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INTERPRETING *THIS* CONSTITUTION: THE UNHELPFUL CONTRIBUTIONS OF SPECIAL THEORIES OF JUDICIAL REVIEW

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The United States has an aged Constitution. In fact, among the world's extant constitutions, ours is the oldest of those that are both written and judicially enforceable as supreme law. Most Americans, growing up under the presuppositions of how our own Constitution operates, may well assume that it merely reflects a commonplace feature of government. But that assumption is inaccurate. Even now, the world's general practice is contrary to our own. Indeed, a great deal of our early constitutional law that is so much taken for granted at home is more carefully studied in other countries that have only recently modified their own basic legal arrangements in partial imitation of the American constitutional plan. In India, Japan, and West Germany, for instance, early American Supreme Court decisions (such as *Marbury v. Madison*,¹ which confirmed the authority of the Supreme Court to refuse to apply acts of Congress which in its view are not consistent with the Constitution), are studied with keen interest because somewhat equivalent powers have been vested in their judiciaries only during the last forty years.² In England, which even now resists suggestions to entrench a written Constitution or a Bill of Rights,³ the manner in which the United States Supreme Court has historically exercised its stewardship in constitutional adjudications is also of very modern interest. It fuels the English debate on both sides of controversy;⁴

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

2. Medicus, *Federal Republic of Germany*, in 1 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW F1, F3; Jeani, India, *id.* at I10; Noda, Japan, *id.* at J8.

3. Lloyd, *Do We Need a Bill of Rights?*, 39 MOD. L. REV. 121, 124 (1976). See generally Griffith, *The Political Constitution*, 42 MOD. L. REV. 1 (1979).

4. The current law in England is still as it was in 1700 in this respect: "An Act of Parliament can do no wrong, though it may do several things that look pretty odd." *City of London v. Wood*, 88 Eng. Rep. 1592, 1602 (1700). "In Britain, the phrase 'judicial review' is merely a flattering way of describing statutory interpretation—the judicial approach to which it is confined by strict rules, though there are signs in recent cases of a more liberal approach developing." Scarman, *Fundamental Rights, The British Scene*, 78 COLUM. L. REV. 1575, 1585 (1978). See also Karst, *Judicial Review and the Channel Tunnel*, 52 S. CAL. L. REV. 447 (1980).

For a review of legal developments in New Zealand, respecting freedom of the press, see ESSAYS ON HUMAN RIGHTS (9th ed. K. Keith, ed. 1968); Burrows, *The Law and the Press*, 4 OTAGO L. REV. 119 (1978). For a review in Australia, see E. CAMPBELL & H. WHITMORE,

some influential persons utilize certain United States Supreme Court decisions to illustrate the wisdom of providing similar protections in England, while a larger number utilize other decisions which, in their opinion, show the unwisdom and untrustworthiness of such judicial power.

A great deal of the hesitancy in other countries to entrench within their own government an independent judiciary with powers of constitutional superintendence such as those possessed by our Supreme Court, reflects an ambivalence still not entirely laid to rest even in the United States. Essentially, it is an ambivalence that such provisions of fundamental law as are worthy of being placed beyond simple majoritarian tampering in a Constitution must necessarily be cast in language that nevertheless requires interpretation. But insofar as virtually no amount of editorial precaution can fully ensure against subsequent judicial misconstructions that may grow out of mere judicial hubris (or out of impatience for appropriate constitutional change through amendment), there is an anxiety that entrenching fundamental law is not well advised. The judiciary cannot be trusted. The point is very old and equally new.

In England, it takes the form of doubting the wisdom of confiding to judges a power to hem in Parliament by irreversible interpretations of proposed fundamental-law clauses which class-biased judges might construe (or misconstrue) in favor of the propertied classes. It is a concern derived partly from observations about the United States Supreme Court and its uses of the due process clause during the "Lochner" era, i.e., that period during which a very large number of state statutes were held invalid as depriving entrepreneurs of "liberty" of "property" without "due" process.⁵ In the United States, it is equally well represented at the other extreme by the arguments of Alexander Hamilton who dismissed the desire to include a Bill of Rights within the proposed Constitution of 1787. Here, the objection was that the effort would be misleading and insufficient because, however a free speech or free press clause might be framed, the definitional latitude available to courts (as available also to Congress) would tolerate wholesale "evasion":

What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, as intimated upon another occasion, must we seek for the only solid basis of all our rights.⁶

FREEDOM IN AUSTRALIA (1973). See also Hunt & McCarthy, *Why No First Amendment? The Role of the Press in Relationship to Justice*, in AM./AUSTL./N.Z. L. 133, 147 (1980).

The background to the newly entrenched Canadian Bill of Rights is presented in Tarnopolsky, *The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedom*, 44 LAW & CONTEMP. PROBS. 169 (1981), and an assessment of the most recent changes are presented in *Reshaping Confederation: The 1982 Reform of the Canadian Constitution*, 45 LAW & CONTEMP. PROBS. 1 (1983).

5. The reference is, of course, to *Lochner v. New York*, 198 U.S. 45 (1905). The large number of related decisions are summarized in B. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 173-75 (1942) and in the *Constitution of the United States* (G.P.O. 1972).

6. THE FEDERALIST No. 84, at 514-15 (A. Hamilton) (C. Rossiter ed. 1961). For a modern

Nonetheless, at the time Hamilton expressed his own skepticism, the more moderate optimism shared by both Thomas Jefferson and James Madison prevailed, although each readily conceded the inconclusiveness of a Bill of Rights. Indeed, their own observations were extremely measured. Jefferson suggested:

The declaration of rights, is, like all other human blessings, alloyed with some inconveniences, and not accomplishing fully its object. . . . But though it is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen, with that brace the less.⁷

Similarly, writing to Jefferson less than a year before he introduced into Congress his own draft of a Bill of Rights, Madison quite mildly observed: "I have favored it because I suppose it might be of use, and if properly executed could not be of disservice."⁸ Addressing the House of Representatives, Madison reflected the same sensible diffidence:

I will own that I never considered this provision so essential to the Federal Constitution as to make it improper to ratify it, until such an amendment was added; at the same time, I always conceived, that in a certain form, and to a certain extent, such a provision was neither improper nor altogether useless.⁹

Then, adverting to the expectation of judicial responsibility to apply the proposed Bill of Rights in the normal course of adjudication, Madison noted: "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of these rights."¹⁰ Madison's own notes, jotted down to guide him in this extemporaneous address in Congress, summed up the matter: "Bill of Rights—useful not essential . . ."¹¹

These were modest and quite unexceptionable expectations. They did not

view that Hamilton may have been correct in his skepticism, see Kurland, *The Irrelevance of the Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses*, 29 *DRAKE L. REV.* 1, 5-6 (1979-80). And for more general statements respecting the ultimate undependability of judicial review to secure the Bill of Rights, see, e.g., R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 80 (1955) ("I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions."); *THE SPIRIT OF LIBERTY, PAPERS AND ADDRESSES OF LEARNED HAND* 189 (I. Dillard, ed. 1953) ("I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts.").

7. Letter from Thomas Jefferson to James Madison, from Paris (Mar. 15, 1789), reprinted in part in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 462, 462-63 (A. Koch & W. Peden eds. 1944).

8. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in *V THE WRITINGS OF JAMES MADISON* 269, 271 (G. Hunt ed. 1904) [hereinafter cited as *V JAMES MADISON*].

9. Address by James Madison before the United States House of Representatives (June 8, 1789), reprinted in *id.* at 370, 380.

10. *Id.* at 370, 385.

11. *Id.* at 370, 389.

dwell upon extraordinary notions of judicial review, but here, as elsewhere (e.g., *The Federalist Papers*¹²), they treat judicial review quite matter of factly. The marginal uncertainties of the Bill of Rights were taken for granted. The assumption that judges would nonetheless feel bound to apply its provisions as superior law is seen as no anomaly, but rather as a useful device. The attitudes expressed are those of reasonable optimism and not of either naiveté or fear.

Today, however, things are much changed. Two centuries of constitutional adjudication have produced a greying of the Constitution and an uneasiness respecting the interpretive predilections of our own Supreme Court that makes its imitation abroad problematic and amendment here at home discouragingly difficult. My own sense of the ill-fated Equal Rights Amendment,¹³ for instance, is that it became a casualty to the apprehensions of persons who frankly feared not what it said, but how it might be judicially construed. My best impression of efforts in England to secure an equivalent, enforceable Bill of Rights in that country is that the task has been made much more difficult, rather than more likely, because of our experience. I also think that a great deal of this is due to the judiciary's own excessive ingenuity and to the misplaced wisdom that has urged upon the Supreme Court a variety of utterly remarkable views respecting the interpretation (and "noninterpretation") of the Constitution.

12. E.g., *THE FEDERALIST* No. 78, at 485-86 (A. Hamilton) (H. Lodge ed. 1888):

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

See also materials and references in R. BERGER, *CONGRESS VERSUS THE SUPREME COURT* (1969) (while not useful as a source respecting the scope of the clause it purported to deal with, i.e., the clause in Article III respecting "such exceptions" as Congress may make to the Supreme Court's appellate jurisdiction, is nonetheless a very full collection of materials respecting the widespread understanding that substantive constitutional review, incidental to adjudication, would be a feature of the judicial power); A. BICKEL, *THE LEAST DANGEROUS BRANCH* 15 (1962); Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 655-57 (1982); Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 38-45.

