

THE FORUM OF PRINCIPLE

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Professor Dworkin confronts the question whether it is possible for judges to decide constitutional cases without themselves making substantive political decisions. He addresses the two possible ways it has been suggested that judges can do so. The first suggestion is that judges decide constitutional issues by following the original intent of the Framers of the Constitution. The second is that judges should review not the fairness of substantive decisions by the legislature, but the fairness of the process by which those decisions are made. Professor Dworkin argues that both of these positions fail; judges can decide neither the intention of the Framers nor whether process is fair without making substantive political decisions.

I

TWO MISCHIEVOUS IDEAS

The Constitution is the fundamental law of the United States, and judges must enforce the law. On that simple and strong argument John Marshall built the institution of judicial review of legislation,¹ an institution that is at once the pride and the enigma of American jurisprudence. The puzzle lies in this. Everyone agrees that the Constitution forbids certain forms of legislation to Congress and the state legislatures. But neither Supreme Court justices nor constitutional law experts nor ordinary citizens can agree about just what it does forbid, and the disagreement is most severe when the legislation in question is politically most controversial and divisive.² It therefore appears that these justices exercise a veto over the politics of the nation, forbidding the people to reach decisions which they, a tiny number of appointees for life, think wrong. How can this be reconciled with democracy? But what is the alternative, except abdicating the power Marshall declared? That power is now so fixed in our constitutional system that abdication would be more destructive of consensus, more a defeat for cultivated expectation, than simply going on as before. We seem caught in a dilemma defined by the contradiction between democracy and ancient, fundamental, and uncertain law, each of which is central to our sense of our traditions. What is to be done?

There may be a way out. We escape the dilemma if we can construct an apolitical program for deciding constitutional cases. A

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¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-79 (1803).

² See, e.g., J. Choper, *Judicial Review and the National Political Process* 4-12 (1980) (rehearsing the controversy).

program that allows judges to decide, for example, whether statutes imposing a minimum wage³ or forbidding abortion⁴ are constitutional without deciding for themselves whether minimum wage statutes are unfair or whether laws prohibiting abortion invade fundamental moral or political rights. But how can judges decide such cases apolitically if the text of the Constitution is not itself decisive? Two ideas are now prominent. One has been familiar for a long time, and though its appeal has waxed and waned, it has attracted a new generation of enthusiasts. This is the idea of a constitutional *intention*—often called the “original” intention or the intention of the “Framers” of the Constitution. Suppose judges can discover how the Framers intended the uncertain provisions of the Constitution to be understood. If judges follow that original intention, they would not be making substantive choices themselves but only enforcing choices made long ago by others, choices that have been given authority by the people’s ratification and acceptance of the Constitution.

The second strategy also has a long history, but it was given new life and direction in a famous footnote by Justice Harlan Stone⁵ and now, again, in an interesting book by Professor John Ely.⁶ This strategy relies not on the idea of an original intention, but rather on a sharp distinction between matters of substance and matters of process. Suppose judges take up the assignment not of reviewing the fairness or justice of substantive decisions made by those officials who enacted the statutes under review, but only of protecting the fairness of the process through which these statutes were made. Of course reasonable people can disagree whether particular processes are fair. But judges who follow their own convictions about the fairness of process will at least not be trespassing on substantive decisions. In any case, judicial review of the political process only polices democracy; it does not seek to override it as judicial review of substance does.

These are two ways of fleeing from substance in constitutional decisions. My point, in this Article, is that both ways end in failure, and in the same sort of failure. Judges cannot decide what the pertinent intention of the Framers was, or which political process is really fair or democratic, unless they make substantive political decisions of just the sort the proponents of intention or process think judges should not make. Intention and process are mischievous ideas because they

³ See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding Washington’s minimum wage law for women), overruling *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923).

⁴ See *Roe v. Wade*, 410 U.S. 113 (1973) (Texas criminal abortion statute held unconstitutional).

⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see text accompanying notes 67-68 *infra*.

⁶ J. Ely, *Democracy and Distrust* (1980).

cover up these substantive decisions with procedural piety, and pretend they have not been made. The old bodies are now buried here.

II

INTENTION

A. Interpretation and Constitutional Law

Before I begin my defense of these claims, however, I must raise a preliminary issue, in order to avoid a certain confusion. It has become common to distinguish "interpretive" from "noninterpretive" theories of judicial review.⁷ Interpretive theories (according to this distinction) argue that judicial review of legislative decisions must be based on an interpretation of the Constitution itself. This might be a matter of construing the text, or determining the intention of the "Framers," or, more plausibly, some combination of both. Noninterpretive theories are said to suppose, on the contrary, that the Court is at least sometimes justified in holding legislative decisions to standards taken from some source other than the text, like popular morality, or sound theories of justice, or some conception of genuine democracy.⁸

The putative distinction between these two types of theory provides not only a scheme of classification for theories of judicial review but also a scheme for argument about such theories. Constitutional lawyers write papers in which it is proposed, for example, that no noninterpretive theory is consistent with democracy.⁹ Or that any noninterpretive theory must rest on a doctrine of natural law and so must be rejected.¹⁰ Or that no interpretive theory can be correct, or adequate to sustain what almost everyone agrees are proper Supreme

⁷ See, e.g., *id.* at 1; Grey, *Do We Have An Unwritten Constitution?*, 27 *Stan. L. Rev.* 703, 703 (1975); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 *Ohio St. L.J.* 261, 263-65 (1981) [hereinafter Perry, *Interpretivism*]. Though these particular phrases are common, others are used. Professor Brest, for example, speaks of "originalism" and "nonoriginalism," meaning to distinguish "originalist" theories from theories that are interpretivist in some sense not involving interpretation of the original text. See Brest, *The Misconceived Quest For The Original Understanding*, 60 *B.U.L. Rev.* 204, 204-05 (1980). The discussion in the text applies to this distinction as well.

⁸ See J. Ely, *supra* note 6, at 43-72 (providing a critical compendium of these nontextual standards).

⁹ See, e.g., Berger, *Ely's "Theory of Judicial Review,"* 42 *Ohio St. L.J.* 87, 120-21 (1981); Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 6 (1971) [hereinafter Bork, *Neutral Principles*].

¹⁰ See R. Berger, *Government By Judiciary* 249-58, 387-96 (1977) (Framers did not intend for natural law to empower judges to rise above positive limitations of Constitution); Perry, *Interpretivism*, *supra* note 7, at 267-70 (Framers did not constitutionalize natural law).

Court decisions,¹¹ like the major decisions holding racial segregation in education unconstitutional.¹² In this way constitutional theories are studied and rejected at wholesale.

It is, of course, natural to look for schemes of classification that provide argumentative strategies. But this scheme is a poor one, for the following reason. Any recognizable theory of judicial review is interpretive in the sense that it aims to provide an interpretation of the Constitution as an original, foundational legal document, and also aims to integrate the Constitution into our constitutional and legal practice as a whole. No one proposes judicial review as if on a clean slate. Each theory claims to provide the most illuminating account of what our actual constitutional tradition, taken as a whole, really "comes to"—of the "point" or "best justification" of the constitutional system that has in fact been developed in our own legal history. Each draws, from its interpretation of that system, a particular view of how best to interpret the Constitution as an original text. So the thesis, that a useful distinction can be made between theories that insist on and those that reject interpretation, either of the Constitution as a particular document or of our constitutional system as a whole, is more confusing than helpful.

The theories that are generally classed as "noninterpretive"—those that strike us as most activist or most liberated from the actual text of the Constitution—are plainly interpretivist in any plausible sense. They disregard neither the text of the Constitution nor the motives of those who made it; rather they seek to place these in the proper context. "Noninterpretive" theorists argue that the commitment of our legal community to this particular document, with these provisions enacted by people with those motives, presupposes a *prior* commitment to certain principles of political justice which, if we are to act responsibly, must therefore be reflected in the way the Constitution is read and enforced. That is the antithesis of a clean slate argument, and a paradigm of the method of interpretation. It disregards neither text nor original intention, but rather proposes a theory to teach us how to discover what the former means and what the latter is.

Indeed, it might seem that the theories most often called "interpretive"—the theories that strike us as most bound to the text of

¹¹ See, e.g., Grey, *supra* note 7, at 707-10, 718; Perry, *Interpretivism*, *supra* note 7, at 265, 296-97, 300; Sandalow, *Judicial Protection of Minorities*, 75 *Mich. L. Rev.* 1162, 1179-81, 1193 (1977).

¹² *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

the Constitution considered in isolation—are more likely to turn out to be noninterpretive in this broad sense. For they appear to pay very little attention to questions about the “point” of having a constitution or why the Constitution is the fundamental law.¹³ They seem to begin (and end) with the Constitution itself and suppose that constitutional theory need make no assumptions not drawn from within the “four corners” of that document. But this appearance is misleading. For “text-bound” theorists suppose that their disagreement with “non-interpretive” theories is a genuine disagreement. They suppose that they are right and that their opponents are wrong about how Supreme Court justices should go about judicial review. They therefore must have (or in any case acknowledge the desirability of having) reasons supporting their “four corners” theory. But these reasons cannot themselves be drawn from the text considered in isolation; that would beg the question. They must be taken from or defended as principles of political morality which in some way represent the upshot or point of constitutional practice more broadly conceived.

It is worth pursuing this point, because the alleged distinction between interpretive and noninterpretive theories is so popular. We might sharpen the issue by asking what reason a text-bound theorist would have for opposing a plainly outrageous example of what he detests. Suppose the Court held that the Senate was illegal, despite the clear provisions of the constitutional text as amended,¹⁴ because it is unrepresentative and therefore inconsistent with principles of democracy which must be assumed in order to give the Constitution any legitimacy at all. On what non-question-begging theory might the text-bound theorist object to that decision? He might say that the people would not accept such a decision. But this is not absolutely clear, and in any case he thinks the decision would be wrong even if it were (grudgingly) accepted in the end. But why?

A “textualist” cannot say simply that it was the intention of those who wrote and ratified and accepted the Constitution that it be the highest law; still less that the Constitution itself so provides. For the question at issue is the force of the Constitution, and therefore the relevance of the intentions it might be said to embody. Begin at the beginning. A group of people met in Philadelphia and there wrote a

¹³ “The authoritative status of the written constitution is . . . an incontestable first principle for theorizing about American constitutional law. . . . [T]he binding quality of the constitutional text is itself incapable of and not in need of further demonstration.” Monaghan, *Our Perfect Constitution*, 56 N.Y.U.L. Rev. 353, 383-84 (1981) [hereinafter Monaghan, *Perfect*].

¹⁴ U.S. Const., art. I, § 3; U.S. Const. amend. XVII.

document, which was accepted by the people in accordance with the procedures stipulated in the document itself, and has continued to be accepted by them in the way and to the extent that it has. If this makes that document law, it can only be because we accept principles of political morality having that consequence. But these principles might not only establish the Constitution as law but limit it as well. We cannot tell whether these principles do have this consequence, of course, until we decide what these principles are. Any answer to that question must take the form of a political theory showing why the Constitution should be treated as law, and certain plausible political theories at least raise the question whether the document must be limited in some way.

Suppose the textualist proposes, as the relevant theory, that legitimate government must enjoy the consent of the governed. This is a notoriously ambiguous proposition, and even the mythical decision holding the Senate illegal might be justified by some version of it. Someone supporting that decision might argue, for example, that the requisite consent must be more widespread than that gathered in the original ratification process, that it must, in any case, be contemporary, that it is far from clear that the unrepresentative Senate enjoys such consent, and that the availability of the amending process, particularly given the role of the Senate in the most feasible process,¹⁵ is no answer. This is not a silly argument; in any case it is not as silly as the mythical decision would be, and so we cannot explain our sense of the latter's absurdity by supposing that this interpretation of the consent of the governed is itself absurd.

Could the advocate of the "text" do better by appealing, not to political theory, but to the concept of law? None of the standing philosophical theories of law supplies the necessary arguments. Not even positivist theories, which seem the most likely. Neither Bentham's¹⁶ nor Austin's¹⁷ theory of positivism will do. Nor even Kelsen's.¹⁸ Each has the consequence that if the Court's decision were accepted, this would show that the Court was sovereign. Hart's version of positivism might seem more promising.¹⁹ But in fact Hart's theory suggests that, since the Constitution was immediately accepted as law in virtue of the process of ratification, there must have been a

¹⁵ Constitutional amendments can be proposed by a two-thirds vote of both houses of Congress. U.S. Const., art. V.

¹⁶ See J. Bentham, *Of Laws In General* (H.L.A. Hart ed. 1970).

