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THE SUPREME COURT:
AN INTENTIONIST’S
CRITIQUE OF NON-
INTERPRETIVE
REVIEW†

WILLIAM GANGI*

INTRODUCTION

When analyzing the role of judicial power the issue becomes whether it is legitimate for the Supreme Court to interpret the constitutional text in undeniable contradiction to the clearly expressed intent of its Framers.¹ Proponents of the current activist position of the Court answer in the affirmative, using nine complex and interrelated arguments.² They may be briefly sketched here:

1. The Past is Dead — The Constitution Living

To endure societal change our Constitution must remain adaptable, “always being updated to meet the exigencies of succeeding generations.”³

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I would like to thank my colleague, Henry Paolucci (St. John’s University, New York) and Professors Thomas Schrock (University of California—Santa Barbara) and Christopher Wolfe (Marquette University) for their demanding intellects and critical eyes. I also would like to express my appreciation to the Earhart Foundation for supporting my research.

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² This article will not reiterate the arguments discussed extensively elsewhere. See Gangi, Judicial Expansionism: An Evaluation of the Ongoing Debate, 8 OHIO N.U.L. REV. 1, 17-55 (1981). The purpose of this section will be to acquaint the reader with the main arguments of the debate, solely from the perspective of those supporting increased judicial power.

2. When a vacuum exists in pursuing "societal ideals"

After World War II the more sensitive among us became aware of a variance between our professed belief in liberty and equality and the existing realities of racial discrimination and the status of the criminally accused. Someone had to take action, and only the Court seemed capable and willing to give this country's ideals a legal, constitutionally rooted foundation.

3. the Supreme Court is best suited

Our democratic process breaks down when either freedom of expression is hampered or minorities are permanently excluded from electoral participation. Under these circumstances the judiciary enjoys greater flexibility than the executive or legislative branches of government, because it is not susceptible to constituent pressures. This fact has led Professor Louis Lusky to observe that in recent years the Court has claimed a "new and grander conception of its own place in the governmental scheme."

4. to obtain results.

Neither the Constitution nor the Court should be fettered by the views of men long dead. The spirit, not the letter, of the law must endure by assuring that our ideals remain meaningful. While judicial interpretation of the fourteenth amendment, for example, may not be consistent

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* There are numerous expressions articulating the "ideal" portion of this argument. For example, Professor Perry utilizes the phrases "professed ideals," Perry, Book Review, 78 COLUM. L. REV. 685, 699 (1978), and "societal ideals," *id.* at 700; see L. LUSKY, BY WHAT RIGHT? 97-115, 211-42 (1975). Use of these phrases tends to mask the fact that what is being discussed are "rights" lacking historical association with those articulated by the Framers. *See* Gangi, *supra* note 2, at 39-43 (unwarranted expansion of fourteenth amendment liberties).

* An expression of this viewpoint may be found in G. WHITE, THE AMERICAN JUDICIAL TRADITION 369 (1976). The author states:
  
  Because appellate judging has often been defined by judges and commentators in terms of constraints, one may incline to underemphasize its freedoms, which are worthy of recapitulation. First . . . is the power to declare . . . what "the law" is. American judges function as the primary interpreters of the meaning of the Constitution or a statute, until the sovereign people, through their legislative representatives, choose to change that meaning. . . . Judges in America can declare and thereby make law.

  *Id.* But *cf.* infra text accompanying notes 245-56.

* L. LUSKY, *supra* note 4, at 109-10; *see also* S. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 20-22 (1978) (activists' approach when deciding personal liberty questions).

* See A. GOLDBERG, EQUAL JUSTICE 49-50 (1971).

with the original intentions of its framers, it has resulted in the expansion of suffrage, reforms in race relations, and more humane state and federal criminal justice systems.9

5. **In the context of a cumbersome amendment process,**

Like the legislative process, the amendment process "is often blocked by inertia or irresponsibility."10 In addition, malapportionment contributes to paralysis of legislative institutions already circumscribed by constituent prejudice.11 Adjudication provides a far more efficient path for social reform than the "more cumbersome instrument of an amendment."12

6. **the Court has the responsibility for securing individual rights.**

The essence of our constitutional tradition consists of the protection and expansion of equality and individual rights.13 Most recently, the Court has concentrated on "preferred freedoms."14 "Our judicial branch, with the Supreme Court at its apex, is the greatest institutional and constitutional safeguard we possess; only those committed to libertarian suicide would sanction a transfer of the judicial guardianship of our basic civil rights and liberties to either the legislature or the executive or

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11 See id.
both!”

7. **This new Court role has been accepted by the American people**

Even if it is conceded that the Court has gone beyond the original limits of judicial power, the American people have consented to this extension; their tacit approval can be implied from their acceptance of the results achieved. If the people did not accept this new judicial role, they would have taken appropriate measures to curb the Court's power. 

8. **and is irreversible.**

Supporters of judicial power contend that “under our constitutional scheme . . . rights do and should expand.” The Court, therefore, properly employs a double standard when considering property and personal rights. With respect to the former, the Court is more inclined to defer to legislative judgment, accept *stare decisis* and permit legislative social experimentation.

9. **The time has come to recognize explicitly our LegisCourt.**

Today the pretense that the Court is engaging merely in judicial review or rooting its decisions in the constitutional text should be dropped. “[I]f they are, in fact, legislating under the guise of judging, shouldn’t they state this frankly and clearly in their decisions? . . . Are the American people entitled to truth in judging?”

As a result of the above politico-constitutional view, the Supreme Court currently acts simultaneously as the umpire of our constitutional system and as its most important policymaker. Some commentators, including myself, have challenged these arguments, regarding them as both repetitious of the laissez-faire Court and inconsistent with the design of the Founding Fathers. 

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16 *Cf.* Knowlton, Book Review, 32 Ark. L. Rev. 157, 163 (1978) (failure of executive and legislative branches to respond to the growth of power in the judiciary indicates acquiescence).
17 A. Goldberg, *supra* note 7, at 85.
18 See id. at 41-42.
20 *Id.* at 1216; see, e.g., Hazard, The Supreme Court as a Legislature, 64 Cornell L. Rev. 1, 15 (1978); see G. White, *supra* note 5, at 370-71.
ordinary legislative power and circumventing the specified amendment procedures. This Article offers some historical and theoretical criteria and seeks to explain more fully why the clearly discernible intentions of the Framers are the most appropriate perspective for constitutional scholars.

