendment cases the judiciary maintains the democratic process, in Ely's view, by defining and protecting speech, publication, and associational rights and thereby assuring persons "the opportunity to participate . . . in the political processes by which values are appropriately identified and accommodated,"²¹⁰ in equal protection cases the judiciary maintains the democratic process by acting to insure that persons belonging to certain minorities—in particular racial minorities—are not denied "the opportunity to participate . . . in the accommodation those processes have reached"²¹¹—not denied, that is, "access to the . . . bounty of representative government," where "bounty" refers to "exemptions or immunities from hurts (punishments, taxes, regulations, and so forth) along with benefits . . . , [the] patterns of distribution generally."²¹²

Ely recognizes the anomaly—in Ely's view, only an apparent anomaly—of claiming that the judiciary is merely acting to maintain the democratic process when it compels the majority to grant to a minority some benefit the majority has chosen to deny to that minority (or when it compels the majority to refrain from imposing on a minority some burden the majority has chosen to impose only on that minority). "[A] system of equal participation in the processes of government is by no means self-evidently linked to a system of

209. S. GABIN, JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST 76-77 (1980).

210. ELY, *supra* note 7, at 77.

211. *Id.*

212. *Id.* at 74 & n.*.

presumptively equal participation in the benefits and costs that process generates."²¹³ But Ely proposes

to suggest a way in which what are sometimes characterized as two conflicting American ideals—the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other—in fact can be understood as arising from a common duty of representation.²¹⁴

He proposes to show, that is, how the judicial enterprises of, first, “clearing the channels of political change” and, second, “correcting certain kinds of discrimination against minorities” are predicated on “a coherent theory of representative government”²¹⁵—how, in other words, “these two sorts of participation [in the processes of government and in the benefits and costs those processes generate] join together in a coherent political theory.”²¹⁶

Ely’s way around the conflict is what he calls “the . . . concept of ‘virtual representation.’”²¹⁷ Governmental officials can get by without representing the interests of persons belonging to minorities that chronically have little if any political power—minorities, that is, unable to form effective political alliances with other groups and therefore unable to become part of those shifting majorities that wield power in a pluralist democracy—because as a *practical* matter those officials are not electorally accountable to such persons. Ely’s concept of virtual representation is designed to overcome this perceived defect in political reality by requiring officials to grant benefits, which are granted to other persons, to persons with little political power, and to refrain from imposing burdens, which are not imposed on other persons, on persons with little political power, unless there is a constitutionally sufficient reason—*i.e.*, a reason the judiciary is willing to credit as legitimate and adequately weighty—for doing otherwise.²¹⁸ “[A]t least in some situations,” says Ely, “judicial intervention becomes appropriate when the existing processes of representation seem inadequately fitted to the representation of minority interests, even minority interests that are not voteless.”²¹⁹ I am not interested, for present purposes, in Ely’s problematic efforts to articulate criteria

213. *Id.* at 77. See note 218 *infra*. The other principal way the judiciary assures persons equal participation in the process of government—the way other than by defining and protecting first amendment rights, that is—is by defining and protecting voting rights. See ELY, *supra* note 7, at 116–25. By “equal” participation in the process of government, Ely does not mean equal political clout, of course, but equal legal rights—*i.e.*, the same legal rights others have—to speak one’s mind, cast a vote, and the like.

214. *Id.* at 86–87.

215. *Id.* at 74.

216. *Id.* at 77.

217. *Id.* at 82.

218. See *id.* at 82:

[The concept of virtual representation] cannot mean that groups that constitute minorities of the population can never be treated less favorably than the rest, but it does preclude a refusal to *represent* them, the denial to minorities of what Professor Dworkin has called “equal concern and respect in the design and administration of the political institutions that govern them.”

Quoting R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977). Ely underscores the fact that constitutionally sufficient reasons can justify denials of equal participation in particular payoffs by terming the right to equal participation “presumptive.” ELY, *supra* note 7, at 77.

219. *Id.* at 86.

for determining which minorities today chronically lack sufficient political power to justify, under his theory, judicial protection of their interests against the insensitivity or animus of electorally accountable policymakers.²²⁰ I am interested in whether the concept of virtual representation that Ely posits succeeds in justifying noninterpretive review in equal protection cases.