¹⁷ See J. Austin, *The Province of Jurisprudence Determined* 9-33 (London 1832).

¹⁸ See H. Kelsen, *Pure Theory of Law* 193-95 (2d rev. ed. 1967).

¹⁹ See H.L.A. Hart, *The Concept of Law* (1961).

rule of recognition—a generally accepted theory of the process through which legislation becomes law—in virtue of which the Constitution became law.²⁰ But that rule is precisely the idea of a law behind the law to which the mythical decision appealed.

But I am wandering from my point. If the text-bound theorist appeals to some set of political principles as the principles truly embedded in the American tradition, in order to justify his reliance on the “four corners” of the Constitution, his theory becomes explicitly interpretive in the broad sense now in use. But this is also true if he appeals to a theory of law, because any theory of law is an interpretation, in this broad sense, of a social practice even more complex than, and including, constitutional practice. Any claim about the place the Constitution occupies in our legal structure must therefore be based on an interpretation of legal practice in general, not of the Constitution in some way isolated from that general practice. Those scholars who say they simply start from the premise that the Constitution is law²¹ underestimate the complexity of their own theories.²²

All this stinks of the lamp, of course. Not because it is silly or academic, but because it is so obvious. We do not doubt that the Constitution is fundamental law, at least in the sense that its plain provisions (like the provisions for the election of Senators) are immune from challenge on legal grounds. But this is because, at least at this late date, no plausible interpretation of our legal practice as a whole could deny it. Something like the mythical decision would have been somewhat more plausible at the beginning. (Just as *Marbury v. Madison*, plausible at the time, would have been implausible if it had not been decided until a century later.) The mythical decision is absurd now because its interpretation of legal practice is now absurd. The idea of the Constitution as fundamental law is so cemented into the common assumptions that constitute our legal order that an interpretation which denies it would be an interpretation of something else altogether, like an interpretation of architectural styles according to which Chartres turned out not to be Gothic, or an interpretation of Hamlet that ignored the Prince.

It will now be said, however, that even though all constitutional theories are interpretive in the broad sense I have been using, there is nevertheless an important distinction between those theories which interpret constitutional practice in such a way as to make the inten-

²⁰ See *id.* at 97-104.

²¹ See note 13 *supra*.

²² See Commentary, 56 N.Y.U.L. Rev. 525, 536 (1981) (remarks of Prof. Sager).

tion of the Framers of the Constitution decisive and those which do not. Some theories (the argument would run) hold that the best interpretation of our legal practice as a whole requires that legislative decisions be overturned by the Court only when it was the intention of the Framers that this should be done; while other theories believe, to the contrary, that the best interpretation permits Court intervention even when that was not the intention of the Framers. But we cannot tell whether this distinction is important,²³ or even what it means, unless we achieve a better idea of what sort of thing the intention of the Framers is.

B. The Framers' Intention

“It is often problematical what a particular congressman or delegate to a constitutional convention intended in voting for a particular constitutional provision, especially one of the vaguer provisions, like the equal protection or due process clause. Indeed, a particular delegate might have had no intention at all on a certain issue, or his intention might have been indeterminate. The difficulties obviously increase when we try to identify the intention of Congress or a constitutional convention as a whole, because that is a matter of combining individual intentions into some overall group intention. Even when each congressman or delegate has a determinate and ascertainable intention, the intention of the group might still be indeterminate, because there may not be enough delegates holding any particular intention to make it the intention of the institution as a whole.”

This much is common ground between the rival schools on constitutional intention. They continue the argument in different ways. One side argues that in spite of the difficulties every effort must be made, with the resources of history and analysis, to discover what the collective intention of the constitutional Framers was on disputed matters of interpretation.²⁴ They believe that dogged historical study indeed will reveal important and relevant original intentions. The effort is important in any case because, according to this school, judges can avoid making the substantive decisions that threaten democracy only by identifying the original constitutional intention in this way. The other side argues that any effort to discover the original

²³ See text accompanying note 63 *infra*.

²⁴ See, e.g., Berger, *supra* note 9 (recapitulating the “interpretivist” theme of R. Berger, *Government By Judiciary* (1977)); Bork, *Neutral Principles*, *supra* note 9, at 14; Monaghan, *The Constitution Goes To Harvard*, 13 *Harv. C.R.-C.L.L. Rev.* 117, 124-28 (1978).

collective intention of the Framers will turn out to be fruitless, or even perverse. It will end in the discovery that there are no, or very few, relevant collective intentions, or perhaps only collective intentions that are indeterminate rather than decisive one way or another, or perhaps intentions so contrary to our present sense of justice that they must in the end be rejected as a guide to the present Constitution.²⁵

Both sides to this debate suppose that the intention of the Framers, if it exists at all, is some complex psychological fact locked in history waiting to be winkled out from old pamphlets and letters and proceedings. But this is a serious common mistake, because there is no such thing as the intention of the Framers waiting to be discovered, even in principle. There is only some such thing waiting to be invented.

I shall begin my defense of this strong claim by setting out my understanding of how the concept of a "constitutional" intention actually functions in contemporary legal practice. We share the assumptions that when controversy breaks out whether the equal protection clause forbids segregated schools, for example, then it is relevant to ask about the purposes or beliefs that were in some sense "in the mind" of some group of people who were in some manner connected with the adoption of the fourteenth amendment, because these beliefs and purposes should be influential in some way in deciding what force the equal protection clause now has. We agree on that general proposition, and this agreement gives us what we might call the *concept* of a constitutional intention. But we disagree about how the blanks in the proposition should be filled in. We disagree in which sense some purpose must have been in the minds of particular people, in which sense these people must have been connected with the adoption of the constitutional provision, and so forth.

Different *conceptions* of constitutional intention give different answers to these questions. Professor Brest's idea, that a group intention is the product of the "intention votes" of the members of the group,²⁶ is (part of) one such conception. The idea of a "collective understanding," which I discussed in an earlier article,²⁷ could be

²⁵ See, e.g., Brest, *supra* note 7, at 225-38; Grey, *supra* note 7, at 706-18; Perry, *Interpretivism*, *supra* note 7, at 284-97; Perry, *Noninterpretive Review In Human Rights Cases: A Functional Justification*, 56 N.Y.U.L. Rev. 278, 278-83 (1981) [hereinafter Perry, *Noninterpretive Review*]; Sandalow, *supra* note 11, at 1193-95.

²⁶ Brest, *supra* note 7, at 212-13.

²⁷ Dworkin, *How To Read the Civil Rights Act*, N.Y. Rev. Bks., Dec. 20, 1979, at 39 [hereinafter Dworkin, *Civil Rights Act*]. The idea of "collective understanding" supposes that the intent of the legislature is constituted by some combination or function of the individual

used to construct another, and very similar, one. Each of these conceptions claims to give the "right" answer to the question of what a constitutional intention is. But this is a matter of filling in the blanks provided by the common concept through making political choices, not a matter of best capturing what a group intention, considered as a complex psychological fact, really is. There is no stubborn fact of the matter—no "real" intention fixed in history independent of our opinions about proper legal or constitutional practice—against which the conceptions we construct can be tested for accuracy. The idea of an original constitutional understanding therefore cannot be the start or the ground of a theory of judicial review. At best it can be the middle of such a theory, and the part that has gone before is not philosophical analysis of the idea of intention, and still less detailed historical research. It is substantive—and controversial—political morality.

I must be careful not to overstate this point. I do not mean that we can sensibly state any political conclusion we choose in the language of intention, so that if we think the delegates to the original constitutional convention should have outlawed slavery, for example, we can say that they intended to do so, whatever they said or thought. The concept of constitutional intention is bounded by those aspects of the concept of intention that are not contested, as I suggested in my description of the common assumptions that provide us with the concept. Nevertheless it is a concept open to many and different competing conceptions, as we shall see, and its uncontested contours do not determine which of these is the best to choose.

This is my understanding of how the concept of a constitutional intention functions in our jurisprudence. Many constitutional scholars seem to assume, to the contrary, that the idea of a legislative intention, including a constitutional intention, is so well defined in legal practice that once all the pertinent psychological facts are known there can be no room for doubt or debate about what the legislative or constitutional intention was. Brest, for example, in a recent and admirable article,²⁸ assumes that our shared ordinary and legal language fixes the connection between a person's mental events or dispositions and his intentions sufficiently fully for legal purposes. He raises various questions about the intentions of a mayor who enacts an ordinance forbidding vehicles from entering a park,²⁹ and he discusses

beliefs of particular congressmen involved in drafting, advocating, opposing, and passing a given statute. It is a distinctly psychological conception of legislative intention. *Id.*

²⁸ Brest, *supra* note 7.

²⁹ "Does the ordinance prohibit use of the park by a white 1975 Chevy sedan, a moped, a baby carriage? Does it forbid the local distributor of a crash-proof car from dropping it in the park from a helicopter as a publicity stunt?" *Id.* at 209-10.

these on the assumption that we know the complete history of the mayor's mental events; that we know everything that went on in the mayor's mind.³⁰ His answers to most of his own questions are confident and immediate. He says, for example, that if the mayor had never imagined that cars might be dropped into the park from a helicopter as a promotional stunt—if a picture of such a bizarre event never had flowed through his mind—then he certainly did not intend to ban cars entering in this way, even though he would have prohibited this means of entry if he had thought of it.³¹

This is a claim about a single legislator's intention, and, as we shall see, such claims raise fewer problems than claims about the intentions of legislators as a group. But in fact there is no shared concept of even individual legislative intention that dictates either that the mayor had this intention or that he did not, or even that it is indeterminate whether he did. Suppose we are satisfied, for example, that if someone had called the mayor's attention to the possibility of helicopters dropping cars from the sky after he had drafted his ordinance but before he had signed it, he would have expected that the language as drafted would certainly prohibit that stunt. But we are also satisfied that, since the mayor did not wish this result, he would then have changed the statute specifically to allow helicopter drops. Does this establish that his intention was to ban the helicopter drop after all? Or that this was not his intention? Or that his intention was in this respect indeterminate?

Consider the following three arguments: (1) The point of deferring to a law-giver's intentions, when the words he used admit of different interpretations, is to insure that nothing be prohibited unless he desired to prohibit it, and we know, from the counterfactual evidence, that the mayor wanted not to prohibit the helicopter drop. (2) The point of deferring to a legislator's intentions, in such a case, is to insure that his words are read with the meaning or sense in which he used them and expected them to be understood, and the counterfactual evidence shows that the mayor used and meant these words in a sense that would prohibit the unorthodox entry. (3) The point of deferring to his intentions is complex; it includes both the goal that his words should be understood in the sense he meant, and that nothing should be prohibited that he wanted not to prohibit. Normally these two goals call for the same result, but the counterfactual evidence

³⁰ See *id.* at 209-11.

³¹ See *id.* at 210-11.

shows that here they argue for contrary results, and we should therefore say that the mayor's intention was indeterminate.

These three arguments propose three different (partial) theories of the legislative intention of a single legislator. The first proposes that legislative intention is a matter of what the legislator would have wanted the legal result of his act to be if he had thought of the troublesome case; the second that it is what he would have expected it to be in that case; and the third what he both would have expected and wanted it to be. None of these three is either established or ruled out by legal linguistic convention, still less by any ordinary language concept of intention. They are competing conceptions of that concept, in its legal use, and the choice among them depends, as the arguments for each suggest, on more general positions in legal and political theory. Brest is mistaken in supposing that there is only one plausible answer, demanded by some shared concept of intention, about what the mayor intended in these examples. (I use his argument as an example only because it is unusually discriminating and sophisticated. Nearly everyone writing about constitutional intention makes a similar fact-of-the-matter assumption.³²) Brest's various questions about the mayor teach us not, as he thinks, that our concept of intention has bizarre consequences when it is made the centerpiece of a theory of statutory or constitutional interpretation, but that we have no fixed concept capable of filling that role at all.

Brest's questions describe *choices* to be made in developing a concept of legislative or constitutional intention through political theory. Suppose the best theory of representative government holds that a statute covers all those cases which the enacting mayor would have wished it to cover if he had thought of them (even though of course he did not think of them all or even, in detail, of any) provided only that the language of the statute, as language, is arguably broad enough to embrace those cases. We might report this conclusion by adopting the first of the three conceptions of legislative intention just described. But of course it would be a mistake then to say that our theory about the proper reach of a statute follows from our independent theory of intention. The argument goes the other way around.