I. THE STATE OF THE ART

Progress

The idea of a paradise on earth—a millennium—is as old, if not older, than the Torah and the New Testament. Millennialism had been widespread for several centuries following the death of Christ. In the 16th century, it reemerged when Protestant theologians, seeking solace and understanding, resurrected and reinterpreted the noted apocalyptic literature. Wishing to raise the hopes of beleaguered Protestants by chal-

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I continue here a discussion initiated elsewhere on the role that progress has played in constitutional law. See Gangi, supra note 2, at 65-67. The type of research necessary for such a discussion is just beginning to emerge. See, e.g., G. GILMORE, THE AGES OF AMERICAN LAW 99-111 (1977). The problem, of course, is that we are too close, still enraptured by the power that knowledge of "progress" creates. See infra text accompanying note 169. So much so that an intellect like Alexander Bickel could approach it, but fall short, in a chapter entitled "Remembering the Future." A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 102 (1970). For assessments of Bickel's position, see Ely, supra note 13, at 54-55, and Purcell, Alexander M. Bichel and the Post-Realist Constitution, 11 HARV. C.R.-C.L. L. REV. 521, 549 (1976).

23 See N. COHN, supra note 22, at 1-13. By the reign of Constantine in the 4th century, Christianity had been established and millennialism would play no official part in Catholic thought for the next 1000 years. Id. at 14. St. Augustine formulated the Catholic doctrine regarding apocalyptic literature such as Revelation. See infra text accompanying note 26. Augustine claimed that Revelation was to be understood as a spiritual allegory and that the Millennium commenced with the birth of Christ and was realized completely in the Church. N. COHN, supra note 22, at 14. Moreover, St. Augustine posited that sacred scriptural imagery could not be used to foretell the future by ascribing concrete occurrences to the imagery in Revelation, and then following the sequence of events in order to predict when other events would occur. See E. TUVESON, MILLENNIUM AND UTOPIA 15-18 (1964). Joachim of Flora, a 13th century Catholic monk, wrote the first work contrary to the viewpoint formulated by St. Augustine. Id. at 19. In it, he divided history into three ascending ages—the Father, Son, and Holy Spirit. Id. He had an “unmistakeable progressivist tone,” foreshadowing by six centuries Comte’s division of history into three “upward” stages. Id. at 20. Joachim used the scriptural apocalyptic literature to foretell the future, offering the specific date of the commencement and describing the third age in detail as paradise of “love, joy and freedom” where the Word is written directly in the hearts of men and where “no wealth or even property” would exist. N. COHN, supra note 22, at 100. Finally, according to Joachim, precurrying Marx 600 years hence, the Church and State would wither away. See id. at 101; E. TUVESON, supra, at 20; E. VOEGELIN, SCIENCE, POLITICS AND Gnosticism 98-99 (1968).

24 E. TUVESON, supra note 23, at 56-66. As Professor Cohn demonstrates throughout his work, the rich allegorical imagery present in VII, Book of Daniel, and John’s Revelation were reinterpreted each century to fit the circumstances. This literature “catered at all
lenging the then prevalent view of a declining and dying earth. These theologians accordingly produced evidence of earlier upward and downward civilization cycles, and contended what even Saint Augustine could not deny, that the Book of Revelation implied a future millennium. Progress and not decay, therefore, could lie in the future. In the 17th century the new philosophy based on the natural sciences contributed to the optimism generated theologically, providing empirical proof of progress. By the 18th century, however, the theological roots were forgotten and the doctrine of secular progress completely replaced its earlier theological equivalent: Providence. In the same manner, theological doctrines on the character of paradise after death were transformed into secular belief in a utopia on earth. Knowledge of the “laws of nature” eventually permitted the emergence of the New Jerusalem.

The coming together of the New Philosophy and the revival of the belief in a literal millennial end to history produced the Idea of Progress. Without the combination of these two great ideologies, the faith in the secular millennialism that we know as Progress could never have arisen. For that combination created the great characteristic modern belief that advance in technology, standard of living, and other purely material aspects of culture is advance religiously and spiritually as well—that man gets better and better as he controls nature more and more; and, on the other hand, there has been the materialization of religion, to which, as I try to show, a revival of literal millennialism would easily lead.

The roots of modern natural law theory may be found in the natural sciences. As man discovered the physical laws of the universe, so too would he discover similar “natural laws” that govern man in society and destiny. See G. Niemeyer, BETWEEN NOTHINGNESS AND PARADISE 45 (1971). Serious deficiencies can be found in the legal literature with respect to discussions of classical and modern natural law theories. See, e.g., Ely, supra note 13, at 22-32; Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 YALE L.J. 1037, 1042-45 (1980). Several of these misconceptions should be noted.

1. In much contemporary legal literature a continuity is assumed between classical right by nature theory and modern natural rights. Cf. L. Strauss, NATURAL RIGHT AND HISTORY 221 (1952).

2. Classical right by nature and modern natural law theories contain radically different perceptions of “man’s nature,” yet we refer to both positions as “natural law” theories as if they are compatible. The classic perception of the “mature man,” one who has his intellectual and spiritual priorities in proper proportion and order, also differs from our “normal” man today. See L. Strauss, supra, at 127-29; E. Voegelin, THE NEW SCIENCE OF POLITICS 64-66 (1952) [hereinafter cited as New Science].

3. Voegelin contends that classical right by nature theory was eventually “dogma-
Preoccupation with the true path of progress became the basis of Social

tized"; insights into man's nature, as well as man's relationship with transcendence became
rigid doctrinal "'metaphysics'" — something never intended by Plato and Aristotle. See E.
VOEGELIN, ANAMNESIS 186-87 (1978) [hereinafter cited as ANAMNESIS].

(4) There has been little effort to understand classical right by nature theory, as it was
understood by its proponent.

Classical right theory was very practical, sketching a paradigm — what the best state or
regime might look like if the best circumstances were present. The natural right position did
not believe that the best regime could automatically come into existence because all the
ideal circumstances were present but only that it was not contrary to reason. If, however,
the best regime did come into existence, the philosopher-king should rule because he would
bring wisdom and power together. See L. STRAUSS, supra, at 135-47. In less than ideal cir-
cumstances right by nature theory required a corresponding dilution in how the regime was
to be ruled, yet it sought to come as close to the best regime as the actual circumstances
would permit. The "art" of evaluating how much of what was possible could be injected into
existing circumstances without going too far, or not far enough, was called political science.
See id. at 142-43; E. VOEGELIN, 3 ORDER AND HISTORY: PLATO AND ARISTOTLE 294-98 (1957)
[hereinafter cited as PLATO].

It is suggested that since Ely's discussion fails to make the above distinctions, and is
dependent essentially on contemporary philosophy and "natural law" theory, his discussion
of natural law and reason and their rejection is inadequate.