13. Proposed by Congress as the twenty-seventh amendment on March 22, 1972, and the extended ratification deadline having expired on June 30, 1982 (three states [of the requisite 38] short of ratification), the amendment would have provided:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

I

From nearly the beginning, and certainly with the emergence of John Marshall, "special" theories of constitutional interpretation have competed for favor within our Supreme Court. In Marshall's case, it was the innovation of a constitutional jurisprudence pursuant to which acts of Congress (other than those affecting the judiciary)¹⁴ would not be subjected to the same judicial predisposition as acts of the several states. Rather, acts of Congress would be treated as presumptively constitutional;¹⁵ and only in the event that their validity depended upon a manifestly unreasonable or virtually unimaginable interpretation of some clause, might they be successfully impugned.¹⁶ On the other hand, no similar loose construction attended the Marshall Court's review (and invalidation) of state laws in respect to those few constitutional clauses as were addressed to the states.¹⁷

Still, despite his enormously impressive influence on the Supreme Court and his remarkable thirty-four years of service, John Marshall could not live as long as the Constitution itself. And predictably, the fundamentals of Marshall's particular special theory of constitutional interpretation would not necessarily be shared by the Chief Justice (Taney) or the Associate Justices who would come after him. As the jurisprudence of Marshall's own special theory was not fixed in the Constitution, nor was it by any means otherwise so persuasive that none could give reasons to reject it, it could not last. Thus, it came to be dis-

14. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it was obvious that several plausible interpretations of those clauses in Article III describing congressional power in the allocation and regulation of the judicial power, were available to sustain the Act of Congress. See Van Alstyne, *supra* note 12, at 30-32.

15. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

16. John Marshall, it may be useful to add, had no difficulty concluding that the Alien and Sedition Acts of 1798, the first piece of national legislation seriously abridging speech, were plainly constitutional.

17. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) ("contract" impairment clause of Article I, § 10 interpreted to include legislative grant of land which a state was held to have no power to "impair" by rescinding on grounds of fraud and corruption); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (similarly activist interpretation of contracts clause to invalidate state acts). For additional examples and an excellent review, see generally Currie, *supra* note 12. The seed of the rationale for more aggressive review of state vis-à-vis federal laws generally (both procedural and substantive activism), keyed to a special theory of rationing the occasions and substance of constitutional review according to the representative adequacy of the legislative source, appears in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). It was given a systematic push in an unduly famous essay by James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), once identified by Justice Felix Frankfurter as perhaps the single most important piece of writing on American constitutional law. See also A. BICKEL, *supra* note 12, at 35-40. The essential thesis similarly figures centrally in Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). An extreme version (literally removing judicial review of any exertion of national power brought into question on the ground that it exceeded any enumerated or implied power) is proposed in J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175 (1980) ("The federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states.").

placed by quite a different theory — one not at all consistent with Marshall's views.¹⁸

From that time to this time has, in turn, been quite a long time. Other individuals, holding other strong special theories of judicial role and of constitutional interpretation, have had their own turn on the Court.¹⁹ Each, moreover, has drawn varying measures of extraordinary encouragement from very able and occasionally very zealous American scholars. And some, noting the lack of compunction of their predecessors who presumed to proceed by very different theories than those who preceded them, felt correspondingly at ease in doing likewise. And so things have gone.

Within the span of any one generation, the appearance and the dominance of some special theory need not particularly have mattered. For within a given period, an established judicial predisposition may well become "normal," i.e., it may become standard and, in some sense, thus also become correct. Even between two generations, each reflecting quite a different judicial predisposition toward constitutional interpretation, the sense of consternation need not be great. Insofar as the decisional consequences of one Supreme Court's interpretative orientation may well have become politically resented, a shift in the doctrinal vagaries of the next Court, albeit in fact a shift to yet another non-neutral position, would not necessarily be seen as such. Rather, it might be (mis)understood as merely providing a welcome corrective of the perceived hubris or error of the immediately preceding Court.

But it is an inevitable consequence of having an aging Constitution that it exhibits these practices over a very long span of time. And therein is the rub. Over two centuries, the precedents of previous adjudications accumulate. The early cases, under John Jay or John Marshall, were not disadvantaged by the geriatrics of accumulated precedent. Increasingly, however, as the detritus of past decisions mass like so many granular mounds, the piles of antecedent case law confront each new Justice until the task is principally to account for the prior case law and only incidentally, as it were, to interpret the Constitution. The early cases arising under the Constitution tended much more strongly to set down a distinctive jurisprudence. They read as one might expect constitutional law to read. The holdings were cast in broad, quite confidently asserted terms. The opinions fastened on principal issues. The Court was infrequently

18. For example, it is plain that *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), written by Chief Justice Taney, does not proceed from an interpretative predisposition at all like that reflected in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which Chief Justice Marshall sustained an Act of Congress vesting four-fifths majority control of a national bank in private shareholders and private directors, and holding that it was immune to the taxation power of any state despite the absence of any provision in the Bank Act which purported to legislate such immunity.

19. E.g., Mr. Justice Black's textual literalism was defended instrumentally as most conducive to strong protection of civil rights. See Black, *Mr. Justice Black, The Supreme Court and the Bill of Rights*, HARPER'S, Feb. 1961, at 63; Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963). His jurisprudence, however, often resulted in quite the opposite application. See, e.g., *Street v. New York*, 394 U.S. 576 (1969); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *Adderly v. Florida*, 385 U.S. 39 (1966); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

divided, and the resulting doctrines were strong.²⁰ In reading early cases, whatever else one might think of them, one felt that they had the feel of constitutional law. While there was in fact a heavy bias in the interpretive predilections of the Marshall Court, still it had the enormous advantage of not having to answer to the stare decisis legacy of two centuries of shifting schemes of predilection. Now, however, there is such an outstanding exhibition of special interpretive preferences respecting predispositions of constitutional review that it is much more awkward to maintain that it is *this* Constitution that is being interpreted. Rather, it is more widely felt that one must ask: whose partial jurisprudence is currently being applied?

Among the many varieties of such partial jurisprudence, examples and very elaborate scholarship can be mustered to endorse quite a large number of very different propositions, virtually as though each were itself prescribed in Article III. The following is by no means an exhaustive list:

1. Acts of Congress shall not be examined for consistency with the Constitution according to the same interpretive predilection as shall be applied to such clauses that may restrict state legislation;²¹ *and*,

2. Acts of the national government which are challenged merely on the ground that the Constitution confides the power to perform some act to a Department other than the Department from which it issued shall not be examined at all;²² *moreover*,

3. No act of government arising from any source of government, whether national, state, or local, should be seriously examined for consistency with the Constitution except to the extent that it results from a process which the Supreme Court believes to be insufficiently democratic;²³ *but*

20. See Currie, *supra* note 12, at 647:

This was a time of vigorous affirmation of national authority and of vigorous enforcement of constitutional limitations on the states; a time of extensive opinions in the grand style we have come to associate with Marshall; a time, moreover, of remarkable stability and official unanimity The rarity of recorded dissent during this period was so great as to be almost incredible by modern standards.

21. See *supra* note 17.

22. See, e.g., J. CHOPER, *supra* note 17, at 263 ("The federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President vis-à-vis one another.").

23. To a considerable extent, the proposition is embedded in Thayer's rule which obliges the Court to sustain unconstitutional acts of Congress not merely when challenged on grounds of insufficient enacting authority, but also when challenged on grounds that they interfere with affirmatively protected rights. Thayer, *supra* note 17, at 151. Relatedly, insofar as John Ely endorses a tougher substantive standard of equal protection review contingent upon the (judicially perceived) extent to which certain group interests are not given equal dignity or respect within a legislative process, necessarily the idea is equivalently that no similar conformity to the equal protection clause should be required insofar as (judges think) other group interests are given sufficient respect in legislative processes. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 146-65 (1980). The general reference for this sort of thinking is a footnote in Justice Stone's opinion in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). On its face, Stone's footnote was merely a justification for *procedural* judicial activism. It suggested that judges ought to be selectively willing to take

4. Such laws as may be thought to be representation-reinforcing for neglected minorities shall in any case not be examined for consistency with the Constitution by the same standards as would apply to other legislation;²⁴ *on the other hand*,

5. Such acts of government which, in the Supreme Court's view (as informed by a convincing jurisprudence of moral philosophy) abridge any natural right fundamental to persons, shall be examined with sufficient scrutiny as is most likely to determine that they are inconsistent with this Constitution;²⁵ *and finally*,

such cases, and willing to take a harder look at them ("more searching judicial inquiry") than other kinds of cases. It did not decide that such cases, upon examination, should necessarily also result in holding the law invalid unless they satisfied a more exacting *substantive* standard of constitutional demand. The footnote was, however, developed into an independent, sociological rationale for differentiated substantive standards as well. Most of its favored categories are hopelessly far removed from the separate historical basis that would reserve a unique standard for race-based laws alone. The conventional standard of equal protection review is one that virtually no law can fail. See Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972). For a few of the many lucubrations on *Carolene Products'* footnote, see J. ELY, *supra*, at 75-77; Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982); Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982).