We have so far been considering only the question of individual intention. But constitutional theory requires the idea of a group, as

³² See, e.g., Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U.L.Q. 695, 697-98 [hereinafter Bork, *Welfare Rights*]; Perry, *Interpretivism*, supra note 7, at 299-301.

distinct from an individual, intention, and it seems even plainer that we have no fixed concept of a group intention that makes what the Framers intended simply a matter of pure historical fact, a fact we discover simply in discovering everything that went on in their minds. In subsequent sections I shall try to support this claim by showing that there is no inevitable or natural answer to the question of which aspects of individual mental states are relevant to a group intention, or to the further question of how those mental states that are relevant should be combined to form a group intention.³³

But I should first recognize a final qualification to my general point. Even though the concept of constitutional intention is a contested concept, legal practice might nevertheless settle, by convention, some aspects of this concept which ordinary language leaves open, so that constitutional intention becomes partially a term of art. In an earlier article about statutory interpretation, I suggested that our legal practice has indeed narrowed a concept of legislative intention in this way.³⁴ Legal convention stipulates, for example, that statements made in a committee report accompanying an ordinary congressional bill are in effect enacted, as a kind of official group intention, along with the bill itself.³⁵ But I also emphasized that this convention leaves many issues about legislative intention open, and therefore subject to competing conceptions of that concept.³⁶ In any case, there is plainly no equally elaborated convention about constitutional intention. There is no convention either tying various passages in the Federalist Papers to the Constitution itself or denying that connection, for example. On the contrary, constitutional practice in itself neither automatically excludes nor includes, as legislative practice does, matters that an historian might regard as pertinent to establishing the intention of those who made the Constitution.³⁷ In any case, those who insist on the relevance of the original intention are hardly in a position to appeal to any such convention. They argue that the Supreme Court has consistently ignored the intention of the Framers,³⁸

³³ See section II, C, 2-3 *infra*.

³⁴ Dworkin, *Civil Rights Act*, *supra* note 27, at 38-39.

³⁵ I called the conception of legislative intention rooted in the convention that an official intention is "enacted" along with the statute an "institutionalized intention." *Id.* at 38. This is a mixed conception which must be sharply distinguished from the conception of "collective understanding" mentioned earlier, see note 27 *supra*.

³⁶ Dworkin, *Civil Rights Act*, *supra* note 27, at 39-40.

³⁷ See note 42 *infra*.

³⁸ See, e.g., R. Berger, *Government by Judiciary* 243-45, 407-18 (1977) (Warren Court ignored that fourteenth amendment not intended to prohibit segregation).

and so they cannot suppose that the practice of the Court has established a convention defining that intention.

C. Constructing an Original Intention

We must consider, in this section, the variety of choices available to a lawyer inventing or constructing a conception of constitutional intention. We might begin with a general distinction between pure psychological and what I shall call mixed conceptions. A pure psychological conception holds that a constitutional intention is constituted only by selected mental events or dispositions or other psychological states of identified individuals, like congressmen or delegates to a constitutional convention. A mixed conception, on the other hand, takes constitutional intention to be constituted in part by some more "objective" features; for example the "natural" reading of the document. Or, differently, the set of values or purposes that the scheme of the document, taken as a whole, either assumes or promotes. Or the meaning that an intelligent and reflective member of the community would or should attach to the document. (These are merely examples of forms a mixed conception might take.) Psychological states will figure in a mixed conception, but they will not be the whole story.

My distinction between psychological and mixed conceptions of constitutional intention is very general; there are many different versions of both sorts, and any particular version must answer many questions left open by the general description. I shall try to indicate, in a general way, what these further questions are. I shall describe them as they would occur to someone trying to construct a psychological conception, though it will be obvious, I think, that the questions he would face in constructing a mixed conception would be no less numerous or difficult.

1. Who Counts?

Psychological conceptions must identify, for a start, the individuals whose psychological states should count. In the constitutional case, are these the delegates to the original convention, and the members of the congresses that proposed the various amendments? All the delegates or members, including those who voted against? Are the psychological states of some—for example, those who spoke, or spoke most often, in the debates—more important than those of others? What about the psychological states of those involved in the ratification process? Or the psychological states of the people as a whole, or those of them who participated in public debates or who read the pertinent documents when adopted? Do only psychological states at

some particular moment in history count? Or is the process rather more dynamic, so that later psychological states should figure? If so, whose? Supreme Court Justices? Congressmen who might have pressed for amendments but, because they understood the Constitution in a certain way, did not? Segments of the public who formed certain views about the force of the Constitution to protect them in certain ways, and therefore took certain political decisions, perhaps including the decision not to campaign for amendments? If any of these groups do not count, then why not? Shouting "democracy" is not, as we shall see, an answer. Or even muttering it.

Unfortunately, lawyers use various intellectual tranquilizers to convince themselves that they have answered at least some of these questions though in fact they have not. These are generally personifications, as in, for example, the phrase "the intention of Congress." Constitutional lawyers have an even more dangerous personification at hand, in the terrible phrase, "the Framers." Strangers to constitutional law can have no idea how often constitutional lawyers rely on that phrase. I have read countless articles in which it is strenuously mooted for pages what the intention of "the Framers" was on some issue, without any attempt to indicate who in the world these people were—or are—and why.

2. *What Psychological State?*

a. *Hopes and Expectations*

Let us leave the question of who counts at that. There is next the question of what mental events or other psychological states are in play. We noticed a certain puzzle about individual intention in discussing Brest's ordinary-language assumptions about intention.³⁹ Are we interested in a legislator's expectations about what a particular bill will do to the law, or are we interested in his attitudes about these expectations as well? Philosophers (particularly Paul Grice)⁴⁰ have developed an important analysis of "speaker's meaning," that is, what a speaker means in using a sentence as distinguished from what that sentence means in the more abstract. Speaker's meaning is determined by what the speaker expects the hearer to understand the speaker as

³⁹ See text accompanying notes 28-33 *supra*.

⁴⁰ See Grice, *Utterer's Meaning and Intentions*, 78 *Phil. Rev.* 147 (1969); Grice, *Utterer's Meaning, Sentence-Meaning and Word Meaning*, 4 *Foundations of Language* 225 (1968); Grice, *Meaning*, 66 *Phil. Rev.* 377 (1957).

intending him to understand. (This formulation of Grice's well-known analysis ignores important subtleties and complications.)

In the normal case, the speaker's expectations are also his hopes about how he will be understood. If I say that the moon is blue, expecting you to understand that I expect you to understand this in a certain way, I do so because I wish you to understand it that way. But someone may use words expecting them to be understood in a way that will in fact have consequences he deplors. He might not have reflected, for example, on the full implications of the words being understood in just the sense he expected they would be. The mayor in my elaboration of Brest's example was in that position. I said, in discussing that example, that in such a case we might have to choose between a speaker's meaning, in the sense of his Gricean expectations, and his hopes.

In the more ordinary case, when a legislator votes as one member of a legislative body, his speaker's meaning and his hopes may come apart in ways he fully understands, not only later, like the mayor, but even as he votes. Suppose he votes for the fourteenth amendment as a whole, because he is offered only the choice to vote for or against it as a package. He expects that the amendment will be understood as abolishing school segregation, but he much regrets this, and hopes that it will not be so understood. Or suppose he votes for it mainly because he hopes it will be understood as abolishing segregation, though he fears, and on balance, he thinks that it will not be. When we come to count his individual legislative intention, in determining the group intention as a whole, shall we look to his Gricean expectations about how the text will probably be construed? Or shall we look to his hopes, which might be different? Perhaps the whole legislature expected that the amendment would be understood in a certain way, but a majority (formed of those who voted against it and those who voted for it though they would have preferred it not do what they expected it would) hoped it would be understood otherwise. What is the legislative intention then?⁴¹

I do not mean to argue either that a congressman's expectations or his hopes should be given priority, when these come apart, but only that a choice must be made. Other choices, of a similar sort, must be made as well. Should we give different answers when the congressman (or other person) in question is someone who opposed the legisla-

⁴¹ It may be a mistake to suppose that a vote, in a large legislative body, is even a speech act at all. I cannot pursue that suggestion here.

tion, assuming that such people are to count at all? Do all of a congressman's expectations (or hopes or fears) count, or only those in some way institutionally expressed? Suppose the only evidence we have of what a congressman thought a particular bill would achieve is a breakfast conversation with his wife. Does this count? Why not? For evidentiary reasons? Or because we are interested only in what his psychological state was when in a certain building or when surrounded by colleagues? Or because it is not only his psychological state we are interested in after all? In the latter case our theory has become a mixed one.⁴²

b. Negation and Delegation

Any useful conception of constitutional intention must take a position on the connected issues of negation and delegation. Of course there is a difference between a congressman not intending that some piece of legislation have a particular effect, and intending that it not. But the difference is not fully appreciated in constitutional theory, because it is widely assumed that if some legislator has neither of these intentions, then he must have a third intention, which is that the matter be left for future determination by others, including, conspicuously, courts. Professor Perry's statement of this assumption strikes me as representative. He says:

If the Framers did contemplate P . . . 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.⁴³

This analysis of the structure of intention allows three values: a Framer can intend to prohibit, or not to prohibit, or to leave the matter open by delegating the decision to other institutions. Perry uses

⁴² It is interesting that the practice of constitutional textualists here seems to differ from congressional textualists. In the ordinary process of statutory interpretation we would not be interested, I think, in letters written by a senator to his son at college. But suppose a letter were found from Madison to his niece? Cf. J. Ely, *supra* note 6, at 35-36 (comparing Madison's explanation of the ninth amendment on the floor of Congress (unfavorably) with his earlier discussion in a letter to Jefferson). No doubt the difference reflects the point we noticed earlier: that convention has succeeded in making the idea of a group intention more a term of art in contexts of ordinary legislative interpretation than in constitutional interpretation. See text accompanying notes 34-37 *supra*.

⁴³ Perry, *Interpretivism*, *supra* note 7, at 299.

this three-valued structure to conclude that the Framers of the fourteenth amendment intended not to prohibit segregated public schools, because there is no evidence that they had either of the other two intentions.⁴⁴

But this analysis makes no allowance for the possibility that all three positive claims are false. Under many familiar conceptions of intention, they might well all be false, even when Perry's condition⁴⁵ is satisfied, that is, even when the persons whose intentions are in issue "contemplated" (in some sense) the matter in hand, Perry assumes that the congressmen who considered the fourteenth amendment must have "contemplated" the question whether the amendment abolished segregated public schools, because there were segregated public schools around them as they debated.⁴⁶ But suppose some congressman never even imagined that the amendment would have that effect; the thought simply never came to his mind. Is vacancy—not even recognizing an issue—a mode of contemplation? In any case, it surely does not follow, as we have already noticed, that the congressman who never imagined the amendment would strike down segregated schools intended that it not do so.

But suppose the congressman contemplated the possibility in a more active way. Suppose he spoke to himself in the following vein: "I wonder what the Supreme Court will do about segregated schools when the case comes up, as one day it must. There are, I suppose, the following possibilities. The justices may think that since we intended to forbid discrimination in matters touching fundamental interests, they are required to decide whether education is, in fact, a matter of fundamental interest. Or they may think that they should be guided by our more specific intentions about segregated schools, in which case they may try to decide whether the majority of us actively thought that the clause we were enacting would forbid segregation. Or they may think that the effect of what we did was to delegate the question to them as a fresh question of political morality, so that they have the power to decide for themselves whether, all things considered, it would be better to permit or forbid segregation. I hope they won't make the last of these choices, because I think that courts should decide what we've done, not what they want. But I don't know what the right answer is to the question of what we've done. That depends on the correct conception of constitutional intention to use, and, not

⁴⁴ *Id.* at 299-300.

⁴⁵ *Id.* at 299.

⁴⁶ *Id.* at 300.

being a constitutional lawyer, I haven't ever thought much about that. Nor do I, as it happens, have any particular preferences myself, either way, about segregated schools. I haven't thought much about that either."

This is a realistic description of the attitude of particular legislators about a great many issues. But the three-valued scheme proposed by Perry and assumed by many other commentators⁴⁷ is simply inadequate in the face of that attitude. The legislator I describe has none of the intentions (using that word in any familiar sense) that Perry takes to be exhaustive.⁴⁸ But of course Perry is free to construct a conception of constitutional intention that does permit the inference he describes. He can introduce a kind of closure into his conception by making it a regulative principle that if some participant in the constitutional process did not intend to limit federal or state legislative power in some way, or intend to delegate this decision to others, then he will be taken as having intended not to limit that power. This closure insures that there are no "gaps" in any one person's scheme of intention about legislation. It is no objection that this departs from ordinary usage of "intention." We are, after all, constructing a conception for a particular use. But once again the choice needs a justification.