1 E. TUVESON, supra note 23, at 7-8. There are several general themes that are relevant
here. First, if laws of nature regarding man and society presumably existed from the begin-
ing of time, why had they not been previously discovered? Since the 16th century the
constant answer to that question has been (though the "laws" found varied considerably)
that until then (meaning, when each law is discovered), the "natural laws" were "hidden"
from man by existing institutions—church, state, and family. Institutions had a vested in-
terest in seeking to hide these natural laws from men. See G. NIEMEYER, supra note 30, at
11.

Second, it is necessary to destroy existing institutions and practices in order to permit
the natural laws to do their magic. Once freed, no longer inhibited by institutions or prac-
tices, these natural laws would have progressively beneficent effects on society. Particulars,
of course, varied with the thinker, as did the degree of destructiveness required—a topic
related to development of the idea of progress. There are three primary categories: (a) where
the focus falls on the end to be achieved (teleological); (b) where the emphasis falls on a
"'value' in the form of abstract ideal proposition," id. at 42, and (c) where the emphasis falls on the activities necessary to achieve either—(a) or (b) (activist). Hence, when the
practitioners are of utopian (b) or progressivist (a) persuasion, programs regarding the end
of value would leave "a good deal of the ultimate perfection to gradual evolution and com-
promising on a tension between achievement and ideal, while the activist variety will tend to
[take] violent action toward the complete realization of the perfect realm." See id. at 41-43,
73-79; NEW SCIENCE, supra note 30, at 88-92.

Third, these "hidden" laws of nature have been viewed as if they were an object in
history. As God knew Providence, so some thinkers claim they could know the end of his-
tory. Joachim of Flora first developed the symbol of stages of unfolding historical drama.
His basis was scriptural, while subsequent ones were "scientific." Though varied in content,
the symbol of historical stages has been constant, promulgated by such thinkers as Turgot,
Condorcet, Fourier, Comte, Spencer, and Marx. These beliefs also influenced 20th century
legal thinkers such as Pound. See G. NIEMEYER, supra note 30, at 3-72; supra note 22.

Fourth, and finally, many post-eighteenth century thinkers assume that man has no
Darwinism, laissez-faire economics, and the "new scientific philosophy of the universal law." Indeed, concern for progress has influenced modern jurisprudence for one hundred years. The pervasiveness of its unproven assumptions remains the bane of contemporary scholarship.

The Seduction of the Supreme Court

Science in the mid-19th century opened new vistas for understanding the universe. In England, Herbert Spencer, Darwin's most important advocate, transformed "Darwin's biological laws into social 'laws.' [S]ociety, too, [like an animal species], was an organism that evolved by the survival of the fittest." Spencer also accepted the theory that "the intellectual powers of the race would become cumulatively greater, and over several generations the ideal man would finally be developed." By 1864 Social Darwinism had become a social force in the United States.

"nature," and is infinitely perfectible. As today, the road to the New Jerusalem, of course, is varied. One common early 20th century belief was that changes in the environment would cause genetic changes, and those improvements would then be transmitted from generation to generation. Such views were assumed by Marx and Engels. See Yoder, Science vs. Ideology: The Case of Lysenko, 8 INTERCOLLEGIATE REV. 45, 45-46 (1972).

For a discussion of the Court's "super-legislative" determinations in the economic and preferred freedom areas, see infra note 75.

Although both natural sciences and theological speculation gave birth to progress, the theological roots were lost by the 19th century. Principles and methodology initially developed in the hard sciences were, in the name of progress, applied to what would be described as the social sciences.

Progressivist thinking almost inevitably leads to viewing history from a futuristic perspective: the law reflects knowledge of where history is moving. The past becomes largely irrelevant except inasmuch as it "fits" on a continuum between what existed, and what proponents often "know" the future will be.

E. Goldman, Rendezvous With Destiny 90-91 (1966). Spencer and Comte were the originators of modern sociology. Spencer's "science" of sociology led him to propose that the only way to improve the human condition was to do nothing to meet the effects of economic competition. See R. Hofstadter, Social Darwinism in American Thought 38-51 (rev. cloth ed. 1959). Furthermore, Spencer believed that progress was a necessity and that human perfection was inevitable. Comte, however, contended that in his "science" of sociology a planned and controlled society was required. Id. at 83. For one commentator's comparison of modern sociological theory, see J. Wilson, Thinking About Crime 62-63 (1975).

R. Hofstadter, supra note 36, at 39 (emphasis added). "The ultimate development of the ideal man is logically certain. . . . Progress . . . is not an accident, but a necessity. Instead of civilization being artificial, it is a part of nature; . . . [like] the development of the embryo or the unfolding of a flower." Id. at 40 (footnote omitted) (quoting H. Spencer, Social Statics 79-80 (1850)). Once progress is assumed, a "new man" is always just dawning—or is on the horizon. See infra note 148.

R. Hofstadter, supra note 36, at 44-46.
During this "Age of Faith" it became fashionable to believe that legal truth was a species of scientific truth: that "law [was] a science." The belief that "there [was] such a thing as the one true rule of law which, being discovered, [would] endure, without change, forever" was prevalent.

Since law now possessed a scientific method, analogous to that in the natural sciences, "the law library [became the] laboratory" and the "printed case reports" became the "experimental materials." Case reporting emerged as a "new type of legal literature." Casebooks replaced treatises. Advocates proposed a methodical approach that suggested "the vast majority [of past cases were] worse than useless, for any purpose of systematic study." The "principal function of the new academic [case reporting] literature was to draw the line between the correct cases and the vast majority of worthless ones."

The incorporation of these natural laws of laissez-faire thinking into constitutional law eventually impacted on legislative attempts to address various societial needs. The laissez-faire ideology that had dominated the "Age of Faith" was soon challenged by a growing progressivist movement. During the succeeding "Age of Anxiety," reform in the form of recodification emphasized legal realism, suggesting that judges created rather than found law, and, thus, all precedents now were to be ex-

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40 Id. at 43; see also Horwitz, The Conservative Tradition in the Writing of American Legal History, 17 Am. J. Legal Hist. 275, 280 (1973) (the American ideology since the 19th century has been "that law is a science discoverable by reason and that its scientific character is what distinguishes law from politics. . . . It distinguishes reason and learning from will and power").
41 G. Gilmore, supra note 22, at 47. Christopher Columbus Langdell, the first dean of Harvard Law School, epitomized the "law as a science" age, id. at 42, and was the originator of the case method of teaching, id. at 125 n.3.
42 Id. at 58. Professor Gilmore particularly noted the role of the West Publishing Company, which "made a contribution to our legal history [that] may have dwarfed the contributions of . . . all the learned professors on all the great law faculties." Id. at 59.
43 Id.
44 Id. In other words, case reporters need not publish every case adjudicated. Id. Professor Gilmore adds, however, that "string citations of the wrongly decided cases, . . . not infrequently outnumbered the parallel strings of correct cases." Id. In short, it was not experience that determined truth but "knowledge" of what was consistent with the natural economic laws of society.
45 See A. Bickel, supra note 22, at 15-16; G. Gilmore, supra note 22, at 64-67; Horwitz, supra note 40, at 278.
46 One should remain cognizant of how nineteenth century science introduced race superiority into public considerations of justice. See generally R. Hofstadter, supra note 36, at 170-200 (sociological approach to racism and public policy).
47 G. Gilmore, supra note 22, at 70-71.
No longer would only the correct principle be sought; instead, the operative facts of each case would be analyzed.