24. See, e.g., J. ELY, *supra* note 23, at 222. See also Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Ely, *Democracy and Judicial Review*, 17 STAN. LAW. 3 (1982).

25. Critically reviewed in Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1 (1981), and in Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 359 (1981). For leading examples, see A. MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM* (1982); P. BOBBITT, *CONSTITUTIONAL FATE* 94-97, 137, 144-45, 159-67 (1982) (arguing for the appropriateness of "ethical" argument which, to the extent that it is distinguishable from a liberal interpretation of particular clauses [e.g., the ninth amendment, the privileges and immunities clause of the fourteenth amendment], proceeds essentially by posing broad normative statements, eliciting audience concurrence that surely legislation inconsistent with such statements simply must be unconstitutional, and concluding, therefore, according to the ethos of the American polity, such legislation is indeed unconstitutional); Parker, *The Past of Constitutional Theory — And Its Future*, 42 OHIO ST. L.J. 223 (1981) (condemning the political pluralism characteristic of process-oriented theory and advocating exposure of underlying assumptions made by the theory to strive toward more democratic approach); Perry, *Non-interpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981) (reprinted in M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 91, 97-102, 123 (1982)) (arguing for a "religious" function for the Supreme Court, i.e., an obligation to discover contemporary vital values as the ligaments that bind an enlightened society, to enact them as appropriately protected rights); Richards, *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation*, 4 U. DAYTON L. REV. 295 (1979) (claiming a shift to human rights in constitutional development as the underlying normative backdrop balancing stability and change in constitutional development); Saphire, *Professor Richards' Unwritten Constitution of Human Rights: Some Preliminary Observations*, 4 U. DAYTON L. REV. 305 (1979) (criticizing validity of Richards' theory as failing to develop role of history in human rights paradigm); Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity?*, 42 OHIO ST. L.J. 335 (1981) (exploring theories focusing on the process of decision-making and arguing that such theories sacrifice constitutional moral function in serving society by subordinating concern for substantively "just" decisions). For related ideas, see C. BLACK, *DECISION ACCORDING TO LAW* (1981); Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) [hereinafter cited as Grey I]; Grey, *Origins of the Unwritten Constitution: Fundamental Law in American*

6. This Constitution shall be deemed to have enacted all essential principles of justice, despite first impressions to the contrary. Accordingly, the Supreme Court shall hold invalid such legislation as convincing sources of moral philosophy persuade a majority of its members are inconsistent with essential principles of justice, as shall they also employ the judicial power to impose upon all levels of government appropriate enforceable obligations to insure to each person the material conditions of justice.²⁶

Revolutionary Thought, 30 STAN. L. REV. 843 (1978); Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980).

26. See *supra* sources cited note 25. See also Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; Stone, *Equal Protection and the Search for Justice*, 22 ARIZ. L. REV. 1 (1980); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

27. The term "noninterpretivism" may not go back beyond its appearance in Grey I, *supra* note 25, at 703. The reason may be obvious. It signals a frank resolve to detach judicial review from the Constitution itself by stipulating it purports not to be interpreting the Constitution. It may say too much about the current condition of constitutional scholarship that "noninterpretivism" is willingly adopted as a mode of describing one's own work in constitutional law. If there were not writers who evidently welcome its fit, e.g., Perry, *supra* note 25, at 278, one might have supposed that its use was limited and purely perjorative, a mere epithet cast cruelly against a judge or another writer—a harsh opinion of their work (e.g., that judge so-and-so rendered another "noninterpretation" of the first amendment in his latest opinion). Compare the following comment by James White on these tendencies:

To say, as some do, that "we" ought to regard ourselves as "free" from the constraints of meaning and authority, free to make "our" Constitution what "we" want it to be, is in fact to propose the destruction of an existing community, established by our laws and Constitution, extending from "we" who are alive to those who have given us the materials of our cultural world, and to substitute for it another, the identity of which is most uncertain indeed. In place of the constituted "we" that it is the achievement of our past to have given us, we are offered an unconstituted "we," or a "we" constituted on the pages of law journals. One can properly ask of such a person, and mean it literally, "Who are you to speak as you do? Who is the 'we' of whom you speak?" To answer that the new "we" is defined not by the Constitution we have, but by the Constitution we wish we had, is no answer at all; for who is the "we" doing the wishing? In the new world, who shall be king?

White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 442-43 (1982) (footnote omitted).

Volunteers are evidently not in short supply. Having persuaded himself that "noninterpretivism" is inevitable in any case (see Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 183 (1982)), Mark Tushnet presumes to respond to the unasked question:

When I reach this point in the argument . . . I am invariably asked, "Well, . . . how would you decide the X case?"

...

My answer, in brief, is to make an explicitly political judgment; which result is, in the circumstances, likely to advance the cause of socialism? Having decided that, I would write an opinion in some currently favored version of Grand Theory.

Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

Of course, not all of these prescriptive interpretative and noninterpretative²⁷ directives could be provided for in Article III, even were there a predisposition to do so, for they fit together uncomfortably. It is true, moreover, that in fact *none* of them is thus provided for,²⁸ although each has been enthusiastically endorsed and each, to some extent, has been acted upon to some extent by the Supreme Court at different times.

There is, however, a cost to these things. The American model is difficult to commend abroad when its career at home exhibits such a high degree of unanticipated judicial plasticity. It has become increasingly difficult to alter, moreover, when the anxiety of even marginal ambiguity in proposed amendments cannot now be answered as Madison was able to answer Hamilton's concerns. We do not dare now to add the possibility of new troubles given the troubles we have seen. Time may not always heal all things. In the aging of our Constitution, time has tended to reveal too many things.

There may be, moreover, the additional misfortune of a negative synergism at work in these matters — a long term effect that neither the Supreme Court nor a majority of people would desire if either could control the matter solely by their own action, but an effect nonetheless that tends to come from their joint reactions. The Constitution is increasingly difficult to modify by amendment. The difficulty is partly the consequence of mistrust of uncertainty, a mistrust to which the judiciary has itself contributed by its endless, shifting quest among special theories of constitutional review. The sheer greater unamendability of the Constitution in turn, however, reciprocally presses in on the judiciary — that it must do its best to spin out additional, mutating “meanings” from existing clauses to maintain the contemporaneity of the (now unalterable) Constitution. If, for instance, it is no longer feasible for an Equal Rights Amendment to be ratified, it becomes even more legitimate than before for the Supreme Court to construe the fourteenth amendment toward the same end. And yet, since the judiciary tends to take this task upon itself anyway,²⁹ what then does it matter that the Equal Rights Amendment was not ratified, and who, moreover, could be confident of its interpretation were it to be approved?

II

It is sometimes observed quite ruefully that were the first amendment or the entire Bill of Rights to be freshly considered today, as though they were

28. Nor is there the slightest reason to think that any of these formulations would be acceptable as a proposed, express provision for inclusion explicitly in Article III.

29. E.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (Brennan, J., for a plurality). See also *Craig v. Boren*, 429 U.S. 190 (1976). Compare Van Alstyne, *The Proposed Twenty-Seventh Amendment: A Brief, Supportive Comment*, 1979 WASH. U.L.Q. 189 with Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971). Others, unimpressed with the straining required to adapt the fourteenth amendment to render superfluous any new amendment, nonetheless urge essentially the same outcome via some other existing provision (e.g., the ninth amendment). Compare C. BLACK, *supra* note 25, at 35 with Van Alstyne, *Slouching Toward Bethlehem with the Ninth Amendment*, 91 YALE L.J. 207 (1981).

not now a feature of our Constitution, they could not possibly be accepted. Most often, the point is offered reproachfully to suggest that Americans do not believe in these liberties as much as was originally the case. Possibly there is something to that idea, but possibly it is much oversold. Rather, it may be that we have been tutored to take proposed constitutional language much more seriously, to parse each phrase, to imagine every possible nuance of each adjective or noun, and to treat the matter much more as we would treat the fine print in the exclusionary clauses of an insurance policy, i.e., with fear and apprehension, rather than with hope and confidence. Very little in the Bill of Rights itself could endure that process and, with all respect, the tendency of the Court to superimpose special, or noninterpretive predispositions is certainly part of the difficulty.