3. *What Combination of Individual Intentions?*

These no doubt tedious distinctions and comments have all been aimed at identifying the people whose psychological states are to count in a pure psychological conception of constitutional intention, and defining the psychological state of these people that is to count. But such a conception must also provide the function of these states that is to furnish the constitutional intention of the "Framers" as a group, because these psychological states will differ from person to person, in some cases radically. Shall we adopt what might be called a "majority intention" approach, which insists that the constitutional intention must be a set of intentions actually held by each member of a particular subclass defined (numerically but roughly) as the "bulk" or "majority" of the pertinent population? (That is the upshot of

⁴⁷ See, e.g., Berger, *supra* note 9, at 89-90, 99-100, 120-30; Bork, *Welfare Rights*, *supra* note 32, at 697; Monaghan, *Perfect*, *supra* note 13, at 362-67, 374-80.

⁴⁸ Perry clearly assumes his three-valued scheme is exhaustive, because his argument requires that assumption, and because he claims "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." Perry, *Interpretivism*, *supra* note 7, at 299.

Brest's "intention-vote" theory of the way individual intentions combine in a group intention.⁴⁹ But he is wrong, once again, to think that this choice is imposed on us by some fixed concept of what a group intention is.) In that case we might frequently expect to find no collective intention whatsoever on important issues, because even people whose psychological states are in the same direction on some issue may differ enough so that no concrete opinion of any particular person—about, for example, exactly what the equal protection clause should prohibit—will command the necessary number of assents. If we linked a majority intention conception to the closure stipulation on negation that I described,⁵⁰ the total effect might well be that the original constitutional intention makes almost nothing unconstitutional.

Or shall we adopt some "representative intention" approach according to which the constitutional intention is a kind of composite intention not too different from any one legislator's actual intention, but in fact identical to the intention of no one at all? (We might think of this as the intention of some mythical average or representative legislator, in the same way that a sociologist constructing the "popular morality" of some community might describe a set of views held in total by no one.) Obviously more judgment is required (and therefore more room for nonempirical disagreement is provided) by this choice, but a larger positive intention would be provided, and less power therefore assigned to any closure rule that has been included.

D. Abstract and Concrete Intentions

I will not pursue these various questions posed by the attempt to create a constitutional intention: they are evident and of evident importance, though they are rarely answered, or even recognized, in the recent academic debates. But I should discuss at greater length one special and perhaps less obvious problem. Imagine a congressman who votes for a statute declaring combinations in restraint of trade illegal, and whose psychological state has the following character. He believes that combinations that in fact restrain trade should be prohibited, and this is, in general, why he votes for the bill. But he also believes that a forthcoming merger in the chemical industry does not restrain trade, and he expects that no court will decide that it does. What is his "legislative" intention with respect to this merger?

⁴⁹ See Brest, *supra* note 7, at 212-13.

⁵⁰ See text accompanying note 48 *supra*.

We must distinguish between different levels of abstraction at which we might describe that intention. We might say that he intends to prohibit whichever combinations are in fact in restraint of trade, or that he intends not to prohibit the chemical merger. The former is a relatively abstract statement of his intention, which matches the words he voted for. (Or, to put the same point differently, states his abstract intention.) The latter is a much more concrete statement (or the statement of a much more concrete intention) because it takes into account not only these words but his own beliefs about their proper application.⁵¹ It makes a difference which of the two statements we regard as appropriate for our conception of legislative intention. If we choose the abstract statement, then judges who believe that the chemical merger does restrain trade will believe they are serving the congressman's intentions by prohibiting it. If we choose the concrete statement, then prohibiting the merger will frustrate his intentions whether or not that merger restrains trade. Which should we choose?

Of course this issue arises in the constitutional context as well. Suppose a congressman votes for an amendment requiring "equal protection" because he believes that government should treat people as equals, and that this means not treating them differently with respect to their fundamental interests. He believes that the clause he votes for would be violated by criminal laws providing different penalties for blacks and whites guilty of the same crime, for example, because he believes that liability to punishment touches a fundamental interest. But he also believes that separate and unequal public schools would not violate the clause because he does not consider education to be a fundamental interest. Once again we can distinguish an abstract and a concrete formulation of his intention. Under the former he intends that whatever is in fact a fundamental interest be protected, so that if a court is itself convinced that education is (or perhaps has become) a fundamental interest, that court must believe it is serving his intention by outlawing segregation. But under the latter, concrete, formulation his intention is to protect what he himself understands to be a fundamental interest, and a court that abolishes segregation opposes rather than serves his intention.

One way to put the distinction, which I have used on other occasions, fits the constitutional but not the congressional example just

⁵¹ The distinction between abstract and concrete intention is related to, but different from, the distinction, in the philosophy of language, between "transparent" and "opaque" propositional attitudes. See, e.g., W. Quine, *Word and Object* 141-46 (1960); Quine, *Quantifiers and Propositional Attitudes*, 53 *J. Phil.* 177 (1956).

used. When phrases like “due process” or “equal protection” are in play, we may describe a legislator’s or delegate’s intention either abstractly, as intending the enactment of the “concept” of justice or equality, or concretely, as intending the enactment of his particular “conception” of those concepts.⁵² My earlier use of the distinction, in these terms, has drawn a considerable amount of criticism.⁵³ These critics make, I think, an important mistake; but it is perhaps one I encouraged by certain of the examples I gave of the way the distinction between concepts and conceptions works in ordinary language.⁵⁴ They suppose that any particular congressman who voted for the fourteenth amendment had either an abstract or a concrete intention—that he either intended to prohibit acts that treat people differently in what in fact are their fundamental interests or intended to prohibit acts that treat people differently in what he considered their fundamental interests—but not both, and that it is a matter of straightforward historical fact which of these intentions he had.⁵⁵ But of course both statements about his intention are true, though at different levels of abstraction, so that the question for constitutional theory is not which statement is historically accurate but which statement to use in constructing a conception of constitutional intention.

The choice is of devastating importance. If the abstract statement is chosen as the appropriate mode or level of investigation into the original intention, then judges must make substantive decisions of political morality not in place of judgments made by the “Framers” but rather in service of those judgments. The arduous historical research of the “intentionalists” into the concrete intentions of eighteenth or nineteenth century statesmen⁵⁶ is then all wasteful irrelevance. The intentionalists might be able to defend their choice of the

⁵² See R. Dworkin, *Taking Rights Seriously* 131-49 (1977).

⁵³ See, e.g., Monaghan, *Perfect*, *supra* note 13, at 379-80 & n.155; Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 *Colum. L. Rev.* 1029, 1037-41 (1977); Perry, *Interpretivism*, *supra* note 7, at 297-98.

⁵⁴ I said that someone who tells his children not to treat others unfairly “means” them not to do what is in fact unfair rather than what he, the parent, thinks unfair. R. Dworkin, *Taking Rights Seriously* 134 (1977). This does not deny that if the parent thinks it unfair to cheat on exams he intends his children not to cheat on exams. It rather touches on an issue I discuss below, see section II, D, 1 *infra*, which is the question of the parent’s “dominant” intention. I meant that the parent would not have intended his children not to cheat on exams if he had not thought that cheating was unfair.

⁵⁵ Perry’s formulation captures the point: “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.” Perry, *Interpretivism*, *supra* note 7, at 298.

⁵⁶ E.g., R. Berger, *Government By Judiciary* (1977).

concrete intention by appealing to some controversial theory of representative democracy, or some other political theory, that makes legislators' concrete intentions decisive for interpretation. But that strategy would defeat their own claim that the content of the original intention is simply a matter of history and not of political theory. Can they defend the choice of the concrete intention in some more neutral, purely historical way, by collecting more information about the mental life of the delegates or congressmen? I think not, but I shall consider certain ways in which the attempt might be made.

1. *Dominant Intention*

We might be tempted to say that if someone has an abstract and a concrete intention one of these must be dominant—one must drive the other. There are certainly cases in which this distinction makes good sense. Suppose a delegate to a constitutional convention hates psychiatrists and believes that allowing psychiatrists to testify in criminal trials, from which practice they derive large fees, offends due process of law. If he votes for a due process clause, we may sensibly ask whether his dominant intention was to forbid violations of due process or to punish psychiatrists, and we may make progress in deciding which by deploying a counterfactual. If his conception of due process had been different, and he had believed that allowing psychiatrists to testify did not offend due process, would he still have voted for the clause? If not, then his reason for voting for it was to punish psychiatrists. His dominant intention was to attack psychiatrists by denying them fees; banning violations of due process was a derivative or instrumental intention only.

The distinction between dominant and derivative intentions must work differently, of course, when a legislator's concrete intention is the negative intention of not prohibiting something. The appropriate counterfactual question is then this one: if he had had a different belief, and believed that the provision in question would prohibit what he in fact thought it would not, would he nevertheless have voted for that provision? If our congressman had had a different conception of equality, for example, and thought that segregated schools would violate an equal protection clause, would he still have wanted to impose equality on government?

We may indeed find reasons for thinking that some congressman would not have voted for an equal protection clause under those circumstances. These reasons might be as discreditable as the psychiatrist-hater's reasons. Perhaps he could not stand the idea of integrated schools as a matter of visceral reaction, and so would have voted

against them even if he thought that justice demanded integration. In that case we might say that his intention that segregated schools not be prohibited was his dominant intention not because his abstract intention was a means to that end, but because the concrete intention would have trumped the abstract intention if he had been aware of the conflict. On the other hand, we might well discover positive evidence that a particular congressman would still have voted for the clause even if he thought that it did prohibit segregation. We might find a letter reporting that he personally favored integration on other grounds.

In the most interesting cases, however, the upshot of our counterfactual test would not be to establish either the abstract or the concrete intention as dominant. For our counterfactual is a remarkably strong one. It requires us to imagine that our congressman's beliefs about equality were very different from what in fact they were—no counterfactual any less strong would serve the argument for dominant intention—and we must therefore suppose that the rest of his political theory suffered further changes that would make the beliefs we now suppose him to have natural for him. But this will have the effect of sharply reducing the amount of actual historical evidence that can be relevant to answering the counterfactual.

Suppose we found, for example, that our congressman thought liberty a much more important value than equality. We might be tempted to the conclusion that he would not have voted for the equal protection clause if he thought that a constitutional requirement of equality would strike down segregated schools, because this would be a substantial invasion of liberty. But this is an illegitimate conclusion, because someone's beliefs about the content and the importance of equality are mutually supportive, and we have no reason to think that if our congressman had thought equality more comprehensive than he did he would not also have thought it more important than he did. Our speculations, that is, must include not only the hypothesis that he thought differently about a particular issue of political morality, but that he therefore thought differently about political morality in general, and once we open the issue of how his more general political beliefs might have been different from what they in fact were, we lose our moorings entirely. I do not mean, of course, that we are driven to the conclusion that if he had thought the clause would reach school segregation he would nevertheless have voted for it. Only that we are extremely unlikely to discover historical evidence that could support the opposite conclusion. Most of the evidence we might think relevant would have been swept away in the proper formulation of the counterfactual question. So we cannot find, in the counterfactual test, any

general basis for the thesis that the Framers' concrete intentions must have been their dominant intentions.

2. *Intention to Delegate*

Now consider a different attempt to justify that thesis. Suppose we ask the following counterfactual question: if our congressman had imagined that some other official (a state legislator, perhaps, deciding whether to establish segregated schools, or a judge deciding whether segregated schools are unconstitutional) might hold a conception of equality different from his own, according to which segregation is a violation of equality, would he have wanted that other official to consider segregation unconstitutional? This is a very different counterfactual to the one considered in the last section, because now we understand our congressman to continue to believe that segregation does not violate equality. We ask whether, believing that, he would have wanted a judge or official to enforce (what he, the congressman, took to be) a mistaken view of equality.

Perhaps he would have, for the following sort of reason. He might have thought that a constitution should reflect not the best standards of justice in some objective sense, but rather the conception of justice the citizens hold from time to time, and he might also have thought that the best means of realizing this ambition would be to encourage legislators and judges to employ their own conceptions. But though our congressman might have held such a view of proper constitutional practice, he probably did not. He probably would have wanted (what he thought to be) the correct standards of justice to be applied whether then popular or not. In that case, our present counterfactual would be answered: No. Our congressman would not have wanted a later judge, who disagreed with (what the congressman believed to be) the correct theory of equality, to apply the judge's own theory. But it would be a very grave mistake to report this conclusion by saying that the congressman's concrete intention that segregation not be abolished was his dominant intention and his abstract intention that equality be protected was only derivative. We are not entitled to that conclusion because our counterfactual did not discriminate the two intentions by supposing that he no longer held his permissive conception of equality.