Legal realism and progressivist politics converged during the period of the New Deal. Having experienced the deadening, ideological hand of laissez-faire adjudication, the Progressivist-Realist coalition was in no mood to brook judicial interference:

judicial power was [to be] a relic of the dead past. The Realists . . . stripped the judges of their trappings of black-robed infallibility and revealed them to be human beings whose decisions were motivated much more by irrational prejudice than by rules of law. The law, state and federal, was in process of being reduced to statutory form with most of the significant continuing problems being committed to administrative agencies. The judicial role was bound to become progressively more modest, more mechanical, more trivial.\(^\text{41}\)

The clash over New Deal legislation between the Progressivist-Realists and a Supreme Court still dominated by laissez-faire thinking, ended in victory for the former.\(^\text{62}\) Thereafter, the Court, criticized and politically threatened, retreated and eventually explicitly disavowed any right to

\(^{\text{40}}\) G. Gilmore, supra note 22, at 79. The followers of Langdell advocated studying a few correct cases and disregarding the rest. See supra note 44 and accompanying text. Arthur Corbin, one of the great post-Langdellian scholars, advocated studying all the cases. G. Gilmore, supra note 22, at 79.

\(^{\text{41}}\) G. Gilmore, supra note 22, at 79.

\(^{\text{42}}\) Id. at 90. Gilmore notes that reform took the form of recodification: "to free judges . . . from the fetters of aberrant precedents in unenlightened jurisdictions." Id. at 71; see infra text accompanying notes 263-64.

\(^{\text{43}}\) G. Gilmore, supra note 22, at 92. Respecting sociological jurisprudence, Professor Horwitz notes: "The principle argument is that there is some sort of inevitable and necessary unfolding of different stages of legal ideas." Horwitz, supra note 40, at 279. The "stages" proposed by Roscoe Pound were (a) Archaic Law; (b) Strict Law; (c) Liberalization. Id. However, "never are we told why the second stage becomes the third or, indeed, which social forces gain and which lose by this transition." Id.

\(^{\text{44}}\) Holland, American Liberals and Judicial Activism: Alexander Bickel's Appeal from the New to the Old, 51 Ind. L.J. 1025, 1026 n.3 (1976). Holland further explains that Felix Frankfurter was one of the formulators of "Robert La Follette's platform plank in 1924 which called for a constitutional amendment giving Congress power to override Supreme Court invalidation of federal statutes by a two-thirds vote. Frankfurter even advanced the modest proposal of excising the due process clause from the fourteenth amendment." Id. at 1036 n.28.

Professor Gilmore notes that the change from laissez-faire thinking to a New Deal philosophy was "not much more than a changing of the guard," G. Gilmore, supra note 22, at 87, "a change of course, not a change of goal," id. at 100. This much is clear: "[T]he slogan 'law is a science' became 'law is a social science.' Where Langdell had talked of chemistry, physics, zoology, and botany as disciplines allied to the law, realists talked of economics and sociology not merely as allied disciplines but as disciplines which were in some sense part and parcel of the law." Id. at 87.
substitute its opinion for legislative judgment in the economic area.\(^5\)

In the post-New Deal era, however, it was not long before progress once again reared its head. While economic rights were demoted, personal rights were elevated—a distinction never adequately defended outside a series of assumptions indistinguishable from the distinction itself.\(^6\) Most prominent among the arguments defending the distinction were those regarding the free marketplace of ideas. It was felt that "[t]o encourage societal progress, it is important . . . to protect 'those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society. . . .'"\(^5\) The Warren Court best typified this philosophy and in turn emphasized the protection of personal rights. Professor Bickel observes:

The Justices of the Warren Court thus ventured to identify a goal. It was necessarily a grand one—if we had to give it a single name, that name

\(^{5}\) See, e.g., Nebbia v. New York, 291 U.S. 502, 539 (1934) ("[p]rice control . . . is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt"). See generally W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 127-28 (5th ed. 1980) (description of political climate in which the Court reversed its due process approach) (hereinafter cited as CONSTITUTIONAL LAW). During this period it was fashionable to perceive the states as social laboratories. G. GILMORE, supra note 22, at 91.

\(^{6}\) See infra note 75.

\(^{55}\) McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34, 34-46 (quoting Kovacs v. Cooper, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring)); see L. LUSKY, supra note 4, at 113. The concept of the "open society" is largely indistinguishable from the preferred freedom position. It guarantees to all the "fullest liberty of professing and discussing . . . any doctrine, however immoral it may be considered." Kendall, The "Open Society" and Its Fallacies, 54 AM. POL. SCI. REV. 972, 972 (1960) (quoting J. S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 14 (R. McCallum ed. 1946)).


Advocates believe that a society remains open only if it removes barriers to free expression and individual goals created by either private or governmental actions that deny either acceptable procedures or substantive rights. See, e.g., L. TIBE, supra note 14, § 16-25, at 1063; Ely, Constitutional Interpretivism: Its Allure and Impossibility, 53 IND. L.J. 399, 404-05 (1978). An open society fosters man’s "moral evolution." See Perry, supra note 13, at 292; infra note 153.

Proponents of the open society concept generally argue that as a nation we failed to live up to our commitment until the emergence of the Warren Court, when, as noted earlier, the "vacuum" became apparent and the Supreme Court was found "best suited" to act. See supra notes 4-7 and accompanying text.
would be the Egalitarian Society. And the Justices steered by this goal in the belief that progress, called history, would validate their course, and that another generation, remembering its own future, would imagine them favorably. . . . On such a faith . . . was built the Heavenly City of the Twentieth-Century Justices.58

No serious commentator can ignore this long and varied legacy of progressivist assumptions. Today various “fundamental values” dominate the literature, continuing to make progressivist assumptions about the nature of man, society and government. They assume “that constitutional law is fundamentally the application of reason to public issues; it attempts to create from the lawyer’s skill of intelligent, conscious argumentation a moral charter capable of ordering almost any aspect of human conduct.”57 Such dreams die hard.58

The Supreme Court and Democratic Theory

Traditionally, a tension existed between the power of judicial review and the recognition that we possess a representative democratic regime. Today, that tension in fact has largely been dissolved by redefining each term.59 The following analysis is offered.