To be sure, given a certain view of judges, and given a certain capacity for philosophic detachment, it may be feasible to dismiss these difficulties as inconsequential. If one imagines that enlightened judges can stay atop matters, one may also suppose that their own ingenuity may be sufficient to "perfect" the Constitution, however spare its actual provisions. Surely, this view is not merely remarkably optimistic, however, but considerably silly. A wholly creative Supreme Court could well have made an isolated provision in Article IV of the Constitution (that the United States shall guarantee to each state a "republican" form of government) an ample text to have outlawed slavery, to have extended the right to vote, and to have protected free speech as well. For is it not obvious that no government can be genuinely republican (i.e., representative) unless it is a government of free people, sharing a common right to vote, and fully protected in their freedom to express their political differences? Thus the bare text of this one clause in Article IV can facilitate immense good. A special theory of a constitutional role for courts would endorse it. Accordingly, neither the first,³⁰ thirteenth,³¹ fourteenth,³² fifteenth,³³ nineteenth,³⁴ twenty-fourth,³⁵ nor twenty-sixth amendment,³⁶ was important after all. None needs to have "cluttered" the Constitution. Given suitable ingenuity, perhaps the whole of the Constitution could be reduced to a single paragraph and still not lose any of the judicial glossing it has received.

At the other extreme, there is the view that the judiciary ought never invoke the Constitution as an invalidating barrier to legislation unless no amount of ingenuity can plausibly free them from doing so, because judicial review is

30. "Congress shall make no law . . . abridging the freedom of speech or of the press" U.S. CONST. amend. I.

31. "Neither slavery nor involuntary servitude . . . shall exist within the United States" *Id.* amend. XIII, § 1.

32. "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XIV, § 1.

33. "The right . . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." *Id.* amend. XV, § 1.

34. "The right . . . to vote shall not be denied . . . on account of sex." *Id.* amend. XIV, § 1.

35. "The right . . . to vote . . . shall not be denied . . . by reason of failure to pay any poll tax or other tax." *Id.* amend. XXVI, § 1.

36. "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied . . . on account of age." *Id.*, amend. XXVI, § 1.

itself anti-democratic and to that extent objectionable.³⁷ A recently popular

37. See Thayer, *supra* note 17, at 151. I characterized as "unduly famous" this original and most influential article, in note 17. Perhaps I should say why.

With respect to the adjudication of cases involving challenges to the constitutionality of states statutes, Thayer held that it was the duty of the judiciary "to allow to [the] constitution nothing less than its just and true interpretation." *Id.* at 155. In fully equivalent cases involving acts of Congress, however, it was Thayer's view that the Court was emphatically *not* to allow the Constitution anything less than "its just and true interpretation;" rather, it was to allow much less than a just and true interpretation. The Court was urged to do so, moreover, whether the issue of constitutionality turned on an alleged failure of enumerated or implied constitutional power vested in Congress to presume to do as it had done, or whether the issue turned on the inconsistency of the Act with some positive prohibition in the Bill of Rights. Thus, Thayer acknowledged that his proposed rule will operate against "private rights" as well, though it has a "tendency to drive out questions of justice and right" *Id.* In brief, acts of Congress were to be upheld and enforced by the Supreme Court unless founded on a preposterous, rather than an erroneous, misinterpretation of the Constitution. Moreover, even if the legislative record were to make it quite clear that Congress had in fact never even considered the constitutionality of its proposed action, Thayer urged the view that the Court should nonetheless pretend that it had, pretend also that Congress treated the issue (of constitutional interpretation) conscientiously, and pretend that Congress would not have enacted the Bill but for a good faith belief in its consistency with the Constitution. Indeed, even if the congressional record made it quite clear that Congress enacted the Bill despite its own expressed doubts and in express expectation that the issue would be more appropriately resolved in court, still the Supreme Court was to treat the Bill as (falsely) reflecting a conscientious debate in Congress and a conscientious conclusion that the Bill was not inconsistent with the Constitution. See *id.* at 146 (dealing with the problem and airily concluding that "we must assume that the legislature have done their duty . . .").

Taken at face value, Thayer's "analysis" should produce Supreme Court rulings along any of the following lines. None of them seems the least bit attractive:

1. The Act as applied in this case does not in our view rest within any enumerated or implied power of Congress; moreover, despite the able argument by counsel representing the government whose views we have heard respectfully, we are persuaded that as applied, this Act also abridges the petitioner's freedom of speech contrary to the first amendment. However, as our view is not controlling, as Congress is irrebutably presumed to have concluded otherwise, and as its view though incorrect is merely incorrect and no worse, we now sustain the Act as applied; [or]

2. We hold that the Act of Congress as applied is not unconstitutional either for lack of power to enact it or for conflict with some affirmative prohibition in the Constitution (although, of course, this in fact is not our view); [or]

3. We hold that the argument respecting the unconstitutionality of the Act of Congress is correct and has not been refuted, but since reasonable persons might conclude otherwise we therefore hold the Act to be constitutional.

I think none of this would have been the least bit attractive but for the character of practical results that the thesis was expected to yield; namely, that acts of Congress which a conservative Court would hold invalid might, under Thayer's rule, be sustained. Of course, that kind of outcome more favorable to Congress might well be desirable and defensible by rules of constitutional interpretation eminently persuasive in their own right, yet (unlike Thayer's rule) not in the least derogating from the independence of judicial constitutional review. It requires no fictitious imputation of constitutional interpretation within Congress (and no nonsense suppositions about either the representativeness or scruples of Congress) for the judiciary itself to apply a rule of generous construction in respect to the enumerated powers of Congress. The rule of generous construction, like Thayer's rule of "clear error," may of course result in upholding more acts of Congress than otherwise might be sustained. While

variant of this argument is that the Supreme Court should yield the "meaning" of the Constitution in such degree as the legislation under review appears to be the product of democratic processes. One might reject the assumptions of either argument merely on the practical basis that the Court (as well as the Constitution) is on quicksand once it feels charmed by this advice. A majority of people constituting a representative body at one time may be no less genuinely representative at that time than a fully equivalent majority of another time, but with each holding a wholly different view of the power they possess under the Constitution. Depending, then, upon the accident of the substance of the enacted legislation, indistinguishable statutes (indistinguishable, that is, in terms of the degree of representativeness that secures them) are identically "constitutional" though their provisions in fact may be mutually exclusive of one another and mutually exclusive also in terms of their compatibility with the Constitution. In this fashion, judges have little to do other than to be jerked about as mannikins, approving the "constitutionality" of whatever is "representatively" enacted, and reviewing seriously only "unrepresentative" enactments.

Additionally, the proposition that the Supreme Court should vary the substance of constitutional clauses depending upon its view of the "representativeness" of the particular legislation at issue in the case, is subject to the serious objection that it imputes to the Court an obligation it has no professional competence to discharge. Its "judgments" in this area are unlikely to be sophisticated,³⁸ its outcomes will be correspondingly eccentric, and its reasoning tends ultimately to exhibit a built-in circularity.

Sometimes, the object of "representativeness" inquiry is the electoral representativeness of the office holder or law-making body whose act or practice is in constitutional question.³⁹ The notion is that the wider the electoral

not free from criticism on its own account (federalism critics will tend to fault it), it is not contingent upon doubtful assumptions respecting the capacity of the President or the Congress fairly to assess the scope of their respective powers for the purpose of binding courts as well. Neither does it make any assumptions (irrebuttable or otherwise) that the President or Congress actually made such an inquiry before acting, or acted only after conscientious anguishing. Certainly it does not invite a tendency to ration the independence of judicial review inversely to the degree of consideration that those departments may have given the matter. In brief, there is no renunciation of independent judicial review, and no subordination of the Court's own view of the "just and true" interpretation of the Constitution according to the politically-driven and self-serving rhetoric of the political departments.

38. An example is readily furnished by Justice Brennan's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 361 (1978) (Brennan, J., concurring and dissenting), in which the analysis based on representativeness jurisprudence is either clearly unsophisticated or seriously disingenuous. Compare the opinion in the same case by Justice Powell. *Id.* at 265. See also Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 800-02 (1979).

39. For a discussion and interesting case review applying this point of view, see C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 76-95 (1969). According to this view, the degree of "presumption of constitutional validity" will move from zero in the case of an individual police officer's on-the-spot decision to take certain action (which is subsequently challenged) through "1" when the officer acted pursuant to a (mere) local ordinance adopted by a city council through "3" when anchored in a clearly-framed state law, through "8" when in the form of a clear Act of Congress,

auspices of the source of "law" drawn into question, the greater the demonstration must be of its degree of inconsistency with the clause or combination of clauses pursuant to which it is challenged.⁴⁰

Sometimes, the object of "representativeness" will instead focus on the breadth of the electoral base composed by the enacting body to suggest the substantive validity of an act subsequently challenged in an appropriate case on grounds of alleged substantive constitutional inconsistency. If, however, the ambient legislative circumstances suggest to the Court that the majority of legislators, and those whom they represent, may be indifferent to the proposed Act (for instance, the Act would have no immediate implications for them [except, of course, as a legislative precedent]), then the datum that the Act will not in fact have a broad field of application is deemed to undermine the integrity of its "representative" auspices such that a lesser degree of constitutional inconsistency should suffice to have the Court hold that it is unconstitutional.⁴¹

A variation of this second approach then closes the gap by becoming circular. If, though an Act emerges under electorally-representative auspices (e.g., Congress rather than an individual police officer), and though it will affect a majority of all persons in all regions of the country alike, to the extent that members of the Court surmise from the content of the Act that it cannot be *authentically* representative (because to the Court's satisfaction such an Act could not have been passed if it were "authentically" representative), then it is stripped of any presumption of substantive constitutional consistency and, indeed, is presumed not to satisfy the clause invoked to question it.⁴²