3. *Interpretive Intention*

But this brings us to a third, and in many ways more interesting, argument that judges should look to the concrete rather than the abstract intentions of the Framers, which is simply that the Framers

intended they should. I do not know whether the Framers, as a group, had any particular view about the subjects we have been discussing. I do not know whether they themselves thought that judges construing a problematical text should look to the intentions of the legislators, or, if they did, how they would have answered the questions I raised about who counts as authors of the statute, or which psychological states of those authors count in fixing their intentions, whether abstract or concrete intentions count, and so forth. But suppose we were to find, through the appropriate research, that the Framers did have views on these issues, and that they thought the concrete rather than the abstract intentions of legislators should be decisive in interpreting problematical legislation. They would have thought, applying this thesis to their own work, that future officials faced with difficulties of interpreting their constitution should look to their own, the Framers', conceptions of justice and equality, even if later officials were convinced that these conceptions were poor ones. Would all this settle the question for us? Would it follow that this is the right conception of constitutional intention for our judges and other officials to use?

We might call the Framers' opinions about proper judicial performance their general "interpretive" intention.⁵⁷ In my earlier essay I suggested that most of the delegates and congressmen who voted for the "broad" provisions of the Constitution probably did not have an interpretive intention that favored concrete intentions. There is no reason to suppose they thought that congressmen and state legislators should be guided by their, the Framers', conceptions of due process or equality or cruelty, right or wrong.⁵⁸ (I meant this as an argument *ad hominem* against the view that "strict" construction of the Constitution provided maximum deference to the wishes of the Framers.) The critics complain that I offered and had no evidence whatsoever for that opinion.⁵⁹ This is an overstatement. I had good evidence in the language in which the amendments were drafted. It is highly implausible that people who believe their own opinions about what counts as equality or justice should be followed, even if these beliefs are wrong, would use only the general language of equality and justice in framing their commands. They would not have been able to describe the applications of these clauses they intended in any detail, of course, but they could have found language offering more evidence of their own

⁵⁷ I follow Brest in this phrase, Brest, *supra* note 7, at 212, 215-16, though with some reservations about calling these opinions intentions at all.

⁵⁸ R. Dworkin, *Taking Rights Seriously* 133-36 (1977).

⁵⁹ See, e.g., Munzer & Nickel, *supra* note 53, at 1039-41; note 55 *supra*.

conceptions than simply naming the concepts themselves. Indeed, it is hard to see what evidence, beyond the evidence of language, we should expect to find that would support my claim if it were true. Nor do my critics on this point suggest they have evidence in support of their rival claim.

So I hold to my opinion that, if those who voted for the due process and cruel and unusual punishment and equal protection clauses held any theories about how later officials should go about deciding what the Constitution required, they probably believed that their abstract intentions should be followed. But the mistake I believe my critics have made is a different one. They are wrong to think that the interpretive intention of the Framers matters one way or the other.

Brest agrees with the critics that, insofar as the Framers' intention is to be our general guide, their own interpretive intentions must be decisive of all questions about which conception of their intention we should use, including the question whether their abstract or concrete intentions are to count. He says that the first job of someone seeking to discover and enforce the intention of the Framers would be to discover their interpretive intent.⁶⁰ But why? Suppose we have decided (for reasons of legal or other political theory) that sound constitutional practice requires judges to look to and enforce the abstract intentions of the Framers, even though judges must make judgments of political morality in order to do this. Then we discover that the Framers themselves would have reached a different decision about that issue in our place. Why should this make a difference to us? Why is it not simply our view against theirs on a complex issue of political theory, so that if our reasons are good we should not abandon these reasons just because people in another age would have disagreed?

We might be seduced by the following answer: "We must accept their views on this matter because they made the Constitution and their intentions about how it should be interpreted should count, not our contrary views." But this is in fact a very bad answer. Remember where the argument stands. I argue that any conception of constitutional intention must be defended on political grounds, by deploying, for example, some theory of representative government as superior to other theories. The intentionalists reply that one conception can be defended as best on neutral grounds and, in particular, that the choice of concrete over abstract intentions can be defended in this way. But

⁶⁰ Brest, *supra* note 7, at 215.

then the present argument—that we should look to concrete intentions if the Framers intended that we should—is circular in the following way.

We must be careful to distinguish the reasons we might have for looking to the intention of the Framers at all from the intentions we find when we look. Of course we could not justify our initial general decision to look to their intention by saying they intended we should. That “argument” would obviously beg the question. But our present enterprise—trying to define a suitable conception of constitutional intention—is part of the project of justifying looking to intention, not part of the project of discovering what was intended. We are trying to state, more exactly than is usually done, the *sense* or *kind* of collective intention to which we have reasons to defer. But then we cannot, without begging the question in the same way, say that we should defer to one kind or sense of intention rather than another because those whose intentions are picked out in that description intended we should. Of course, if anyone argues that judges should look to abstract rather than concrete intention because the Framers intended this, then it would be pertinent, by way of objection, to point out that they did not. But this was not our reason. We are assuming, for the present purposes, that we found our reason in general arguments about just or wise constitutional practice. If so, the imagined fact that the Framers had other views on that score is not pertinent.

There is an important general point here.⁶¹ Some part of any constitutional theory must be independent of the intentions or beliefs or indeed acts of the people the theory designates as Framers. Some part must stand on its own in political or moral theory;⁶² otherwise the theory would be wholly circular in the way just described. It would be like the theory that majority will is the appropriate technique for social decision because that is what the majority wants. For this reason a constitutional theory divides into two levels. At the first level the theory states whose beliefs and intentions and acts, of what character, make a constitution. Only at the second level does the theory look to the acts and intentions and beliefs described in the first level to declare what our own Constitution in fact provides. If the first, independent level argues that the abstract intentions of the Framers count in determining what our Constitution is, we have no

⁶¹ I discuss this point at greater length, and apply it to the political theory of utilitarianism, in Dworkin, *Is There A Right To Pornography?*, 1 *Oxford J. Legal Stud.* 177, 202-05 (1981) [hereinafter Dworkin, *Pornography*].

⁶² See text accompanying notes 14-21 *supra*.

reason to withdraw that opinion if it is discovered that the Framers would have thought otherwise. The first level is for the theory, not for them.

I labor this point because it is so widely assumed that the initial, broad decision to look to the intentions of the Framers necessarily includes the decision to look to their interpretive intentions as well. In some circumstances this assumption would be even more obviously illegitimate or self-defeating. Suppose we had made an initial decision to look to the intention of the Framers, but found, when we investigated their own theories of constitutional intention, that they did not think their own intentions should matter at all, under any conception. They might all have thought, for example, that the Constitution should be interpreted according to the "plain meaning" of its words, with no reference to the intentions or other psychological states of the authors. Or suppose (to take another example) that we had decided, for our own reasons, that the intentions not only of delegates and congressmen but also of the state officials who were leaders in the process of ratification should count. But when we looked to the interpretive intention of the latter, we found that they, in our place, would have counted only the delegates and congressmen, and would have ignored people like themselves. Of course it would not then follow, in the case of either example, that we should then ignore the substantive intentions we had earlier resolved to consult. If the first level of our constitutional theory gives us good reasons to look to what the Framers intended in enacting the due process or equal protection or other clauses of the Constitution, it is no contrary argument that these would not have seemed good reasons to them. But we have no greater argument for referring the question of abstract against concrete intentions to the interpretive intentions of the Framers than we have for referring to them the question whether their intentions should count at all.

I shall summarize the argument of this section. The most important choice, in constructing a conception of constitutional intention, is the choice between an abstract and a concrete statement of that intention. This is not a matter of finding which of the two intentions a particular Framers had; he had them both. Nor can we establish, by historical evidence, that the concrete intentions of the Framers were dominant for them. We have good evidence, in the language of the Constitution, that the Framers did not themselves hold the interpretive opinion that only their concrete intentions should count. But that is not important, because the question of which of their intentions should count cannot itself be referred to their intentions.

E. Summary: Does It Matter?

This long catalog of problems and issues was meant to show that the idea of a legislative or constitutional intention has no natural fixed interpretation that makes the content of the Framers' intention just a matter of historical, psychological, or other fact. The idea calls for a construction which different lawyers and judges will build differently. Any justification for one construction, and therefore for one view of what the Framers intended, must be found not in history or semantic or conceptual analysis, but in political theory. It must be found, for example, in an argument that one conception fits better with the most compelling theory of representative government. But then the idea with which we began, that judges can make apolitical constitutional decisions by discovering and enforcing the intention of the Framers, is a promise that cannot be redeemed. For judges cannot discover that intention without building or adopting one conception of constitutional intention rather than another, without, that is, making the decisions of political morality they were meant to avoid.

There is an obvious reply to that strong conclusion, which is this: "Your point is technically correct, but overblown. Perhaps it is true that the idea of an original constitutional intention is not, as it is often supposed to be, a neutral historical matter. Perhaps it is necessary to make political decisions in choosing one conception of that original intention rather than another. But these are not the kinds of political decisions that the 'original intention' school wants judges to avoid. They want judges to refrain from substantive political decisions, like the decision whether it is unjust to prohibit abortion or execute convicted murderers or interrogate suspected criminals without a lawyer. The choice of a conception of the Framers' intention depends, as you have several times suggested, not on substantive political decisions like these, but rather on decisions about the best form of representative democracy, and though this is of course a matter of political theory and may be controversial, it is not a matter of substantive political theory. So the 'original intention' school could accept all your arguments without surrendering its most important claims."

This reply is inadequate on its own assumptions. Even if judges need only look to issues of process in choosing a conception of constitutional intention, the conception they choose may nevertheless require them to decide issues of the plainest substantive character. This is obviously true, for example, of the point I discussed in most detail: the choice between an abstract and a concrete statement of intention. Perhaps the reason judges should look to abstract rather than concrete intentions (if they should) lies in some procedural theory about the

proper level of abstraction for a democratic constitution. But judges who accept this view of constitutional intention must decide whether prohibiting abortion violates equality, or whether capital punishment is cruel and unusual, in order to enforce what they take the original intention to be.

But the reply I described is interesting because it shows how the two general topics of this essay—the flights from substance through the routes of intention and process—are connected. Intention could not even begin to provide a route from substance if the distinction between substance and process, the distinction on which the second route depends, were itself to give way. If the original intention school were forced to concede not only that the consequences of certain conceptions of constitutional intention require judges to decide issues of substance, but that the choice among these conceptions is itself a matter of substance rather than simply process, then it would not be able to establish its position even by finding a good political argument for a conception that looks only to concrete intentions. The game would already have been lost.

In the next part of the Article we shall see that the distinction between substance and process on which the original intention school must rely in fact is an illusion. But let me first end the present summary by picking up a thread left loose earlier.⁶³ I asked whether the distinction between “interpretive” and “noninterpretive” constitutional theories was useful if we understood “interpretive” to mean relying on the Framers’ intentions. I now suggest that it would not be useful, even so understood, for two reasons. First, almost any constitutional theory in fact relies on some conception of an original intention or understanding. “Noninterpretive” theories are those that emphasize an especially abstract statement of original intentions (or could easily be revised so as to make that emphasis explicit with no change in the substance of the argument). Their argument is distorted by insisting that they do not rely on any conception of an original intention at all.

The second reason is more important. The distinction suggests, as I said, that illuminating arguments can be made for or against “interpretive” or “noninterpretive” theories as a class. But that now seems an unreasonable assumption. The important question for constitutional theory is not whether the intention of those who made the Constitution should count, but rather what should count as that

⁶³ See text accompanying note 23 *supra*.

intention. Any successful answer to that question will be complex, because a conception of constitutional intention is comprised of a great many discrete decisions only some of which I described. We might want to say, for example, that the best answer is the answer given by the best conception of democracy. But that will not divide constitutional theories into two grand classes and provide a wholesale argument for one class and against another. It puts a question that we may hope will single out one theory from others both within and without any large class we might initially construct. Constitutional theory is not a wholesale trade.

III

PROCESS

A. *Process and Democracy*

“The United States is a democracy. The Constitution settles that, and no interpretation of our constitutional system that denies it could be plausible. This plain fact provides both a brake and a spur to judicial review. Democracy means (if it means anything) that the choice of substantive political values must be made by representatives of the people rather than by unelected judges. So judicial review must not be based on the justices’ opinions about whether, for example, laws prohibiting the sale of contraceptives violate rights to privacy. For that reason *Griswold*⁶⁴ was wrong, as were *Roe v. Wade*⁶⁵ and *Lochner*.⁶⁶ Liberals approve the first two of these decisions, and hate the third; conservatives *vice versa*. But a sound theory of judicial review—the only theory consistent with democracy—condemns them all, and condemns any other decision expressly or implicitly relying on the idea of substantive due process.