Critics of American democracy often portend that its institutions, most notably the legislative process, have failed.60 No commentator, however, either has demonstrated that a majority of Americans equate legislative inactivity with institutional failure, or has frankly confronted the issue of legitimacy.61 What do they mean by failure? The failure alluded to, I suggest, ultimately refers to legislative declination to adopt proposals these commentators consider appropriate, wise, or just. Such contentions

58 A. Bickel, supra note 22, at 13-14. Despite Bickel’s later pessimism, he originated the ideas that the constitutional text should be interpreted in open ended fashion and that the Court was a “prophet and shaper” whose duty it was “to create moral principles and give them substance.” Id. at 11-42, 108-68; see Ely, supra note 13, at 54-55; Holland, supra note 52, at 1026-28; Purcell, supra note 22, at 532-33, 537-38.
58 See G. Gilmore, supra note 22, at 99.
59 It is suggested that Raoul Berger’s minority position preserves adequately the traditional tension. See Gangi, supra note 2, at 10-14. These themes will be addressed in the final section of this article.
60 See Gangi, supra note 2, at 24-26, 41-43, 45 n.379. The institutional failure assumption most often relates to the “vacuum,” “better suited,” and “cumbersome” arguments. See supra text accompanying notes 4-7, 10-12.
61 The problem arises as to how to count the majority in order to judge whether it has been circumscribed. Is it a simple numerical majority, counted nationally, or one as envisioned by Madison, where there is greater protection from majority tyranny? See Gangi, supra note 2, at 59-62. Can we cite national polls in order to prove that the majority’s will has been thwarted? See infra text accompanying notes 271-72.
cannot be equated with democratic institutional failure, because, with some probing, they are defective in at least two respects: (1) Either rights to the proposed legislation are claimed, the existence of which has not been established, or (2) there is a presumption that the legislature failed to reflect accurately the views of its constituents. These contentions often mask the fact that what essentially is at stake is a disagreement over personal preferences: what legislation ought to have been adopted from the perspective of the critic in spite of probable majority opposition.

Repeated allusions to democratic failure, thus, are no more than advocations of "results" that the advocate believes ought to have been pursued. The failure of the legislature to pursue such results becomes their per se criteria for judging democratic failure or institutional inadequacy. The identification of democratic institutional failure with favored results, moreover, often is hidden from view by unsupported contentions that the results advocated are required by either the Declaration of Independence, the Constitution, or the Bill of Rights. Such assertions, however, are never concretely demonstrated without ignoring historical evidence to the contrary. In this regard, claims of democratic failure eventually become inseparable from current claims for judicial power, for they both attempt to justify judicial intervention on the grounds that other democratic institutions failed to "progress" toward desirable results as rapidly and as consistently as the majority of citizens ought to have demanded. These rationalizations do little to refute accusations of judicial usurpation or illegitimacy.

The above principles may be more specifically demonstrated. Today the literature is dominated by two primary groups: those urging judicial action either to protect the democratic process, or to further define substantive rights. Each school contends, however, that its rival school asks the Court to impose mere personal preferences on the citizenry: an imposition contended to be an abuse of its power. Both procedural and sub-

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83 At least one commentator has concluded that even "process" questions entail personal preferences. See Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1063 (1980).
84 See Tushnet, supra note 30, at 1037.
86 See Gangi, supra note 2, at 46-47, 50-51.
88 See Gangi, supra note 2, at 32-33.
89 See Alexander, Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique, 42 OHIO ST. L.J. 3, 44-51 (1981); Braden, The Search for Objectivity in Constitutional Law, 57 YALE L.J. 571, 573-74 (1948). For example, procedural limitations include
stantive proponents redefine the original tension between judicial review and representative democracy as intended by the Framers; both schools delegate to the judiciary a level of power not contemplated by the Framers. The judiciary is elevated to the position of supreme public policymakers, completely reversing the New Dealers' hard-won battle against the laissez-faire proponents.

The procedural and substantive schools in fact converge: both need to substitute judicial intervention for legislative choices on public policy questions. These positions converge because commentators rationalize and logically explicate provisions of the text—now called ideals—instead of historically establishing the people’s adoption of the advocated preferences. Commentators often simply assume or assert that these ideals, never before imposed, were present from inception. This approach enables them to avoid the question of whether the preferences advocated were either in fact present from the beginning, or are consistent with traditional perceptions of what role the legislature, as compared to the judiciary, was to play in establishing public policy within the competency granted to it by the Constitution. In short, it permits them to circumvent the legitimacy issue.

As things now stand, the Court has renounced its right to intervene with respect to legislative decisions on “economic rights” but presently intervenes on matters of “personal rights.” This inconsistency has occa-
non-economic, fundamental rights. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52, 71, 75 (1976) (to require consent of a party other than pregnant woman and her physician in abortion decision is unconstitutional); Roe v. Wade, 410 U.S. 113, 154 (1973) (fundamental rights of personal privacy include abortion decision during first trimester).

76 See McCloskey, supra note 55, at 40-45. But see Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 939 (1973) (non-economic rights should not be granted special protection; the Constitution says little about either contract law or abortion) [hereinafter cited as Crying Wolf].

77 Jurisprudence for the past century has managed repeatedly to suppress the question of the common good, initially with respect to economic rights, and today, regarding the rights of criminal defendants. See Gangi, supra note 2, at 49 n.404. Professor Voegelin has stated: If . . . I can build a system, the truth of its premise is thereby established; that I can build a system on a false premise is not even considered. The system is justified by the fact of its construction; the possibility of calling into question the construction of systems, as such, is not acknowledged. . . . [W]e now see more clearly that an essential connection exists between the suppression of questions and the construction of a system. Whoever reduces being to a system cannot permit questions that invalidate systems as a form of reasoning.