The concept of virtual representation—or, looked at from the other side, the presumptive right to equal participation in the payoffs generated by the democratic process—may make good sense on political-moral grounds. But clearly it is not a concept that the Framers constitutionalized.²²¹ Nor, of course, is there any societal consensus as to the concept.²²² By what right, then, does the judiciary constitutionalize the concept? That, again, is the interpretivist's essential question and challenge. Ely seems at points to claim that the concept is simply an aspect of the larger concept of "representation" implicit in the notion of "the democratic process." For example, Ely writes that judicial enforcement of virtual representation—what he calls "a representation-reinforcing approach to judicial review"—"is not inconsistent with, but on the contrary . . . entirely supportive of, the underlying premises of the American system of representative democracy."²²³ He also suggests that the concept has "been at the core of our Constitution from the beginning," that it "has informed our constitutional thinking from the beginning,"²²⁴ that it "lies at the core of our system [of government]."²²⁵

If in fact that, or something like it, is Ely's claim, it fails on two grounds. First, even if the concept of virtual representation is somehow implicit in Ely's particular vision of the democratic process, that alone would hardly justify judicial enforcement of the concept in constitutional cases, for Ely's particular vision of the democratic process is not one the Framers constitutionalized, or one as to which there is any consensus.²²⁶ Second, and more fundamentally, far from being implicit in the notion—or at least in any conventional notion—of the democratic process, the concept of virtual representation is plainly in tension with it. In rejecting Ely's various efforts to justify "representation-reinforcement as a value that courts are entitled to

220. Compare *id.* at 145–70 with Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3 (1981); Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981).

221. I do not take issue with Ely's interesting suggestion that something like the concept of virtual representation is implicit in certain constitutional provisions, such as the privileges or immunities clause of article IV or the commerce clause, U.S. CONST. art I, § 8, cl. 3, which were designed, at least in part, to curtail parochial state legislation discriminating against "geographical outsiders." See ELY, *supra* note 7, at 82–84. But it is clear that the particular concept of virtual representation Ely espouses, designed to prevent unjustified discrimination by a state against certain of its voting "insiders," is not one the Framers constitutionalized. And Ely does not claim otherwise. If the Framers had constitutionalized the concept, judicial enforcement of it would constitute interpretive review; Ely recognizes that judicial enforcement of the concept is a species of constitutional policymaking, and he seeks to justify it as such.

222. See note 193 and accompanying text *supra*.

223. ELY, *supra* note 7, at 88.

224. *Id.* at 82.

225. *Id.* at 135.

226. See text accompanying notes 190–93 *supra*.

press beyond that representation provided by the written Constitution and statutes,²²⁷ Robert Bork, our exemplary interpretivist, has written:

It would not do to derive the legitimacy of representation-reinforcement from such materials as, for example, the one-man-one-vote cases because those cases themselves require justification and cannot be taken to support the principle advanced to support them. Nor would it do to rest the concept of representation-reinforcement on the American history of steadily expanding suffrage. That expansion was accomplished politically, and the existence of a political trend cannot of itself give the Court a warrant to carry the trend beyond its own limits. How far the people decide not to go is as important as how far they do go.

The idea of representation-reinforcement, therefore, is internally contradictory. As a concept it tends to devour itself. It calls upon the judiciary to deny representation to those who have voted in a particular way to enhance the representation of others. Thus, what is reinforced is less democratic representation than judicial power and the trend toward redistribution of goods.²²⁸

Of course, it is possible to define "the democratic process" prescriptively—which is precisely what Ely has done—so as to encompass the concept of virtual representation. But to do that is to try to win the argument by an act of definition—a vain strategy when the definition is one as to which there is nothing approaching a consensus.²²⁹ A less loaded definition of the democratic process—one that tends to be more descriptive than prescriptive—will include as one of its key elements the feature that policymaking, which may or may not be constrained by a constitution,²³⁰ is subject to control by officials accountable, directly or indirectly, to the electorate. (Granted, this element calls into question whether the American political system is wholly democratic, given the prevalence of constitutional policymaking by the judiciary.) Consequently, the concept of virtual representation, because it was not constitutionalized by the Framers,²³¹ is in tension with the notion of the democratic process. Under the concept, as Ely elaborates it, the Supreme Court has authority to require governmental officials to grant benefits to persons to whom they do not want to grant them, and to refrain from imposing burdens on persons on whom they want to impose them, unless the officials can persuade the Court to let them do otherwise. In short, policymaking is partly in the hands of an institution of government that by design is not electorally accountable. The tension has been highlighted by Robert Cover in his discussion of judicial protection of minorities in the period from 1938 to 1965.²³² "[D]evelopments after 1938," says Cover, "were surely informed by the tension between respect for the structures of [American] politics and

227. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695, 698.