“But if our commitment to democracy means that the Court cannot make decisions of substance, it equally means that the Court must protect democracy. In particular, the Court must make democracy work by insuring, in the words of Justice Stone’s famous footnote,⁶⁷ that legislation not be permitted ‘which restricts those political processes which can ordinarily be expected to bring about repeal of

⁶⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down Connecticut’s ban on the use of contraceptives).

⁶⁵ 410 U.S. 113 (1973) (striking down Texas’s antiabortion statute).

⁶⁶ *Lochner v. New York*, 198 U.S. 45 (1905) (striking down New York’s maximum hours law for bakers).

⁶⁷ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

undesirable legislation,' and that 'prejudice against discrete and insular minorities' not be allowed 'to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.' So the Court must be aggressive in its protection of free speech, and sensitive to the consequences of prejudice, because these are the values of democracy itself."

This is (a paraphrase of) how Ely⁶⁸ reads the *Carolene Products* footnote. This is his theory of judicial review, his own route from substance. The argument contains a series of propositions: (1) Judicial review should be a matter of attending to the process of legislation rather than the outcome considered in isolation from that process. (2) It should test that process against the standard of democracy. (3) Process-based review is therefore consistent with democracy, while substance-based review, which looks to outcomes, is antagonistic to it. (4) The Court therefore errs when it cites a putatively fundamental substantive value to justify overturning a legislative decision. *Griswold* and *Roe v. Wade* were wrongly decided, and the Court should abstain from such adventures in the future. Ely defends each of these propositions; together they make up his book.

I think the first proposition is powerful and correct.⁶⁹ But the other three are in different ways wrong and in all ways misleading; they are mistakes that submerge and subvert the single insight. Judicial review should attend to process not in order to avoid substantive political questions, like the question of what rights people have, but rather in virtue of the correct answer to those questions. The idea of democracy is of very little help in seeking that answer. Nor does it follow, just from the commitment of judicial review to process rather than to outcomes isolated from process, that the so-called "substantive due process" decisions Ely⁷⁰ and others⁷¹ deplore are automatically placed out of bounds. On the contrary, the commitment to process gives some of these decisions new and more powerful support.

In this section I argue that the abstract ideal of democracy, in itself, offers no greater support for a process-based than an outcome-

⁶⁸ J. Ely, *supra* note 6.

⁶⁹ I argue for it in R. Dworkin, *Taking Rights Seriously* 234-39 (1977), and in Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 *J.L. & Educ.* 3, 10-12 (1977) [hereinafter Dworkin, *Social Sciences*], and I shall sketch the main outline of my argument in the next section; see text accompanying notes 98-101, 107-08 *infra*.

⁷⁰ Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale L.J.* 920, 933-37 (1973).

⁷¹ See, e.g., Bork, *Welfare Rights*, *supra* note 32, at 700-01; Monaghan, *Perfect*, *supra* note 13, at 354-56, 374-67, 373-74.

based jurisprudence of judicial review. In the next section I try to develop a different basis for process-based review, in a theory of rights as trumps over the majority will,⁷² and then argue that Ely's argument, properly understood, is really that argument rather than the argument from democracy that lies in the title and on the surface of his book.⁷³

Ely insists that the proper role of the Supreme Court is to police the processes of democracy, not to review the substantive decisions made through those processes.⁷⁴ This might be persuasive if democracy were a precise political concept, so that there could be no room for disagreement whether some procedure was democratic. Or if the American experience uniquely defined some particular conception of democracy, or if the American people were now agreed on one conception. But none of this is true,⁷⁵ as Ely recognizes.⁷⁶ His argument must therefore be read as supposing that one conception of democracy is the right conception—right as a matter of “objective” political morality—and that the job of the Court is to identify and protect this right conception. It is far from clear, however, that this assumption is consistent with Ely's argument⁷⁷ against what he calls “fundamental value” theories of constitutional review. He says, as part of that argument, that there cannot be substantive political rights for the Court to discover because there is no consensus about what substantive political rights people have, or even whether they have any.⁷⁸ Can he now suppose that there is a right answer to the question of what democracy really is, even though there is no consensus about what that answer is? (If the Constitution should not follow the *New York Review of Books*,⁷⁹ why should it follow the *Harvard University Press*?)

But I want to pursue a different issue now. In what sense is the concept of democracy a procedural as distinct from a substantive

⁷² See text accompanying notes 98-101 *infra*.

⁷³ See note 101 *infra*.

⁷⁴ J. Ely, *supra* note 6, at 74, 102, 181.

⁷⁵ See Perry, *Interpretivism*, *supra* note 7, at 304-10 (no consensus on sort of democratic process that ought to prevail in United States); cf. Mann, *The Social Cohesion of Liberal Democracy*, 35 *Am. Soc. Rev.* 423, 423-32 (1970) (reviewing empirical studies of value commitment in United States and Britain; little value consensus on questions of social stratification and political participation).

⁷⁶ This, of course, is the burden of Ely's argument that neither tradition nor consensus provides a sound basis for discovering fundamental values. See J. Ely, *supra* note 6, at 60-69.

⁷⁷ See *id.* at 43-72.

⁷⁸ See *id.* at 63-69.

⁷⁹ “The Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?” *Id.* at 58.

concept at all? I must be careful to avoid a certain confusion here. I am asking not about the *content* of a conception of democracy, but about the kind of *case* necessary to show that one conception of democracy is superior to another. Some theories of democracy put what we tend to regard as matters of substance into the very description of democracy. The theory of democracy celebrated in "peoples' democracies," for example, supposes that no society is democratic if its distribution of wealth is very unequal. Winston Churchill, relying on a very different idea, once said that democracy means that an early-morning knock on the door is the milkman.⁸⁰ Other theories⁸¹ insist that democracy is a process for reaching political decisions, a process that must be defined independently of any description of the decisions actually reached. They define democracy as a set of procedures governing the citizen's participation in politics—procedures about voting and speaking and petitioning and lobbying—and these procedures do not themselves include any constraints on what democratically elected officials can do or the reasons they can have for doing it. Even if we accept this view (it is plausible, I might add, only if we take a very generous view of process), the question remains how to decide which procedures compose the best conception of democracy.

We might distinguish two general strategies for making this decision, two types of "cases" for democracy. Suppose we draw a line between "input" and "outcome" in the following way. Input cases for democracy are based entirely on some theory about the proper allocation of political power either between the people and the officials they elect, or among the people themselves, and make no reference to the justice or wisdom of the legislation likely to be the upshot of that allocation of power. Outcome cases, on the contrary, are based at least in part on predictions and judgments of this sort. The pure utilitarian case for democracy (to take a familiar example) is an outcome case. Utilitarians might agree that the *definition* of a democratic state consists in a set of procedures describing who can vote, how voting districts must be established, and so forth. But they would argue that democratic procedures are just because they are more likely than other procedures to produce substantive decisions that maximize utility. Any question about which of alternate procedures forms the best conception of democracy must therefore be submitted to the test of long-term utility, that is, to the test of outcomes.

⁸⁰ See H. Thomas, *A History of the World* 388 (1979) (quoting Churchill).

⁸¹ See J. Pennock, *Democratic Political Theory* 3-15 (1979) (briefly outlining various procedural and substantive theories of democracy).

The distinction between input and outcome cases for democracy is important in the constitutional context. If the Supreme Court must develop its own conception of democracy because it cannot find any sufficiently precise conception either in history or present consensus, then it must consider what counts as a good argument for one conception rather than another. If the Court can rely, for this purpose, on an input case, then it can avoid confronting the issues of substantive justice that Ely says it must avoid. But if it cannot—if the only plausible cases for democracy (and therefore the only plausible cases for one conception of democracy over another) are outcome cases—then the Court must face whatever issues of substance the best case makes pertinent. Ely's argument that the Court can avoid issues of substance by resting its decisions on the best conception of democracy would then be self-defeating. For once Ely concedes (as he must and has⁸²) that the Court must define the best conception of democracy for itself, and thus make fresh political judgments of some kind, he has only two arguments in favor of the program he describes: that courts are well placed to make judgments about fair process, but very badly placed to make substantive political judgments,⁸³ and that court-made judgments about process are consistent with democracy, while court-made judgments about substance are not.⁸⁴ If the Court cannot make the judgments about process Ely recommends without making the judgments about substance he condemns, then his own arguments will subvert his own theory. Can Ely's argument (or any other version of a *Carolene Products* theory) survive this challenge by producing an input case for democracy?

It seems unlikely that there can be such a case, at least if we have in mind a case sufficiently powerful not merely to recommend democracy as a vague and general idea, but to supply reasons for choosing one conception of democracy over another. Outcome cases can easily be that powerful. Pure utilitarianism might turn out not only to recommend the general idea of majority rule, but also, as I suggested, to recommend extremely precise provisions about, for example, districting for representation, limiting the vote by age groups or in other ways, free speech, and the protection of minorities. But where would

⁸² See Commentary, 56 N.Y.U.L. Rev. 525, 528 (1981) (remarks of Prof. Ely) ("At some point . . . [my] judge will be left substantially on his or her own" in elaborating a procedural model of democracy); cf. J. Ely, *supra* note 6, at 75 n.* (participation itself can be regarded as a value; Court should pursue "participational values").

⁸³ J. Ely, *supra* note 6, at 75 n.*, 102.

⁸⁴ *Id.* at 75 n.*, 101-02.

we turn for input theories this powerful? It seems, at first blush at least, that our ideas about the fair allocation of political power are exhausted by the general recommendation of some form of democracy, and are inadequate to discriminate which form.

We might test that initial intuition by studying the arguments that Ely himself makes for a particular version of democracy. He supposes that the best conception of democracy includes a scheme for the protection of free speech, which he describes as keeping open the channels of political change.⁸⁵ Unfortunately, although Ely writes with great interest and power about freedom of expression, what he says is entirely by way of offering concrete advice about how the Court should decide free speech cases. He assumes rather than argues that his advice draws on considerations of process rather than substance.⁸⁶ Does it? Can Ely in fact provide an input case for the proposition that democracy must include free speech?

There are, of course, a variety of theories in the field, each of which purports to explain the value of a rule prohibiting government from restricting what its citizens may say. Perhaps the best known is John Stuart Mill's theory which calls attention to the long-term value of such a rule to the community as a whole. Mill argues that truth about the best conditions of social organization—the conditions that will in fact improve the general welfare—is more likely to emerge from an unrestrained marketplace of ideas than from any form of censorship.⁸⁷ But this is a utilitarian, outcome case for free speech, not an input, process-based case. (It is also a very doubtful case, but that is another matter.) Other theories defending free speech fall into the school that Ely calls "fundamental value" theories. Curiously, the best known of these theories also belongs to Mill. He argues that free speech is an essential condition of the development of individual personality; that the ability to speak out on matters of general concern is an ability of fundamental importance to people, without which they will not develop into the kinds of people they should be.⁸⁸

⁸⁵ See *id.* at 105-16.

⁸⁶ In praising the "theory" the Court has adopted in the first amendment area as "the right one," Ely simply asserts that "rights like these [free association], whether or not they are explicitly mentioned, must nonetheless be protected, strenuously so, because they are critical to the functioning of an open and effective democratic process." *Id.* at 105.

⁸⁷ See J. Mill, *On Liberty* 19-67 (C. Shields ed. 1956). "Wrong opinions and practices gradually yield to fact and argument; but facts and arguments, to produce any effect on the mind, must be brought before it." *Id.* at 25. Hence, the "peculiar evil of silencing the expression of an opinion" is that it robs the human race of the "opportunity of exchanging error for truth," and of gaining "the clearer perception and livelier impression of truth produced by its collision with error." *Id.* at 21.

⁸⁸ See *id.* at 40-55, 67-90.

One other familiar argument for free speech might seem to provide an input case, at least at first sight. We might say, with Madison, that democracy is a sham (or, worse, self-defeating) unless the people are well informed, and that free speech is essential in order to give them the information necessary to make democracy a reality.⁸⁹ Justice Brennan recently made a similar argument from the structure of democracy the centerpiece of his case for free speech in *Richmond Newspapers*.⁹⁰ The Madisonian argument is not an argument for equality of political power, person by person. It is rather an argument for maximizing the political power of the people as a whole, the power of the populace to elect the right officials and control them once elected, so as to achieve what the people, as distinct from those actually in power, really want. It is an argument for improving the political power of the demos, not for equality of political power among the demos.