E. VOEGELIN, supra note 23, at 44.

78 See Crying Wolf, supra note 76, at 940-43.


80 Professors Lusky, see L. LUSKY, supra note 4, at 242, Ely, see Ely, supra note 55, at 404-05, and Perry, see Perry supra note 13, at 327-28, attempt to preserve a tension, but it is a tension of their own making—not the one constitutionalized by the Framers. Professors Lusky, see Lusky, supra note 8, at 408 and Perry, see Perry supra note 13, at 280, concede as much. Regarding Professor Ely, see Professor Berger's devastating criticisms in Berger, Ely's "Theory of Judicial Review," 42 OHIO ST. L.J. 87, 87 (1981) and Berger, Government by Judiciary: John Hart Ely's "Invitation," 54 IND. L.J. 277, 277 (1979) [hereinafter cited as Invitation]. To the best of my knowledge, Ely has failed to respond to these criticisms.

81 See Gangi, supra note 2, at 32-33.

82 See Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 1-7.
This approach reconciles the tension between judicial review and representative democracy by obliterating it. Such judicial power ignores the Framers' concern about centralized power and legislative responsibility.\(^8\) It amounts to the merging of the powers separated in the Constitution, coincidentally ceding to the Court the right to determine arbitrarily the values contained therein.\(^4\) Needless to say, no commentator has adequately defended this contemporary role of the Court as being consistent with self-government in the democratic republic constitutionalized by the Framers.

**Open-Ended Adjudication**

The success of modern proponents of judicial power, however, requires that some attention be focused on the means employed to support it. They argue that the Constitution must remain "living," and that the power to keep it up-to-date must be in the hands of the Supreme Court.\(^8\) They contend, more particularly, that, with respect to certain constitutional phrases, "their meaning cannot be determined by reference to text or history."\(^8\) Those components merge to create the belief that the constitutional text, most often illustrated by the due process and equal protection clauses, must be interpreted in an open-ended fashion.\(^8\) A minor-

\(^8\) See Gangi, *supra* note 2, at 10-14.

\(^4\) L. Lusky, *supra* note 4, at 109-11. The position of the Court is that it is licensed to disregard the interpretive meaning whenever the Court believes a different meaning is better. *Id.* at 111.

\(^8\) See Gangi, *supra* note 2, at 19-23.

\(^8\) See supra note 67.

\(^8\) See, e.g., *Crying Wolf, supra* note 76, at 945; *see* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204, 205 (1980). Contemporary courts create rights by finding them to be fundamental to due process. For this development, see Cord, *Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment*, 44 Fordham L. Rev. 215, 216-44 (1975). While contemporary fundamental rights are usually not found explicitly in the Bill of Rights, or traceable to the intentions of the Framers, the Court finds them in the "penumbra" of the articulated rights. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Two criticisms of the position that the need for adaptability creates additional judicial power also may be noted here. First, until recently, our society's need to adapt to changing circumstances did not enlarge the judicial power. That need was thought to require, if anything, greater judicial deference to the legislature when statutory proposals did not clearly violate constitutional commands. Upon precisely that premise rested the progressivist critique of the laissez-faire court. *See supra* text accompanying notes 51-55. If the need for societal adaptability enlarged the judicial power, how can such claims be denied to the executive or legislative branches? Should they also argue that "circumstances" require greater power than is constitutionally authorized? *See* Gangi, *supra* note 2, at 26-27.

Second, proponents of judicial power often assume, but seldom defend, an analogy between the common-law judicial practice of "making law" and the same power to create con-
ity of commentators justify this approach on the rather narrow ground that the Court should be "entitled . . . to seek out the sorts of evils the framers meant to combat and to move against their twentieth century counterparts." Other commentators go further, perceiving the Constitution to contain words or phrases that are "general and leave room for expanding content as time passes and conditions change." Professor Nagel provides this analysis:

[C]onstitutional values are stated at exalted levels of abstraction partly because modern sophistication, having liberated judges from the confines of text and history, has liberated constitutional values from specificity as well. The exalted nature of the values is also a corollary to assumptions about constitutionalism itself: the Constitution . . . [it is] suggest[ed], necessarily must address the most serious public concerns, and must achieve a result that can be seen as virtuous in order to be worthy of its fundamental status. Any "imperfections" in the document must be remedied by interpretation.

Once the Constitution is so viewed, a variety of questions arises. First, what is meant by a constitution? Traditionally, constitutions have been conceived as setting specific limits and defining fundamental structures.\[^{81}\]

\[^{88}\] Crying Wolf, supra note 76, at 929; see also infra text accompanying note 136.
\[^{89}\] Bork, supra note 82, at 13 (quoting Wechsler, Toward Neutral Principles of Constitutional Law, in Principles, Politics, and Fundamental Law 3, 43 (1961)); see also Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 695 (1976) ("living Constitution" justifies judicial action when other branches fail to act); Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1162 (1977) (changing of the Court creates uncertain constitutional protection). Allied expressions include the belief that constitutional provisions "exist on a spectrum ranging from the relatively specific to the extremely open-textured," Ely, supra note 55, at 413, or provisions that are "difficult to read responsibly as anything other than open and across-the-board invitations to import into the constitutional decision process considerations that will not be found . . . in the Constitution," id. at 415. But see Gangi, supra note 2, at 5-10, 13-14, 21-22; infra text accompanying notes 238-61.
\[^{90}\] Nagel, supra note 57, at 1179-80.
\[^{91}\] See Government by the People, supra note 13, at 34.
For example, the United States Constitution defines important relationships: federalism, separation of powers, and amendment process. Once a constitution's phrases are considered open-ended, wherein lies their limits? Second, once a constitution is conceived of as open-ended, it no longer provides limits for subordinate legislation, thus raising questions of why even an integral provision, the amendment procedure for example, should not also be considered open-ended.\textsuperscript{9} Third, is it permissible to change the intentions of the Framers regarding all provisions, or are some provisions considered inviolable? Are there inherent limits with respect to open-ended interpretation?\textsuperscript{3}

In this context, contemporary Court opinions have been described as arbitrary, inconsistent and more coercive than persuasive.\textsuperscript{9} That we con-

\textsuperscript{9} We really are never told why some “phrases” may/should be construed in open-ended fashion while others may/should not be. The only inhibitor on the endeavor appears to be either personal preferences or drab imagination—one still influenced by an “historical” understanding of the words as they originally were used. Such reluctance merely appears quaint, lacking in principle to someone with more imagination and/or sensitivity toward “injustice.” See Parker, The Past of Constitutional Theory—And Its Future, 42 Ohio St. L.J. 223, 257-59 (1981).

What prevents Congress and even the Court from “adapting” the Constitution to modern times, for example, by substituting a four year term for the current two year term for representatives? See Gangi, supra note 2, at 25 n.213. Should we evaluate legislative and executive abuses of power by one standard and judicial abuse by another? Id. at 32. With respect to the limits of adaptability, Professor Bridwell observes: “[O]ne of our most outstanding modern rhetorical questions [is], ‘[m]ay we thrust aside the dead hand of Earl Warren?’” Bridwell, The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule?, 31 S.C.L. Rev. 617, 643 n.114 (1980) (quoting Sobran, Taking the Fourteenth, 30 Nat’l Rev. 283, 284 (1978)).