40. Note, then, that what would be "held" unconstitutional when reflected merely in the practice of a given police officer may (and sometimes must) logically be "held" constitutional if reflected in a state statute. Of course, that inconsistency could be avoided by treating the first decision on the merits as a binding precedent (though by hypothesis the "first decision" itself would have been different had that "first decision" involved a state statute [or federal statute] rather than an individual police officer's act) — but this way of coping with inconsistency then makes the content of the prevailing constitutional rule very much the accident of which kind of "case" happened to be adjudicated first. How very strange. One may attempt other permutations, but most will be found to exhibit similar difficulties. The point illustrated here is distinct from the different point discussed in note 43, *infra*, in the example taken from *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Rather, it is a more general form of the example (*infra* note 42) taken from *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

41. *But see* *Katzenbach v. Morgan*, 384 U.S. 641 (1966), yielding to Congress the determination of what kinds of state legislative distinctions are forbidden by the equal protection clause, though the provisions of the Act in question affected a very limited portion of the nation and in fact received virtually no attention in Congress. A refinement to this approach would qualify it, however, by reinstating the nearly insurmountable presumption of substantive constitutional consistency insofar as the Court is of the view that, despite the regional or otherwise restricted field of impact of the proposed Act, the economic and/or sociological position of those to whom it may apply is such that their political influence with the legislature is "bound" to be substantial. *See, e.g.,* *Southern Pac. Co. v. Arizona*, 325 U.S. 711, 767 n.2 (1945); *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938).

42. Legislation unfavorable to women is treated generally in this respect, partly on the conjecture that women are (sometimes) not adequate to represent their interests because of self-victimization of "stereotype," e.g., that they would have effectively acted to forestall certain legislation, but for the damaging effects of our culture which precludes them from taking their own constitutional rights seriously within the legislative process, and obliging the

The circle is closed by generalizing this last analysis: such legislation as certain Justices believe to be "unjust" can *never* be representative since by definition authentically representative bodies could not have enacted it had they been *duly* considerate of what they were doing (i.e., duly representative).⁴³ Thus, every "unjust" law carries no presumption of representativeness and

Court to do so in their behalf. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973). Compare discussion in J. ELY, *supra* note 23, at 166-69 with Note, *supra* note 29, at 1505 n.48. Legislation favorable to women may likewise be treated the same way, insofar as the same school of political sociology can persuade some Justices that such legislation, unfavorable to men, is only *seemingly* unfavorable to men (but actually favorable to them [in the Court's view] insofar as it is favorable to women in respect to some reinforcement of "woman's role"). *See, e.g.,* *Mississippi Univ. of Women v. Hogan*, 102 S. Ct. 3331, 3339 (and compare the dissent at 3347) (1982); *Orr v. Orr*, 440 U.S. 268, 283 (1979); *Craig v. Boren*, 429 U.S. 190, 220 n.2 (1976).

43. This use of representativeness jurisprudence in the rationing of substantive judicial activism should also be distinguished from the relevance of legislative facts in constitutional litigation. *See, e.g.,* Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75. The distinction is illustrated by comparing *Katzenbach v. Morgan*, 384 U.S. 641 (1966), with *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In the first case, *Morgan*, an Act of Congress forbade the use of voter-literacy tests because in its view the use of such tests was *per se* sufficiently unfair as to deny equal protection to such persons as could not pass them. In the second case, *South Carolina*, an Act of Congress suspended the use of voter-literacy tests in certain jurisdictions as an efficient means of enforcing the fifteenth amendment's prohibition against otherwise-difficult-to-detect racial misapplications of such tests by voting registrars.

In *South Carolina*, no novel or different construction of the fifteenth amendment was relied upon by Congress than the judiciary, acting independently, regarded as entirely sound (and conventional). The question, then, was the sufficiency of the factual predicate relied upon by Congress, the sufficiency of the "legislative facts:" i.e., was there sufficient evidence of difficult-to-detect registrar misapplications of certain literacy tests to support Congress' conclusion that, given these conditions, the remedy it proposed (suspending the tests in jurisdictions in which less than half of the eligible-age population registered and voted in 1964, mitigated by a bail out provision), was legislation "appropriate" to enforce the fifteenth amendment's prohibition of such racial misapplications? The Court agreed that the evidence was sufficient.

In *Morgan*, Congress presumed to legislate its view respecting the constitutional consistency of literacy tests and the obligation of each state to deny to no person the equal protection of its laws. The Court had previously held that there was no inconsistency between minimal English literacy test requirements and the equal protection restriction on the several states. A majority of the court nonetheless concluded that insofar as it could "perceive a basis" for the contrary (legal) conclusion reached by Congress, it would yield to the reasonableness of that view. *But see* *Oregon v. Mitchell*, 400 U.S. 112 (1970).

The implications of the *Morgan* case can, of course, be confined. *See, e.g.,* Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299 (1982); Cohen, *Congressional Power to Interpret Due Process and Equal Protection?*, 27 STAN. L. REV. 603 (1975). Nonetheless, *Morgan* does provide a strong opening wedge for additional "representativeness" determinations as, say, that the Court should similarly yield if it could "perceive a basis" for a (legal) conclusion reached by Congress that two-month old fetuses are as deserving of protection as seven-month old fetuses such that it shall be a federal crime for physicians whose medical practice may affect such commerce as it is within the congressional power to regulate, or physicians either directly or indirectly receiving federal funds, to perform an abortion resulting in death or damage to a fetus more mature than sixty (thirty? ten?) days old, Compare *Roe v. Wade*, 410 U.S. 113 (1973).

correspondingly, no presumption of substantive constitutional consistency attaches such that the Court should defer in the absence of litigation demonstrating a "clear error" (rather than a mere error) in the constitutional premises of the enacting body.

The dénouement of "representativeness" jurisprudence may ultimately follow this form:

1. "Truly representative" legislation is not to be held inconsistent with the Constitution merely because the Court is (otherwise) persuaded that it is unauthorized or forbidden by the Constitution. Rather, such legislation must be sustained unless premised upon a manifestly unreasonable interpretation of that clause or combination of clauses that has been brought to bear on the question;

2. "Unjust" legislation, however, is never "truly representative," because legislation which is in fact "unjust" could not have been *duly* considerate (i.e., truly representative) in respect to those whom it affects;

3. *Therefore*, all legislation which (the Court thinks) is "unjust," is stripped of any presumption of substantive constitutional consistency; indeed, such legislation must be held invalid once shown to be inconsistent with what is itself not a manifestly fanciful interpretation of that clause or combination of clauses that has been brought to bear on the question.

— The simpler form is this:

1. Laws a current majority of this Court think are "just" shall (almost) always be held to be constitutional, the Constitution to the contrary notwithstanding;

2. Laws a current majority of this Court think are "unjust" shall (almost) always be held to be unconstitutional, the Constitution to the contrary notwithstanding.⁴⁴

To foreign students of American constitutional government, the basic objection itself must sound extremely peculiar. The international significance of American constitutional law is precisely that the institution of judicial review is anti-democratic. To "reveal" that it is anti-democratic may sound as though a shameful discovery had been made deserving of apology and atonement. In fact it is no revelation at all. It is seized upon with the same indicting passion as though one were to read the Constitution for the first time and discover that several of its original clauses actually condoned slavery which, until the investment of the thirteenth and fourteenth amendments, was entirely true.⁴⁵ Still, as in the case of the several slave clauses, the anticipated anti-

44. These uses of "representativeness" jurisprudence in adjusting the substantive standards of various clauses, incidentally, should be distinguished from their uses in respect to *procedural* (as distinct from *substantive*) judicial restraint and judicial activism. The 4,000 plus caseload of the Supreme Court (the majority of which cases are on its certiorari, rather than its appeal docket) obviously requires some rationing system in determining which cases to hear. The tendency of judges to employ their own notions of political sociology in deciding which cases to hear (e.g., because certain types of laws seem "fishy") may not be very sophisticated and may, of course, engender its own frustrations. But it produces no important body of substantive constitutional law with the ramified inconsistencies and the sheer vagrancy of keying the "meaning" of clauses to perceived "representativeness."

45. See U.S. CONST. art. I, § 2, cl. 3 (direct taxes shall be apportioned . . . by adding to

democratic character of judicial review was no secret. Rather, it was treated most matter-of-factly. And, *unlike* the slave clauses in this respect, it was not defended merely as a necessary concession to secure ratification. It was defended as a positive good: the integrity of the Constitution would not depend upon mutating impressions in Congress or elsewhere.⁴⁶ Judges were not expected to "adjust" the meaning of clauses in proportion to the numbers or representativeness of legislative bodies. The difficulty with the objection is, therefore, that while its endless repetition has given it the appearance of profound insight, it may rather be set aside as altogether trivial.