228. *Id.* at 698-99.

229. See note 2 *supra*.

230. Constrained that is, by a set of value judgments deemed for whatever reasons to have the status of "supreme law."

231. See note 221 *supra*.

232. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, in *THE ROLE OF THE JUDICIARY IN AMERICA* (forthcoming 1981, American Enterprise Institute).

protection for minorities.”²³³ The duty of virtual representation is a strategem for protecting minorities from the vagaries of a “majoritarian” political process, but protecting racial minorities (Cover’s particular focus) “can hardly be understood purely as a neutral regulation of the political processes when the processes are mainly about the maintenance of Apartheid.”²³⁴

Again, I am not saying that the concept of virtual representation is a bad thing, or that the judiciary ought never to engage in constitutional policymaking. The whole point of the work of which this Article is a part is to justify some constitutional policymaking by the judiciary (noninterpretive review), including that in equal protection cases. I mean only to say that the concept of virtual representation is in tension with the notion of democratic process—in particular with the principle of electorally accountable policymaking—and thus the interpretivist’s question cannot be ignored: By what right does the judiciary impose the concept of virtual representation—the presumptive right to equal participation in the payoffs generated by the democratic political process—on electorally accountable officials? Here, as in his discussion of noninterpretive review in first amendment cases, Ely points to the fact that “[a]ppointed judges . . . are comparative outsiders in our governmental system, and need worry about continuance in office only very obliquely.” This, says Ely, puts them in a better position than electorally accountable officials, in particular legislators, “objectively to assess claims . . . that . . . by acting as accessories to simple majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are.”²³⁵ I wonder what marvelous “system” it is that “presupposes” that elected officials attend to the interests of all persons, and not merely to the interests of the persons whose support they need to continue in office. If there were an actual consensus—as opposed to a rhetorical tradition²³⁶—supporting the proposition that the American political system ought to be such a system, judicial enforcement of the concept of virtual representation could be defended as enforcement of that consensus. But Ely does not claim, much less offer evidence to the effect that, there is any such consensus, and in fact there is none.²³⁷

The fundamental problem with Ely’s contention that elected representatives cannot be trusted to resolve impartially equal protection claims—claims that a benefit or a burden ought to be extended more widely or not at all—is that generally they will, and do, resolve such claims the way their constituencies want them resolved. And except for pointing to the possibility of “majority tyranny,” Ely says nothing in response to the interpretivist’s contention that those constituencies should be able, and under “democratic” principles are entitled, to resolve such claims the way they want—Ely concedes that the

233. *Id.*

234. *Id.*

235. ELY, *supra* note 7 at 103. See *id.* at 88, 102-03.

236. Which, like most such traditions, reflects not a consensus but the rhetoric of political “elites.”

237. Again, if there were such a consensus, there would likely be little need for the judiciary to enforce it.

proper resolution of such claims will “be full of judgment calls”²³⁸—constrained only by value judgments constitutionalized by the Framers. Constrained, that is, by interpretive review—judicial enforcement of the Framers’ value judgments—not by noninterpretive review, which, as Ely acknowledges, is what judicial enforcement of virtual representation amounts to. Let Robert Bork make the point.

Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor the minority can be trusted to define the freedom of the other. This dilemma is resolved in constitutional theory, and in popular understanding, by the Supreme Court’s power to define both majority and minority freedom through the interpretation of the Constitution. Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, placed beyond the reach of majorities by, the Constitution.²³⁹

“But,” continues Bork, “this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court’s power is legitimate only if it” enforces the Framers’ value judgments as to the proper “spheres of majority and minority freedom. If [the Court] . . . merely imposes its own value choices, . . . [i]t then necessarily abets the tyranny either of the majority or of the minority.”²⁴⁰

But what about the ugly possibility—indeed, if the past really is prologue, the probability—to which Ely points: that, occasionally at least, majorities will victimize chronically powerless minorities? There is, after all, much that majorities can do to minorities that is not offensive to any value judgment that the Framers constitutionalized. The Constitution established by the Framers does not ordain a perfectly just political order. (Recall, for example, that the 1789 Constitution accommodated slavery. And the institution of racial segregation, as we’ve seen, is not offensive to any value judgment that the Framers of the fourteenth amendment constitutionalized.) Ely’s basic argument—the only thing he has to say that can serve as a response to the “by what right” question—is that it is somehow *fairer* to have politically disinterested judges resolve equal protection claims of majority tyranny than to have legislators—in effect the majority itself—resolve them. Thus, the subtitle of the chapter in which Ely elaborates the concept of virtual representation is “The Court as Referee.”²⁴¹ He writes: “[A] referee analogy is . . . not far off: the referee is to intervene . . . when one team is gaining unfair advantage.”²⁴²

But this elementary notion of “fairness,” of impartial, disinterested conflict resolution, is not adequate to the justificatory task Ely and others assign it. Consider Terrance Sandalow’s argument to that effect:

238. *Id.* at 103.

239. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 3 (1971).

240. *Id.*

241. ELY, *supra* note 7, at 73.

242. *Id.* at 103.

Prevailing ideas of fairness . . . do not call for impartial decisions when rules are to be legislated. . . . No one supposes, for example, that fairness requires courts to substitute their judgments for those of legislatures with respect to tax rates for the wealthy, the level of welfare payments for the poor, or the content of regulations imposed upon milk producers in the interest of consumers. Such issues, it is commonly understood, are to be resolved through the political process, and that is so even though there is a risk that the majority will not fully appreciate the costs that are imposed upon the minority. . . .

As a nation, we are committed to the idea that government, to be ethically defensible, requires the consent of the governed. . . . Since pre-Revolutionary times, the active and continuous participation of the governed in their government, either directly or by representation, government "of" and "by" the people, has been understood to be central to the democratic ideal. Courts not only are unable to draw upon this source of legitimacy, but in setting their judgment against that of the legislature, they oppose the very agency of government that is most clearly entitled to do so.²⁴³

Ely does not adequately grapple with the sort of argument Professors Bork and Sandalow develop, and therefore Ely's effort to justify noninterpretive review in equal protection cases is seriously incomplete and, on that score alone, unsuccessful.²⁴⁴

Ely's effort to justify the species of noninterpretive review he finds congenial, "participational" review—his effort to establish that constitutional policymaking in both freedom of expression and equal protection cases is not inconsistent with our societal commitment to democratic government—is not persuasive. And it is not persuasive mainly because it relies on a sleight of hand: Ely conceptualizes "the democratic process," with which (he argues) participational review is consistent, in a self-serving way. Seeming to rely on some (imagined) consensus, he builds into his conception of the democratic process those features that will permit him to conclude that participational review "is not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy."²⁴⁵ In that crucial respect, Ely's constitutional theory—his limited noninterpretivist theory—is quite circular. More generally—and here I quote Larry Alexander's artful paraphrase of my critique of Ely—"Ely fails to justify the imposition of his implied-from-the-Constitution conception of democracy against the will of the

243. Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1177-78 (1977).

244. His effort to justify noninterpretive review in procedural due process cases, in terms of "fairness," is similarly unsuccessful. Compare ELY, *supra* note 7, at 21 ("what procedures are needed fairly to make what decisions are the sorts of questions lawyers and judges are good at") with *id.* at 102 ("Lawyers are experts on process writ small, the processes by which the facts are found and contending parties are allowed to present their claims. . . . And of course many legislators are lawyers themselves."). Cf. CHOPER, *supra* note 3, at 72-73: "[T]he Court's constitutional reappraisal of those popularly sponsored policies that arguably endanger one cluster of plainly articulated personal liberties, those that involve the administration of justice . . . , may be independently justified as being of intrinsic and intimate concern to the functioning of the judicial department itself."

245. ELY, *supra* note 7, at 102. Cf. note 2 *supra*.

branches that are constituted according to an expressed-in-the-Constitution conception of democracy. . . .”²⁴⁶ I cannot see how to avoid concluding that Ely has failed to defend, against the claims of interpretivism, what he set out to defend.²⁴⁷

246. Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 44 (1981).

247. Elsewhere in the work of which this Article is a part, I expect to show that Ely, moreover, has failed to justify a distinction critical to his entire enterprise—the distinction between “participational” review on the one hand, and “substantive” review on the other. The distinction, though seductive, is illusory. Or perhaps I should say (if it makes a difference) that the distinction is not consequential. For the constitutional theory that justifies—if indeed any constitutional theory finally justifies—noninterpretive review under “participational” norms like freedom of expression and equal protection, also serves to justify noninterpretive review under the “nonparticipational” political-moral norms that inform, for example, modern constitutional doctrine regarding substantive due process. A corollary, of the you-can’t-have-your-cake-and-eat-it-too variety, is that one cannot do what Ely has tried to do—praise the judiciary’s constitutional policymaking with respect to participational norms while at the same time condemning it with respect to all other, nonparticipational norms. But that’s another story.