The idea of judicial adaptability of the Constitution is based on the common-law analysis of Benjamin Cardozo. See G. Gilmore, supra note 22, at 76-77; Cord, supra note 87, at 218 n.16. Professor Wolfe has provided both insight into and detail regarding Cardozo’s role in shaping the modern judicial role. See Wolfe, supra note 87, at 301-02. First, Wolfe notes that canons of constitutional construction existed from the beginning, the emphasis falling on “the ability of the legislature to adapt appropriate means to achieve its legitimate ends. This adaptability is intrinsic to the Constitution: it is adaptation within the Constitution rather than adaptation of the Constitution.” Id. at 301 (emphasis in original).

Second, “modern adaptation is not typically described as an effort to change the Constitution. It is defined as a process of giving content to certain ‘great generalities.’” Id. at 302 (emphasis in original). See supra text accompanying note 19. In this context, Professor Wolfe notes that “it becomes possible to defend judicial review as no more than enforcement of Constitutional commands, while at the same time providing a quite ‘malleable document’: a container into which the desired content may be poured.” Wolfe, supra note 87, at 302. The original perception that permitted legislative adaptability has been changed, however, to “where judges are overruling legislatures.” Id. at 303. Professor Wolfe concludes: “The distinctive aspect of modern discussions of rules of interpretation is . . . that they hardly exist. . . . To have a set of rules of interpretation would be to put excessive limit on the capacity of the judiciary to adapt the Constitution.” Id. at 305 (emphasis in original).

\textsuperscript{9} See, e.g., Mendelson, Raoul Berger’s Fourteenth Amendment—Abuse by Contraction vs.
tinue to talk about the discipline "constitutional law," I suggest, is sheer habit and is perhaps self-deceptive. What in fact has occurred under the open-ended constitutional interpretation of the Warren and Burger Courts has been the imposition of personal preferences by particular Justices and their supporters. These preferences have been grafted onto the "generalities" of the constitutional text, often under the misleading rubric that they have always been there. The intention of such a constitutional philosophy is to use the Court as the vehicle to take American society where advocates believe it ought to go. Accordingly, even the narrowest claim of a judicial power to adapt the Constitution has resulted in decisions the Framers specifically would not have approved.

For example, notwithstanding that some proponents seemingly limit the Court's power to adapt the Constitution to those "inferences from values the Constitution marks as special," their position is not tanta-

Abuse by Expansion, 6 Hastings Const. L.Q. 437, 440–41 (1979). It is suggested that "[the] unique experiment in government by judges called Warren Court activism," id. at 443, exemplifies those neo-activist opinions that grew "more and more devious, sloganistic and directed to the human thirst for fairytales . . . [the] purpose [being] to obscure (for lesser minds) a raw exercise of judicial fiat," id. at 440–41.

"Today we should perhaps call constitutional law "Progressivist Advocacy Law." It is suggested that there is little distinction in contemporary legal writing between constitutional law and advocacy of personal values disguised in textual terminology. See Bridwell, The Federal Judiciary: America's Recently Liberated Minority, 30 S.C.L. Rev. 467, 472-74 (1979).

" See Ely, supra note 13, at 10-11 (Supreme Court decision in Roe v. Wade, 410 U.S. 113 (1973), was the imposition of the Court's value preferences on the state legislature).

" See Address by C. Wolfe, How the Constitution Was Taken Out of the Constitution, 1981 Meeting of the American Political Science Ass'n (Sept. 3-6, 1981) (mimeograph). As Professor Wolfe comments:

The Process whereby the Constitution has been taken out of constitutional law consists of several steps. First, the Constitution has been emptied of substantive content. This has been done by severing constitutional provisions from their underlying theoretical principles and by raising the meanings of constitutional provisions to such a high level of generality that they are vague and ambiguous.

Second, the Constitution has been given a new content. This has been done generally by re-defining interpretation as "specification of constitutional generalities" by means of balancing competing interests and by adding to the Constitution a new unwritten clause which may be called the "judicial necessary and proper clause."

Other, more particular methods have been employed as well (e.g., taking advantage of changed meanings of words, substituting words broader or narrower than those of the Constitution, misusing history, taking old precedents out of context and investing them with a new meaning, and ignoring implications of one part of the Constitution for another).

Id.

" See infra text accompanying note 127.

" See Crying Wolf, supra note 76, at 935 (emphasis omitted). In regard to the abortion cases Professor Ely commented:

[M]y point is that the prior decisions, including those that have drawn the most fire,
mount to the view that the Court is bound by the clearly ascertainable intentions of the Framers. On the contrary, even this narrow power of adaptability frequently entails modifying the original definitions of those values from their previous interpretations. Another group of commentators cedes greater power, positing that the Court’s constitutional role is to establish values and principles not traceable in any way to the constitutional text or historic milieu.

Thus, despite many heated disagreements between them, proponents of both procedural and substantive rights cede enormous power to the judiciary. As discussed earlier, process-oriented proponents elevate democratic values, perceiving that the function of the Court is to assure the openness of the society, while substance-oriented proponents view preferences as rights and tend to perceive the judicial role in more elitist terms. Consistent with open-ended premises, however, both positions go “beyond an emphasis on structure, process and participation.”

In disagreement with the above views, proponents of the traditional perspective advocate that exercises of judicial power should consist of adherence to the constitutional boundaries intended by the Framers. I contend that the open-ended methodology today is simply the primary means by which the Supreme Court majority, like its laissez-faire predecessors, masks the giving of “constitutional stature” to whatever “results” are believed beneficial. It has become the means by which the most recent progress is incorporated into the constitutional text. What the Justices “find” in the Constitution today are their own “values.” Some commentators still apparently believe they know or have a “vision” of the

at least started from a value singled out by, or fairly inferable from, the Constitution as entitled to special protection.

Id. at 936 n.97.

100 See Bork, supra note 82, at 17. In his discussion of Tribe and constitutional rationalism, Professor Nagel explains:

The preferred method of analysis is to examine text, history, political theory, social facts, and other sources in order to identify a value that should be accorded constitutional status. Because constitutional significance is not tied to specific language or history, the value is necessarily both important and vague; hence, almost any issue can have constitutional dimensions, and the value alone cannot explain case outcomes.

Nagel, supra note 57, at 1178.