III

Virtually discarded among the many descriptions of constitutional review in the United States, in contrast with the many special theories, is the following description by the unremarkable Justice Owen Roberts:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.⁴⁷

As a concise summary of the judicial obligation, Justice Roberts' dictum is worthy of consideration despite the sophisticated criticism it obviously invites. To be sure, its comparison of the judicial task with a mere mechanical exercise may be subject to criticism;⁴⁸ the thought that the judicial task is as simply done as laying down a T-square to see whether one line is perpendicular to another may itself not square even with an ordinary citizen's impression of the difficulty, to say nothing of those professionally involved in constitutional litigation. But the suggestion that the judicial task of constitutional review should be performed with the same undissembling interest in accuracy as one would bring to his or her own work bench is, nonetheless, a proposal of enormous and lasting appeal. In fact, it may capture more accurately than any other single statement exactly what most people would hope for from the Supreme Court.

The idea is indeed to see whether the two things, the statute and the Constitution, square. If they do not, then the judicial task, which is to state the truth, is not less well done on that account. The correction of the line representing a *statute* that does not square is for those responsible for drawing such lines. It is with Congress, not the Court. Similarly, the correction of the line representing the relevant article in the *Constitution* is for those to whom the

the whole number of free Persons") (encourages slavery because congressional representation directly correlates to the number of slaves brought into the state); *id.* art. IV, § 2, cl. 3 ("fugitive slave" clause recognizing and enforcing slaveowners' rights). See also *id.* art. I, § 19, cl. 1; *id.* art. V. See generally *THE CONSTITUTION, A PRO-SLAVERY COMPACT* (W. Phillips ed. 1845).

46. See *supra* note 12 and accompanying text.

47. *United States v. Butler*, 297 U.S. 6, 62 (1936).

48. See, e.g., A. BICKEL, *supra* note 12, at 90.

responsibility is given for altering such lines. It is not the Court's business to move it or to misrepresent its location from any presupposition of its own that a different constitutional line might be better. The fact that the alteration of constitutional lines (i.e., the amendment of constitutional clauses) is difficult, has no bearing on the judicial obligation. If the means of altering constitutional lines is thought to be too difficult to tolerate correct decisions, that observation may propose a very good reason to alter the clause in the Constitution that makes amendment so difficult. It proposes no obvious reason, however, for judges to misstate the Constitution. The case to do so is no better than its opposite, i.e., than justifications for a predisposition to find that a statute and the Constitution do not square (when in fact the Court believes they do) because of antipathy to the statute or because of one's belief that Congress has made an enormous political or moral (but not unconstitutional) mistake.

The Roberts dictum is sometimes brushed aside on the strength of the suggestion that he did not fully appreciate that it is a *Constitution* the judges are expounding in those cases,⁴⁹ and not merely some lesser thing as a statute, an administrative regulation, or a trivial municipal ordinance. But this suggestion is not at all convincing either biographically or in the abstract. Explicit in the dictum is the recognition that it is a Constitution being expounded. Explicit as well, however, is important recognition that it is merely *this* Constitution the judges are expounding, not some other.

If the Constitution contains clauses not always the most noble (as of course it may), clauses that may weigh too heavily upon a judge's conscience, he or she may reassess the personal acceptability of the judicial task. If the task of *this* Constitution's scrupulous construction and application sometimes seems trivial, demeaning or even pernicious, the private conviction provides a thoroughly decent reason to find a career in something one believes to be less compromising and more ennobling. Short of entangling considerations that may sustain acts of civil disobedience,⁵⁰ it provides no reason to refabricate the Constitution or to misrepresent the statute. That it is a Constitution being expounded readily explains why one should be especially conscientious about its determination; it warrants an exceptional willingness to listen, to consider, and to be very careful.⁵¹ That because it is a Constitution being expounded judges

49. The phrase is Marshall's, from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-07 (1819), in which the immediate point is that while the government "can exercise only the powers granted to it," because "it is a *constitution* we are expounding," the "fair and just interpretation" of those powers ought not be grudging. The same useful proposition is asserted quite forcefully in a memorable Holmes' opinion a century later, as well. See *Missouri v. Holland*, 252 U.S. 416 (1920). The rule of generous construction of express national powers is analytically quite different from a suggestion that an interpretation which the Court would conclude was erroneous (though "merely" erroneous and not preposterously so) should nonetheless be applied for adjudicative purposes by the judiciary if the erroneous interpretation is preferred by Congress. Compare *supra* note 37.

50. See J. ELY, *supra* note 23, at 183 ("At that point you'd hardly be acting like a judge . . ."). In which case one does not pretend to do one's duty, but rather declares why one will not do so under the circumstances.

51. "[P]recisely because 'it is a *constitution* we are expounding,' we ought not to take liberties with it." *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 647 (1949) (Frankfurter, J., dissenting) (citation omitted).

should therefore feel more free than otherwise to fudge its interpretation, however, is a proposition that though argued often, has never been argued convincingly.

IV

Despite the straightforwardness of the judicial duty described by Justice Roberts, headway against it has also been directed from quite a different quarter than from those suggesting the Supreme Court should simply "adjust" the Constitution to make it better. The Roberts metaphor, as already noted, does imagine something like a T-square that judges simply lay down to see whether a statute squares with the Constitution. If not that, at least it must assume that "the line" representing the constitutional clause with which a statute is being compared is reasonably obvious. (It may also imagine that that line is not merely discernible, but that it is also fixed, i.e., that it does not move from time to time, though the latter assumption is not critical to all arguments of this type.) In either case, "the line" representing the constitutional clause must at least be reasonably discernible. Otherwise, whether with the aid of a T-square or merely by one's own, unaided eyesight, it is impossible to perform the judicial duty — to say whether the statute "squares" with that line. In any event, this much is fairly certain: the less discernible the constitutional line, the less possible the performance of the judicial task even as laid down in the Roberts dictum.

The headway this sort of observation seeks to make against the conventional description of the judicial task now becomes clear. Determining *where* the line represented by a constitutional clause lies is in fact not the same as the mechanical task of seeing *whether* one line "squares" with another. The Roberts dictum takes for granted the obviousness of the line representing the constitutional clause that has been invoked.⁵² The task it assumes is solely that of measurement, i.e., the determination of whether the two "square." But the problem of judges is not principally that of measurement. It is rather, that of interpretation. It is the problem of first deciding *where does the constitutional line lie?* Redundantly, then, the task of judges involves judgment. The Court must determine the meaning of words which in one moment seem plain to one, plain but the opposite to another, marginally uncertain to others, and virtually hopeless to still others.

Between these two critical sentiments, justifications for a great deal of "meta" constitutional law have been proposed. For some, the Constitution is only too clear in certain particulars, but the clarity it yields is extremely disappointing. The actual Constitution does not fulfill one's expectations; it does not exalt what one hopes and it is not a Constitution commensurate with one's notion of a Constitution as ideal norm. "The" judicial duty is therefore to adjust the Constitution by degree, to be guided by a meta Constitution superimposed upon the inadequate original, to bring it 'round to normative maturity.⁵³

52. A. BICKEL, *supra* note 12, at 90.

53. See *supra* materials collected notes 25-26.

For others, it is quite the opposite point that the Constitution is insufficiently clear in nearly all of its most significant clauses, specifically its most normative clauses such as the due process clause, the equal protection clause, or the ninth amendment virtually in its entirety.⁵⁴ Accordingly, "the" judicial duty is to impute some meaning without which the constitutionality of statutes cannot be determined, and to impute that meaning according to some notion of what courts might do that neither duplicates legislative processes nor leaves these clauses virtually useless in litigation.⁵⁵

The consequences of these polar objections to the conventional view of the judicial duty (namely, the objections that the Constitution is clear but inadequate and also that in its most essential features it is unclear and thus requires improvisation) nurtures what is, perhaps, the majority of all academic writing about the Constitution today. I confess, however, that I find very little of it helpful and cannot make any productive use of either point of view. To the contrary, I believe that most of it will eventually be seen at a later date as but the academic residue of yet another period in which American constitutional law records its native propensity for instability and rank politicization.

The first view (that insofar as the Constitution is clear but disappointing, the appropriate role of judges is to make it "better" by reconstruction) is not worth further comment. The second view, that in its most interesting features the Constitution is just so indefinite that the Roberts dictum is simply not helpful (because, while the preference for a truthful construction of the Constitution is unquestionably alluring, alas it is frankly also sometimes impossible), is not so lightly dismissed. Indeed, in part my own professional writings are but an exhibit of the difficulty. Some of that writing deals with the speech and press clause of the first amendment — an amendment to the Constitution unquestionably important and, on its face, of exceptional clarity. Yet, it is one point of an attempt to take the first amendment seriously to induce a wholly sympathetic understanding that conscientious interpretations of the first amendment *do* differ: that many of the problems of constitutional adjudication are not imagined, that they are not contrived, and that they do not proceed merely from judges who are ideologues. Ideologues and persons with hubris have unquestionably served on the United States Supreme Court. But discount every decision one wishes to make on that basis, and decisions of exquisite difficulty still remain in substantial number. The example of the free speech clause, seemingly the clearest provision we have in the entire Bill of Rights, may paradoxically serve best to make the point.⁵⁶

Even so, while I think it entirely true that conscientious interpretation of the Constitution is often a more difficult task than the Roberts dictum implied, by no means does its problematic quality lead to a conclusion that failing anything fairly passable as interpretation, courts must improvise meaning accord-

54. See J. ELY, *supra* note 23, at 191.

55. E.g., *id.* at 87 ("The remainder of this chapter [actually, of the whole book] will comprise three arguments in favor of a participation-oriented, representation-reinforcing approach to judicial review.").