It is, moreover, a poor argument, at least when it is taken to justify the extensive freedom of speech that Ely and others understand the first amendment to provide. I tried to show why the Madisonian argument fails to do this in a recent article on freedom of the press in the *New York Review of Books*,⁹¹ and I shall simply summarize that argument here. Any constraint on the power of a democratically elected legislature decreases the political power of the people who elected that legislature. For political power is the power to make it more likely that political decisions will be made as one wishes. Suppose the majority wishes that no literature sympathetic to Marxism be published, but the Constitution denies it the power to achieve that goal through ordinary politics. The majority's political power surely is decreased by this constitutional prohibition. We may want to say that the majority has no right to protect (what it deems to be) its own interest through censorship, because this will prevent others from

⁸⁹ "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. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 9 *The Writings of James Madison* 103, 103 (G. Hunt ed. 1910).

⁹⁰ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring in the judgment). Justice Brennan argued that "the First Amendment . . . has a structural role to play in securing and fostering our republican system of self-government." *Id.* This role involves linking "the First Amendment to that process of communication necessary for a democracy to survive, and this entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication." *Id.* at 588.

⁹¹ Dworkin, *Is the Press Losing the First Amendment?*, *N.Y. Rev. Bks.*, Dec. 4, 1980, at 53-54.

working to form a new majority dedicated to new values. But each member of the present democracy might prefer to accept less information for himself, and thus lower his own opportunity to change his mind, just because he does not want others, who now agree with him, to have a similar opportunity. So the argument that the present majority has no right to censor opinions is in fact an argument for reducing the political power of any majority.

The Madisonian argument may be understood as pointing out that although a constitutional constraint on censorship decreases the political power of the people as a whole in this way, it also increases that power in a different way. It provides a larger base of information on which the people may act. At best, however, this shows only that any constitutional protection of free speech is likely to involve a trade-off in which a loss in political power in one sense is matched against a gain in another sense. There is no reason to think that political power as a whole is always on balance improved. Indeed, if the population is generally well informed, or at least sufficiently well informed to have some general idea of what it might gain and lose by any piece of censorship, then the majority's political power will be decreased overall by the constitutional protection of speech. If this issue is even in doubt, then the general spirit of democracy would seem to argue that the choice, whether the gain in information is worth the loss in direct political power, is best made by a majority of the people from time to time.

So free speech cannot be justified by an input case addressed to maximizing the political power of the people as a whole. But it seems more sensible, in any case, to argue for free speech not from the goal of maximizing political power overall, but from the different goal of making political power more equal, person by person, across the population. A law prohibiting the publication of Marxist literature does seem to decrease equality of political power. If so, then a constitutional ban on such laws, even if it diminishes political power generally, improves equality of that power. This suggests a different input case for free speech: democracy consists in providing as much political power in the people as a whole as is consistent with equality of such power, and free speech is necessary to provide that equality.

But now we need a metric of political power adequate to serve this egalitarian conception of democracy, and it is not clear which we should use. We might consider the following suggestion first: equality of political power consists in having the same opportunities for influencing political decisions as others have; the same opportunities to vote, write to congressmen, petition for grievances, speak out on political matters, and so forth. If there is a mechanism for influence

available to some, it must be available to all. Of course, this immediately raises the question whether equality in these opportunities is imperiled when some, who are rich, may purchase ads in newspapers, promise substantial contributions to political campaigns, etc., while others cannot afford to influence politics in any of these ways. We might try to set this difficult issue aside, however, by distinguishing between a right and the value of that right.⁹² We might say, tentatively, that political equality requires at least that everyone have the same opportunity to influence political decisions, so that any legal barriers must apply to everyone, leaving aside whether political equality also requires that everyone's opportunities have the same value to him.

But does a law forbidding the expression of Marxist theories invade political equality so described? Suppose someone says that although the law does deny a certain opportunity to influence political decisions, it denies this opportunity to everyone. This sounds like Anatole France's observation that the laws of France are egalitarian because they forbid both rich and poor to sleep under the bridges.⁹³ But what is wrong with the argument? Is it a better argument in the *Cohen* (Fuck the Draft!) case?⁹⁴ A law forbidding people from wearing obscene messages on their backs prevents Cohen from making his political arguments in that way. But it also forbids his political rivals from wearing "Fuck Karl Marx!" messages stitched to the backs of their pinstripe suits. The Supreme Court protected Cohen on the argument, roughly speaking, that the medium, including the rhetorical style, is part of the message.⁹⁵ This is also Ely's argument in favor of the Court's decision.⁹⁶ But some people on any side of a political dispute would approve the opportunity to use Cohen's medium and rhetoric, and would therefore be equally constrained by an anti-*Cohen* rule.

⁹² I adopt this distinction from J. Rawls, *A Theory of Justice* 204-05 (1971).

⁹³ A. France, *The Red Lily* 95 (W. Stephens trans. 1908).

⁹⁴ *Cohen v. California*, 403 U.S. 15 (1971).

⁹⁵ The Court reasoned:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas . . . but otherwise inexpressible emotions as well. . . . We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id. at 26.

⁹⁶ In *Cohen*, where the ostensible harm "flowed entirely from the communicative content" of the message, the Court properly refused to designate "offensive language" as unprotected speech, recognizing "that what seems offensive to me may not seem offensive to you." J. Ely, *supra* note 6, at 114.

If we want to say that an anti-*Cohen* rule would invade equality of political power, therefore, we must bring back the idea we set aside, prematurely, a moment ago. We must say that equality in political power must take account not only of the opportunities people have if they want to use them, but of the value of these opportunities to them. On this account, those who object radically to the political structure must be permitted to make their protests in language appropriate to their sense of the occasion, if free speech is to have the same value to them as it has to a member of the bourgeois establishment. Indeed, we must take value into account to defend free speech on the present grounds even in the easier classic case I set out first. A law prohibiting the publication of Marxist literature invades equality of political power because, though it leaves the Marxist free to say exactly what anyone else can say, it makes free speech much less valuable for him. Indeed it destroys its value for him, although it does not in any way diminish its value for others who will never be tempted by Marxism and will never want to hear what Marxists think.

Once we admit that a putatively input case for free speech must bring in the dimension of value, the danger is evident. For the most natural metric for the value of an opportunity lies in consequences, not in further procedures. Rights to participate in the political process are equally valuable to two people only if these rights make it likely that each will receive equal respect, and the interests of each will receive equal concern not only in the choice of political officials, but in the decisions these officials make. But then the case for free speech (or for any other feature distinguishing one conception of democracy from another) suddenly seems to be an outcome case. Whether the value of the political opportunities a system provides is equal will depend on whether the legislation likely at the end of the process treats everyone as equals.

But of course it is controversial what the correct standard is for deciding whether some piece of legislation treats people equally. If someone believes that legislation treats people as equals when it weighs all their utility prospects in the balance with no distinction of persons, then he will use what I earlier described⁹⁷ as a pure utilitarian case for defending democracy and choosing amongst competing conceptions of democracy. If someone rejects this utilitarian account of treating people as equals in favor of some account that supposes that people are not treated as equals unless the legislative decisions

⁹⁷ See text accompanying notes 81-82 supra.

respect certain fundamental rights, then this must inevitably affect his calculation of when a political process provides genuine equality of political power. But this means that judges charged with identifying and protecting the best conception of democracy cannot avoid making exactly the kinds of decisions of political morality that Ely is most anxious they avoid: decisions about individual substantive rights. Judges may, of course, believe that the utilitarian answer to the question of individual rights is the correct one—that people have no rights. But that is a substantive decision of political morality. And other judges will disagree. If they do, then the suggestion that they must defend the best conception of democracy will not free them from having to consider what rights people have.

B. Equality and Process

Suppose we begin at the other end. Instead of asking what democracy requires, which leads to the question of what rights people have, let us ask the latter question directly. We might put the question, initially, in the context of Ely's other main topic of concern: racial justice.⁹⁸ Assume that racial prejudice is so widespread in a community that laws enacted specifically for the purpose of putting the despised race at a disadvantage would in fact satisfy the preferences of most people overall, even weighted for intensity and even in the long run. Pure utilitarianism (and pure majoritarianism) would then endorse these laws because they are laws that a legislature weighing the preferences of all citizens equally, with no regard to the character or source of these preferences, would enact. If a judge accepts the pure utilitarian account of treating people as equals, then he must conclude that in these circumstances laws deliberately designed to put blacks at an economic disadvantage (denying them access to certain jobs or professions, for example) treat blacks as equals. He cannot rely on equality or on any egalitarian theory of democracy to condemn such laws.

We know, however, that such laws do not treat blacks as equals. On what theory of equality must we then be relying? We have, I think, an initial choice here. We might argue, first, that these laws fail the test of equality because they offend some substantive interest of blacks which is in itself so important that it should not be left to the utilitarian calculation. This appeals to the consequences of the legislation as distinct from the legislators' reasons or grounds for enacting it.

⁹⁸ J. Ely, *supra* note 6, at 135-79.

But we then need a theory that will tell us which interest is offended here and why it is fundamental. Is it an economic interest? An individual interest in having the same opportunities others have? A group interest in having the same opportunities as those of different races? Why is any of these a fundamental interest? We accept that many important interests people have may nevertheless be compromised for the sake of the general welfare; people in some businesses prosper while others go to the wall because of political decisions justified by the claim that the community is then better off overall. Why are the interests compromised by racially discriminatory legislation (whatever these are) different? It cannot be because people care more about these interests or suffer more pain when they are overridden by the claims of the general welfare. It is far from clear that people do, and in any case a pure utilitarian analysis will take account of this special suffering or specially strong preference in its calculations. If the interests are nevertheless overridden, why do they deserve the extraordinary protection of rights?

I do not think that questions like these can be answered satisfactorily. We should therefore consider our second option. We might argue that racially discriminatory laws are inegalitarian not because they invade interests that are specially important but because it is unacceptable to count prejudice as among the interests or preferences government should seek to satisfy. In this case we locate the defect of the legislation in the nature of the justification that must be given for it, not in its consequences conceived independently of this justification. We concede that laws having exactly the same economic results might be justified in different circumstances. Suppose there were no racial prejudice, but it just fell out that laws whose effect was specially disadvantageous to blacks benefited the community as a whole. These laws would then be no more unjust than laws that cause special disadvantage to foreign car importers or Americans living abroad, but benefit the community as a whole. Racially discriminatory legislation is unjust in our own circumstances because no prejudice-free justification is available, or, in any case, because we cannot be satisfied that any political body enacting such legislation is relying on a prejudice-free justification.

I think this second argument is sound,⁹⁹ and that it provides an adequate (if not necessarily exclusive) basis for judicial review.¹⁰⁰ It

⁹⁹ I elaborated and defended this sort of approach to justifying *some* rights in R. Dworkin, *Taking Rights Seriously* 234-36, 275-77 (1977). See also Dworkin, *Pornography*, *supra* note 61, at 194-206 (defending the right to moral independence).

¹⁰⁰ See Dworkin, *Social Sciences*, *supra* note 69, at 10-12.

is, moreover, in one sense, a “process” or “*Carolene Products*” justification for that review. It holds that the rights created by the due process and equal protection clauses of the Constitution include rights that legislation not be enacted for certain reasons, rather than rights that legislation not be enacted with certain consequences. This is in fact the theory on which Ely himself actually relies (in spite of much that he says).¹⁰¹

But it would be a mistake to suppose (as Ely does) that judges could either choose or apply this theory of judicial review without facing issues that are by any account substantive issues of political morality. Judges must decide that pure utilitarianism is wrong, for example, and that people do have rights that trump both the maximization of unrestricted utility and the majoritarian decisions that serve unrestricted utility. This is not a procedural decision of the sort that Ely thinks judges and lawyers make best. He says that democracy requires that the majority decide important issues of political principle, and that democracy is therefore compromised when these issues are left to judges. If that is right, then Ely’s own arguments do condemn the only available “process” theory of judicial review, the very theory that he himself, properly construed, offers. If we want a theory of judicial review that yields acceptable results—that would permit the Court to strike down racially discriminatory laws even if they benefit the community as a whole counting each person’s interest as one—we cannot rely on the idea that the Supreme Court must be concerned with process *as distinct from* substance. The only acceptable version of “process” theory itself makes the correct process—the process the Court must protect—depend on deciding what rights people do or do not have.¹⁰² So I object to the characterization Ely gives of his own theory. He thinks it allows judges to avoid issues of substance in political morality. But it does so only because the theory itself decides those issues, and judges can accept the theory only if they accept the decisions of substance buried within it.¹⁰³

¹⁰¹ See J. Ely, *supra* note 6, at 82-84. Ely offers a theory of representation that embodies the idea that elected officials must show “equal concern and respect” to all, *id.* at 82, and implicitly rejects the pure utilitarian account of what this means in favor of something like the account described in the text. The pure utilitarian account would not support Ely’s own argument that minority interests constitutionally are guaranteed “virtual representation” in the political process, *id.* at 82-84, and that political decisions based on prejudice (unconstitutionally) deny such representation, see *id.* at 153.