56. See, e.g., Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107 (1982).

ing to perceptions of some special role. The dilemma that is sketched that provides a legitimacy for courts to improvise a special role when interpretation fails is not what it seems to be. There is no such duty-at-large and, indeed, certainly no such imperative merely to decide every case on its merits.

If the meaning of a clause cannot be established without recourse to meta constitutional appeals (or arguments of mere policy), that fact merely provides reason and straightforward explanation of the judicial conclusion that the challenged act of Congress cannot be said to fail to square with the constitutional clause invoked by the litigant who relied upon it. If all that the litigant's own counsel has produced and all the outside scholarship that might be brought to bear on the question still leaves conscientious judges honestly uncertain where "the constitutional line" lies, the uncertainty neither impairs nor delays performance of the judicial duty. Rather, the entire matter is at once resolved by a decision on the merits. The decision is that the litigant has failed to show that the act of Congress does not square with the clause that he or she sought to rely upon, and the challenge fails. The burden to show where the constitutional line lies is not with the Court. It is with the party who claims that the act of Congress does not square with that line. The Court's duty is to entertain the claim, to be attentive to it, to examine the litigant's basis for saying "the line lies *here*," and to see whether the statute squares once the litigant has established where the line is.

So, for instance, the ninth amendment may not only be ambiguous on its face, but of no convincing pertinence even after one's best efforts to make much of it (though there is no reason, *a priori*, to take its futility for granted).⁵⁷ Similarly, the nature of the United States' obligation to guarantee to each state a "republican" form of government may present a similar difficulty (though, again, one ought not simply assume that it will).⁵⁸ If, then, a state resists application of an act of Congress on the claim that the act does not square with

57. The suggestion that the ninth amendment's adjudicative futility ought not be assumed in the absence of serious investigation is meant earnestly. Despite the criticism that has been made of *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (see, e.g., Grano, *supra* note 25, at 8-11), it may very well be an instance of a law which, as applied, was seriously subject to objection on ninth amendment grounds. The case involved a zoning ordinance applied to forbid a grandmother from sharing her own home with her own two grandsons; the ordinance was applied despite the utter lack of any evidence of crowding, interference with others, impact on property values, or any other distinction from any other family living together (as otherwise provided by the same ordinance) or, indeed, anything whatever that should plausibly be disturbing. The integrity of ordinary families, the historical centrality of close, consanguineal ties, the sense of duty and care of "one's own," the almost certain sense of profound impropriety that (I think) research would show would have greeted the mere suggestion of jailing an unoffending grandmother for sharing her home with her own grandchildren, and the extremely well-developed paths of pre-existing decisional law absorbing the presumed "right" to some positive sense of family, may well sum to a rare instance of a compelling ninth amendment case. The ninth amendment need not be seen as an empty sack simply from fear that unless one insists upon making it so, it must at once become every judicial moralist's cornucopia. The burden would appropriately be upon Mrs. Moore to establish the foundations of her claim. In her case, however, it is likely that history would support her very well indeed.

58. See, e.g., Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

one or the other of these constitutional clauses, of course the state may fail — not because of lazy or careless counsel, but because, in the end, the best that could be said was that the “line” representing either clause simply could not be established with sufficient clarity to permit a judgment that the act of Congress failed to square with that line. Nothing obliges the Court to improvise the line, to construct it, or to invent policies of its own which some line might serve. Indeed, nothing entitles the Court to do any of these things. The judicial duty is not less fitly performed because the party raising the challenge fails. Neither was the party raising the challenge necessarily inadequate in exploring the plausibility of certain interpretations. The material was not there; the clause was not helpful in the circumstances. The case is at an end.

It may well be that some clauses are not merely intractable at their edges, but altogether intractable *for litigant use*. If so, it only goes to show, in a practical way, that such clauses have proved to be unserviceable in litigation before the Supreme Court. They need not, on that account alone, be thought of as unserviceable in legislative debate, unserviceable for executive use or unserviceable for each citizen's own private uses.⁵⁹ Rather, it may be merely an unshocking example of nonjusticiability in the concrete sense. In light of the issue before the Court, the best scholarship that the litigant could muster leaves the Court without sufficient basis to hold the challenged act of Congress as not squaring with the constitutional clause. Indeed, one might suggest that most allegedly “nonjusticiable” clauses are not nonjusticiable in the sense that they may not be a source of litigant reliance. Rather, they are nonjusticiable merely in the practical sense that every effort to invoke them as a means to avoid application of an act of Congress has simply been unsuccessful: in a long list of litigants, none was able to show the location of the constitutional line represented by the clause sufficiently to enable conscientious judges to hold that the line represented by the act of Congress did not square.⁶⁰

Neither is there any trick or device to this treatment of the matter. To be sure, this description of judicial review does involve a methodological premise which is brought forward to resolve the putative dilemma, but the premise is neither unconventional nor strained. The premise is merely that when an act

59. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), merely confirmed the separate obligation of the judiciary to determine the consistency of acts of Congress with provisions in the Constitution as an incident of adjudicating “cases” properly before the courts. Despite a few pretentious dicta in other cases (*see, e.g., Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958)), there is no basis in *Marbury* or in any other source for the suggestion that the sole “correct” interpretation of the Constitution is that which is sufficiently convincing for courts to accept. *See G. GUNTHER, CONSTITUTIONAL LAW — CASES AND MATERIALS* 25-30 (10th ed. 1980); Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 *STAN. L. REV.* 585, 589 (1975) (“Decisions *not* striking down laws do not always mean that the laws are constitutional . . . for a court's failure to invalidate may only reflect its institutional limitations.”) (emphasis in original).

60. The point is suggested in Justice Harlan's dictum that “[t]he suggestion that courts lack standards by which to decide such cases . . . is relevant not only to the question of ‘justiciability,’ but also, and perhaps more fundamentally, to the determination whether any cognizable constitutional claim has been asserted” *Baker v. Carr*, 369 U.S. 186, 337 (1962) (Harlan, J., dissenting).

of Congress otherwise applies to define a party's rights, it is to be deemed controlling in the Supreme Court unless the litigant is able to show that, as applied, the act fails to square with some clause (or combination of clauses⁶¹) in the Constitution. The basis of the premise is more immediately the language of the supremacy clause in the Constitution itself: the clause makes an act of Congress the supreme law except insofar as not "pursuant" thereto. The burden of one who claims an act of Congress applies to another is to show that the act does so apply. If this demonstration cannot be made with the requisite clarity, *that* party fails. In turn, the burden of one who claims that an applicable act of Congress nonetheless fails because it does not square with the Constitution is to show that it does not square. If he cannot show what the clause means, he cannot show that the clause helps him and *he* fails.

Neither does this answer to dissolve the alleged interpretive "dilemma" of the courts (i.e., the dilemma that allegedly compels the Court to improvise meanings for constitutional clauses) depend upon one's agreement with this particular methodological premise as a complete or as an exhaustive statement of the matter. One may very well observe that, *depending on the nature of the challenge*, sometimes the burden will be on the party who claims that the act of Congress *does* square. Such an instance would arise when the challenge is not on the basis that the applicable act of Congress is forbidden, but rather on the basis that it was not authorized. It notes that only such acts of Congress as the litigant relying upon them is able to show are "pursuant" to the Constitution, can be the basis of enforceable claims—enforceable by the government or by anyone else. Moreover, its burden-allocating premise is quite unexceptionable. The express phraseology in Article VI ("This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land") straightforwardly supports it.

Indeed, a fuller and relatively complete description, appropriately allocating burdens in respect to constitutional litigation, will itself merely integrate these several observations. First, to the extent that the government or a private litigant claims that an act of Congress does apply to another in the manner alleged, the burden is appropriately the claimant's to show that that is the case. Second, one who claims that an applicable act of Congress nonetheless fails because it does not "square" with the Constitution, must indicate in what particular respect the act is alleged not to square. If it is alleged not to square because there is no obvious enumerated power or combination of powers sufficient to sustain the act in question, the burden appropriately becomes that of the party relying upon the act to show that, to the contrary, there is in fact ample authority to sustain it. On the other hand, if the objection is that the act fails not for want of original power to enact it, but rather because other

61. The point of the reference to "some combination of clauses" is of course to acknowledge that there is an architecture in the Constitution. The crowding clauses obviously bear upon one another, their particular grouping in particular articles likewise may have an illuminating significance, and indeed it may be useful to consider the "structure" of the Constitution as well as the relationships of its features in the course of quite standard and conscientious judicial review. See C. BLACK, *supra* note 39.

constitutional provisions disallow it, the burden of succeeding on that objection is equally clear; it is on the party who so asserts.