¹⁰² See Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L.J.* 1063, 1064-72 (1980).

¹⁰³ See Perry, *Interpretivism*, *supra* note 7, at 310-16; Tushnet, *Darkness On The Edge of Town: The Contributions of John Hart Ely To Constitutional Theory*, 89 *Yale L.J.* 1037, 1045-53 (1980).

We now reach a question more important than the issue of characterization. Ely thinks that a "process" theory of judicial review will sharply limit the scope of that review. He says, for example, that such a theory bars the Court from enforcing "the right to be different."¹⁰⁴ But this now seems arbitrary, and in need of much more justification than Ely offers. Why is racial prejudice the only threat to treatment as an equal in the legislative process? If the Court should insure that people are treated as equals in that process, should it not, for that very reason, also strike down laws making contraceptives or homosexual practices illegal? Suppose the only plausible justification for these laws lies in the fact that most members of the community think that contraception or homosexuality is contrary to sound sexual morality. Or that the will of the majority is served by forbidding contraceptives and homosexual affairs. Or that long-term utility, taking into account the community's deep opposition to these practices, will be best served that way. If it is unfair to count racial prejudice as a ground for legislation, because this fails to treat people as equals, why is it not also unfair, and so also a denial of equal representation, to count the majority's moral convictions about how other people should live?

Some people think it is axiomatic that any legal distinction based on race is offensive to democracy, so that we need no more general explanation of why racial discrimination is unconstitutional. But this seems arbitrary, and the Supreme Court apparently has rejected it.¹⁰⁵ So has Ely.¹⁰⁶ Ely therefore needs a more general explanation of why counting racial prejudice as a political justification violates equality. Once that more general explanation is provided, the question is raised whether the explanation reaches beyond race, and whether it reaches legislation based on popular opinions about sexual morality as well.

Ely discusses this problem only parenthetically, in the course of a footnote about legislation making homosexual practices a crime:

¹⁰⁴ Ely, *Democracy and the Right to Be Different*, 56 N.Y.U.L. Rev. 397, 399-405 (1981).

¹⁰⁵ See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 480-92 (1980) (Burger, C.J., announcing the judgment of the Court) (upholding constitutionality of Public Works Employment Act requirement that grantees use at least 10% of grants to procure services from minority owned enterprises); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (Powell, J., announcing the judgment of the Court) (Constitution does not proscribe state university from ever using race conscious admissions program); *id.* at 328, 336-40, 350-62 (Brennan, J., concurring in the judgment in part and dissenting in part) (neither Constitution nor Title VI bars preferential treatment of racial minorities as means of remedying past societal discrimination).

¹⁰⁶ See Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727-41 (1974).

Neither is there anything unconstitutional about outlawing an act due to a bona fide feeling that it is immoral: most criminal statutes are that at least in part. (Attempting to preclude the entire population from acting in ways that are perceived as immoral is not assimilable to comparatively disadvantaging a given group out of simple hostility to its members. . . . In raising my children not to act in ways I think are immoral, even punishing them when they do, I may incur the condemnation of some, but the sin is paternalism or some such, hardly that of leaving my children's interests out of account or valuing them negatively.)¹⁰⁷

This will not do. Ely is wrong in thinking that legislation against homosexuals is typically motivated by concern for their interests. (Even if he were right, this would not provide the necessary distinction. Racial discrimination is often justified, sometimes sincerely, on the proposition that blacks are better off "in their place" or "with their own kind.") He is right, however, in supposing that a utilitarian justification of laws against homosexuals does not leave their interests "out of account" or value them negatively. It counts the damage to homosexuals at full value, but finds it outweighed by the interests of those who do not want to associate with practicing homosexuals or who find them and their culture and lives inferior. But a utilitarian justification of racial discrimination does not ignore the interests of blacks or the damage discrimination does to them. It counts these at full value, and finds them outweighed by the interests of others who do not want to associate with blacks, or who find them and their culture and habits inferior or distasteful. The two utilitarian justifications are formally similar, and nothing in Ely's argument shows why it offends the proper conception of democracy to permit the one but does not offend it to permit the other.

Nor does his general distinction between process and substance provide the necessary distinction. We must ask why a process that counts racial prejudice as a ground of legislation denies equal representation, and then ask whether our explanation has the further consequence of also denying a role to popular convictions about private sexual morality. In various places I have argued, along the following lines, that the only adequate explanation does have that consequence. Legislation based on racial prejudice is unconstitutional not because any distinction using race is immoral but because any legislation that can be justified only by appealing to the majority's preferences about

¹⁰⁷ J. Ely, *supra* note 6, at 255 n.92 (citation omitted).

which of their fellow citizens are worthy of concern and respect, or what sorts of lives their fellow citizens should lead, denies equality.¹⁰⁸ If I am right, then constraints on liberty that can be justified only on the ground that the majority finds homosexuality distasteful, or disapproves the culture that it generates, are offensive to equality and so incompatible with a theory of representation based on equal concern and respect. It does not follow, of course, that no legislation about sexual behavior is permitted. Laws against rape, for example, can be justified by appealing to the ordinary interests of people generally through a theory of justice that does not rely on popular convictions. But I do not think that laws forbidding consensual homosexual acts can be justified in that way.

I do not propose to reargue my case for these various claims here.¹⁰⁹ But if Ely continues to reject my argument, he must provide a theory of equality that is superior. It remains to be seen what theory he can provide. But in any case his theory must be based on some claim or assumption about what rights people have as trumps over an unrestricted utilitarian calculation, and what rights they do not have. So even if he is able to produce a theory justifying his distinction between racial prejudice and moral populism, he will have abandoned his main claim, that an adequate theory of judicial review need take no position about such rights.

My reservations extend, I should add, to Ely's paradigm example of improper judicial review, which is the case of *Roe v. Wade*.¹¹⁰ But here the issue is more complex. What are the available justifications for prohibiting abortion in, say, the first trimester? If we rule out as medically unsound the idea that abortion is a threat to the mother, then two main justifications come to mind. The first appeals to the moral opinions of the majority, without assuming that these are sound. But if we believe that counting such preferences, as a justification for constricting liberty, denies equality, then our theory condemns this justification as unacceptable.¹¹¹ The second appeals to the

¹⁰⁸ For the latest version of this argument, see Dworkin, *Pornography*, supra note 61, at 194-206, 210-12. Earlier versions are in R. Dworkin, *Taking Rights Seriously* 234-39 (1977) (external preferences should not count); Dworkin, *Social Sciences*, supra note 69, at 10-12 (antecedent probability of prejudice the source of rights).

¹⁰⁹ These claims have been criticized. See, e.g., Hart, *Between Utility and Rights*, 79 *Colum. L. Rev.* 828, 838-46 (1979). I reply to Hart's criticisms in Dworkin, *Pornography*, supra note 61, at 206-12.

¹¹⁰ 410 U.S. 113 (1973).

¹¹¹ Cf. Brest, *The Substance of Process*, 42 *Ohio St. L.J.* 131, 134-39 (1981) (criticizing Ely's "conscientious objection" exemption for legislation based on sincerely held moral beliefs for subverting very purpose of representation-reinforcing mode of review).

interests of the unborn. If unborn infants are people, whose interests may properly be counted by a legislature, then this second justification is sound and passes the test of equal representation. But the Court must decide that deep and undemonstrable issue for itself. It cannot refer the issue whether unborn infants are people to the majority, because that simply counts their moral opinions as providing a justification for legislative decisions, and this is exactly what our theory of equal representation forbids. (Nor, for the same reason, can it either delegate that question to the legislature or accept whatever answer the legislature itself offers.) I am not arguing (now) in favor of either view about abortion, or that *Roe v. Wade* was correctly decided. I insist only that incanting “process” or “democracy” or “representation” is neither here nor there. All the work remains to be done.

IV

THE FORUM OF PRINCIPLE

We have seen an extraordinary amount of talent deployed to reconcile judicial review and democracy. The strategy is the same: to show that proper judicial review does not require the Supreme Court to displace substantive legislative judgments with fresh judgments of its own. The tactics are different. One program argues that the Court can achieve just the right level of constitutional supervision by relying on the “intention” of “the Framers.” Another that the Court can avoid trespassing on democracy by policing the processes of democracy itself. Both these programs are self-defeating: they embody just the substantive judgments they say must be left to the people. The flight from substance must end in substance.

If we want judicial review at all—if we do not want to repeal *Marbury v. Madison*—then we must accept that the Supreme Court must make important political decisions. The issue is rather what reasons are, in its hands, good reasons. My own view is that the Court should make decisions of principle rather than policy—decisions about what rights people have under our constitutional system rather than decisions about how the general welfare is best promoted—and that it should make these decisions by elaborating and applying the substantive theory of representation taken from the root principle that government must treat people as equals. Whether I am right in this, and what it means, are questions for legal and political theory, and it is these questions I think we should address.

Should we nevertheless accept all this with regret? Should we really be embarrassed that in our version of democracy an appointed court must decide some issues of political morality for everyone?

Perhaps—but this is a much more complex matter than is often recognized. If we give up the idea that there is a canonical form of democracy, then we must also surrender the idea that judicial review is wrong because it inevitably compromises democracy. It does not follow that judicial review is right. Only that the issue cannot be decided by labels. Do the best principles of political morality require that the majority's will always be served? The question answers itself. But that is only the beginning of a careful study of the morality of judicial review.

If we undertake that study, we should keep steadily in mind what we have gained from the idea and the practice of that institution. I do not mean simply the changes in our law and custom achieved by the Supreme Court. Every student of our legal history will find decisions to deplore as well as to celebrate. Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply issues of political power, a transformation that cannot succeed, in any case not fully, within the legislature itself. That is important beyond the importance of the actual decisions reached in courts so charged.

Judicial review is a distinctive feature of our political life, envied and increasingly copied elsewhere.¹¹² It is a pervasive feature, because it forces political debate to include argument over principle, not only when a case comes to the Court but also long before and long after. This debate does not necessarily run very deep, nor is it always very powerful. It is nevertheless valuable. In the last few decades Americans debated the morality of racial segregation, and reached a degree of consensus, at the level of principle, earlier thought impossible. That debate would not have had the character it did but for the fact and the symbolism of the Court's decisions. Nor is the achievement of consensus essential to the value I have in mind. American public officials—particularly the large number of them who have gone to law school—disagree about how far those accused of crimes should be protected at the cost of efficiency in the criminal process, and about capital punishment. They disagree about gender and other nonracial distinctions in legislation, about affirmative action, abortion, and the rights of school children to an equal public education whether they live in rich or poor districts of a state. But these officials

¹¹² See, e.g., Bolz, *Judicial Review in Japan*, 4 *Hastings Int'l & Comp. L. Rev.* 87, 83, 97-133 (1980); Galligan, *Judicial Review in the Australian Federal System: Its Origin and Function*, 10 *Fed. L. Rev.* 367, 372-88, 392-97 (1979). See generally Kommers, *Review Article—Comparative Judicial Review and Constitutional Politics*, 27 *World Pol.* 282 (1975).

are, as a group, extraordinarily sensitive to the issues of political and moral principle latent in these controversies; more so, I think, than even the brilliantly educated and articulate officials of Britain, for example. I do not mean that the Court has been their teacher. Many of them disagree profoundly with what the Court has said. But they would not be so sensitive to principle without the legal and political culture of which judicial review is the heart. Nor would the public they represent read and think and debate and perhaps even vote as they do without that culture.

Learned Hand warned us that we should not be ruled by philosopher-judges even if our judges were better philosophers.¹¹³ But that threat is and will continue to be a piece of hyperbole. We have reached a balance in which the Court plays a role in government but not, by any stretch, the major role. Academic lawyers do no service by trying to disguise the political decisions this balance assigns to judges. Rule by academic priests guarding the myth of some canonical original intention is no better than the rule by Platonic guardians in different robes. We do better to work, openly and willingly, so that the national argument of principle that judicial review provides is better argument for our part. We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophesy.¹¹⁴ I call it law.

¹¹³ L. Hand, *The Bill of Rights 73* (1958).

¹¹⁴ Perry, *Noninterpretive Review*, *supra* note 25, at 288-96.