Thus, in a particular case the dispute might involve an act of Congress that makes it a federal offense to cross a state line with the intention of inciting others to riot. That the statute applies to the alleged conduct of the accused is for the government to show. Should the act not be challenged as inapplicable, but rather as beyond the constitutional competence of Congress, the obligation is again upon the government — to show that the act was within the authority of Congress to enact. Possibly the government may rely upon the commerce clause (the power to “regulate commerce among the several states”), coupled with the famous sweeping clause (i.e., the “necessary and proper” clause), but in any event the burden is the government’s to discharge however easily others may think it can be carried. Separately, however, the party to whom the statute is being applied may object that insofar as the statute means to criminalize interstate travel when undertaken for the purpose of orally inciting certain action by others, it is forbidden by the first amendment; i.e., it is an Act of Congress abridging the freedom of speech, forbidden by that clause which says that “Congress shall make *no* law abridging the freedom of speech.” The burden is, of course, upon the defendant to establish that the statute does not “square” with this constitutional provision, and correspondingly to show how this provision fits his case. In this instance, however, that burden may rest upon him quite lightly in the first instance, for the language of the clause itself may seem at once to address this case and the government may be appropriately pressed to overcome the weight of the *prima facie* case.⁶²

Whatever one makes of these matters, they come to the same point. The Supreme Court is not bound at all costs to invent some meaning for every word and clause in the Constitution. It is, rather, to measure the adequacy of that meaning or that interpretation tendered by some party to the litigation, insofar as that tendered meaning or interpretation is relied upon to show how an act of Congress does, or does not “square.” Correspondingly, arguments of constitutional meta interpretation that range beyond the assembly of materials from which reasonable interpretations of constitutional clauses can be derived are of no necessity whatever. Indeed, they are of no propriety. Noninterpreting the only Constitution we are in fact expounding, namely *this* Constitution, whether because one is disgruntled with its limited wisdom or because some provisions are genuinely intractable, is not an impressive enterprise.

V

My consideration of how various judges and academics arrived at a number of specific answers quite satisfactory to themselves, although emphatically less so to others, was prompted by an attempt to examine several practical uncertainties of the first amendment.⁶³ In nearly each such instance, it happened

62. “[T]he specific prohibitions of the first ten amendments and the same prohibitions when adopted by the Fourteenth Amendment leave no opportunity for presumption of constitutionality where statutes on their face violate the prohibition.” Letter from Justice Stone to Chief Justice Hughes, Apr. 19, 1938, *quoted in* Lusky, *supra* note 23, at 1098.

63. This lecture is an adaptation of what will be Foreword for a brief work on INTERPRE-

that the difference in satisfactoriness was achieved by altogether subordinating (if not utterly dismissing) the first amendment and by superordinating some exceptional theory of judicial review. In brief, the recurring suggestion was that the "right" answer to any vexing case arising under the first amendment (or any other clause) is essentially a function of the "right" theory of what courts should and should not do. Decide what courts should do and it will then be obvious how the Constitution should be deemed to apply: it applies in *whatever* fashion as best fits what *courts should do*. On the foundations of that truism, neo-creationists continue to reinvent the Supreme Court in their preferred image, principally as a means to reinvent the Constitution to their preferred ends.⁶⁴

Despite the problems of an aged Constitution, one advantage of having a substantial history is that we may occasionally stand off from it and see what we think it has produced. We have now seen the production of an amazing variety of nonstandard theories of judicial review. They range from variations on (a) — the Supreme Court should regard nearly all constitutional questions as unwelcome and either decline to review them or failing that, uphold all of the laws that it can, to variations on (z) — the Court should engage every dispute that even vaguely resembles a law suit to the end of enacting its own views of justice. The intermediate permutations of nonstandard theory are numerous and ingenious. They virtually exhaust the letters of the alphabet.

This lecture has dealt incompletely with many particular special theories. For that matter, it is not even a full-dress, measured review of any one nonstandard theory. But the sheer gravity of the continuing discourse over such matters, much of which is very ably discussed by other, seems still to have left something out of account. Thus the point of this lecture is at once smaller and larger than one will find reflected in the patient and even brilliant but ad hoc pieces of special theory advocacy. It is to suggest that less has been accomplished than meets the eye. It is also to suggest that the continuing pursuit of nonstandard theories does not now seem as promising as it once did, as an aid to resolving the problematic quality of constitutional law. Neither does it appear to be as useful as it once seemed, as a way out of uncertainty and of professional discontent. Nearly all of it requires, moreover, some degree of playing very loosely with the remembrance that it is merely *this* Constitution that is being expounded. Principally for these several reasons, I think the historic quest to fashion nonstandard theories of judicial review in constitutional cases has pretty much run its course.

Yet, having reflected rather testily on why the professional tendency to press various nonstandard theories of judicial review does not appear impressive after

TATIONS OF THE FIRST AMENDMENT. As a Foreword, its purpose will be to explain why the ensuing chapters of the book will reflect no effort to resolve difficulties presented by cases arising under the first amendment by recourse to any nonstandard theory of judicial review. In brief, no first amendment issue would be "decided" by falling back upon some *deus ex machina* that pleads to some special theory of judicial review. Not because no such theory is available (plainly untrue) or because "none works," but because each requires too much suspension of one's own grounds for disbelief.

64. The most recent prolix prolegomenon of this sort is elegantly represented in Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

all, one need not simply leave the matter at that. It remains to be said that even if one cannot be won over to the particular rather automatic fashion in which one or another special theory of judicial review tends to "resolve" constitutional cases, one need not on that account lapse into a general professional moroseness about the condition or the liveliness of constitutional law. Indeed, it may occur to one that in certain respects it may well be the advocates of nonstandard theories, rather than their critics, who have been prematurely pessimistic about the value of taking this Constitution seriously.

Ordinary judicial conscientiousness in respect to interpretations of our Constitution cuts both ways. It certainly does mean that the boundaries are to be respected, but there is no reason to take this as counsel of despair. The words of the Constitution are instructive. They do impose constraints, equally upon courts as upon other agencies of government. Yet one's own reading ought not be close-minded nor premature. History, moreover, is germane in more than a confining way. Quite frequently, what it yields is heavily dependent upon the premises of its users — which may be far too narrow or wizened,⁶⁵ rather than too wishful. More often than one might suppose, one may be surprised that what was first thought doubtful in respect to the manner in which a given clause or combination of clauses might be applicable to a particular case, is not such a puzzle after all. One may be surprised that an imperfect, brief, and aged document, even absent those amendments one thinks would significantly improve it, can still speak usefully to our condition, without need to strain its provisions; yet I think it still does.⁶⁶

65. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977). For significantly more perceptive treatments of the same historical materials, see A. BICKEL, *supra* note 12, at 102-04; J. ELY, *supra* note 23, at 22-30, 198-201; Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 42 OHIO ST. L.J. 89 (1982); Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980); Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462 (1982); Graham, *Our "Declaratory" Fourteenth*, 7 STAN. L. REV. 1 (1955); Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?*, 87 YALE L.J. 1752 (1978). See also materials collected in C. ANTIEAU, *THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT* (1981); H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956); Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

An ironic effect of neo-cynicism in the uses of constitutional history is the manner in which it furnishes argumentative fuel for "noninterpretivists." For example, a substantial portion of Michael Perry's justification for superimposing a separate moral philosophy on the fourteenth amendment is based on the threat that unless the reader is prepared to treat the fourteenth amendment in this (noninterpretivist) fashion, the reader will be compelled to accept the morally-dreadful consequences of Mr. Berger's "history." Instrumentally, such authors may have a stake in agreeing with the bleaker reconstruction of history for the purpose of persuading one that history is therefore intolerable as an acceptable source of constitutional law. See M. PERRY, *supra* note 25, at 91 ("[u]nless there is a justification . . . for noninterpretive review in human rights cases, virtually all of the constitutional doctrine regarding human rights fashioned by the Supreme Court in this century must be adjudged illegitimate . . .") (emphasis added). For a similar example, see also Tushnet, *supra* note 27, at 781.

66. And to the extent that it may not, the means of legitimate fundamental change are

If one works away at these matters more straightforwardly, moreover, one may well be inclined to think back and wonder why there has been such an enormous amount of peculiar energy expended on efforts to battle in behalf of special theories of judicial review. Moderation leaves quite enough for reasonable people to think about, without the anxiety that the Constitution is subject to capture by devices of special pleading. Give the document its due, and do not fear so much for the rest.

still at hand. It is by amendment that a Constitution records a nation's fundamental changes as an act of will, actively and positively, an observation that cannot be made of such transfigurations merely perpetrated by unimpeached and "not overruled" judges on the skeleton of an inadequate document. By way of concrete example, it seems to me clear enough that the amendments of 1791, and those also of 1866-1870, made our Constitution better by far than what it was without those alterations. So, too, in this respect is it better by far were those alterations not in the Constitution itself, but merely discoverable in the Shepardized inventions of judges. So, as well, with equal matters of fundamental concern today. It is one of the ironies of judicial self-justification that it operates to inhibit the nation's authentic means of making improvements in the Constitution by (a) "proving" that amendments are not needed and by (b) "proving" also that (given the special theories of some judges) none of any significance can safely even be considered.