101 See Crying Wolf, supra note 76, at 946.

102 See R. Neely, How COURTS GOVERN AMERICA 5-7 (1981) (ubiquitous constitutional issues provide the Court with exclusive vehicle to effect changes on individuals and state agencies, often without warning).

103 See Grano, supra note 67, at 177-78.


105 Id.

106 See Ely, supra note 13, at 52-54.
future.\textsuperscript{107} If we could rid ourselves of the illusion that law is some kind of science—natural, social or pseudo—and of the twin illusion that the purpose of law study is prediction, we shall be better off than we have been for at least a hundred years.\textsuperscript{108}

\textit{The Debate over Judicial Expansionism: Interpretivism vs. Non-Interpretivism}

The judicial expansionist debate today distinguishes participants by employing interpretive versus non-interpretive terminology.\textsuperscript{109} The terms were initially employed by Professor Grey\textsuperscript{110} but were most frequently

\textsuperscript{107} See, e.g., Perry, supra note 13, at 295. Professor Gilmore states:
One lesson which we can draw from all this is that the hypothesis [that the future can be predicted] is itself in error. Man’s fate will forever elude the attempts of his intellect to understand it. The accidental variables which hedge us about effectively screen the future from our view. The quest for the laws which will explain the riddle of human behavior leads us not toward truth but toward the illusion of certainty, which is our curse. So far as we have been able to learn, there are no recurrent patterns in the course of human events; it is not possible to make scientific statements about history, sociology, economics—or law.

G. Gilmore, supra note 22, at 100.

\textsuperscript{108} G. Gilmore, supra note 22, at 101.

\textsuperscript{109} Brest, supra note 87, at 204. Brest employs the term “originalism” to convey what other commentators call interpretivism and modern originalism. Id. at 205. This article’s textual discussion employs the interpretive-non-interpretive terminology because commentators have employed it more frequently. See, e.g., R. Berger, supra note 74, at 123; see Brest, supra note 87, at 231.

\textsuperscript{110} See Grey, Do We Have An Unwritten Constitution?, 27 Stan. L. Rev. 703, 706 n.9 (1975). Professor Grey rejects interpretivism on the ground that it could not obtain results he believes desirable. Id. at 714. Furthermore, he apparently argues that since contemporary opinions have not employed interpretivism, it should be discarded on historical grounds. Id. at 717; see Gangi, supra note 2, at 35-37. It is suggested that it is the “contemporary opinions” decided by the Supreme Court that are to be treated with suspicion, not interpretivism. Furthermore, those commentators who concentrate on cases decided primarily during the Warren Court period rekindle the flame by selecting only “correct” cases. They have a very selective view of historical relevancy, including precedents that may expand, but not contract, not to mention invisible canons of construction. See supra text accompanying note 18.

employed with the specificity added by Professor Ely, who defined interpretivism to mean "that judges deciding constitutional issues should confine themselves to enforcing values or norms that are stated or very clearly implicit in the written Constitution." Noninterpretivism, according to Ely, means that "courts should go beyond that set of references and enforce values or norms that cannot be discovered within the four corners of the document."

Ely's definitions are inadequate. First, the "values or norms" of his definition of interpretivism are indistinguishable from the "values or norms" of his noninterpretivism definition, thereby blurring any distinction between them. Second, as Ely uses them, both terms employ "open-ended" textual explication that is entirely speculative and historically unsupported. Third, neither term may be reconciled with traditional concepts of judicial review and democratic theory.

Professor Alexander comes closer to illuminating an essential distinction between interpretivism and noninterpretivism. He states that interpretivists believe "courts should overturn the actions of the democratic institutions of government only when the actions contravene a constitutional command properly interpreted." He then divides remaining approaches to interpretation into three subcategories of noninterpretivism, each, one step further removed from the interpretive definition: 1) Neo-interpretivism holds "that some of the constitutional commands, . . . are empty vessels and delegate to the courts the job of supplying the values required to flesh out the commands." This position requires that "the proper source for the requisite values is the Constitution itself, or rather those values that lie behind and explain the more specific values that interpretivism reveals." 2) Quasi-interpretivism moves further away from...
neo-interpretivism because here "the values necessary to flesh out the non-interpretive constitutional commands need not be tied closely to values explicitly recognized in the interpretive provisions."[118] 3) "Pure noninterpretivism is a position that posits judicial authority to invalidate the actions of democratic institutions based on norms that may be clearly extraconstitutional."[119]

Nevertheless, Professor Perry has made the most significant contribution to clarifying the issues upon which the use of interpretive-non-interpretive terminology turns. Perry equates the terms with conceptions of judicial review, and specifically identifies the "legitimacy of non-interpretive review [as] the central problem of contemporary constitutional theory."[120] He describes the Constitution as consisting "of a complex of value judgments the Framers wrote into the text of the Constitution and thereby constitutionalized."[121] According to Perry two categories exist. The first "category of judgments" relates to the "structure of American government," namely, the division and separation of powers.[122] The second category "specifies certain aspects of the relationship that shall exist between the individual and government."[123]

Interpretive review, as Perry defines it, "ascertains the constitutionality of a given policy choice by reference to one of the value judgments of which the Constitution consists," placing emphasis on the determina-

[^118]: Id.
[^119]: Id. Professor Alexander notes, however, that "Ely discovers the value of 'broad participation in the processes and distributions of government'" without being able to "cite any provision in the Constitution that . . . conflicts with the democratic institutions' definition of such participation." Id. (quoting J. Ely, Democracy And Distrust 87 (1980)). Alexander labels Ely's position therefore as "neo-interpretivism," a subdivision of non-interpretivist review. I concur. Alexander also notes that both neo- and quasi-interpretive are similar to Brest's "moderate originalism." Id. at 10 n.26. Again, I agree. All three may be distinguished from his interpretivism. Alexander comments that quasi- and neo-interpretivism are "noninterpretivist with respect to substantive values, but interpretivist with respect to the authority to seek out non-interpretivist values and with respect to having . . . particular . . . provisions in the Constitution on which to hang all holdings of unconstitutionality." Id. at 10. Apparently, this means that a double standard exists regarding property rights versus personal rights, or structure versus rights. The latter would include extra-constitutional values such as privacy, as well as, expanding rights, such as the exclusionary rule. Such positions are more revealing of liberal ideology than scholarly consistency. See Parker, supra note 92, at 253-57. In any event, in my opinion, Alexander correctly places Tribe in this category. Id. at 10 n.27.
[^120]: Perry, supra note 113, at 263.
[^121]: Id. at 263-64 (emphasis added).
[^122]: Id. at 264.
[^123]: Id.
tion of the "character" given the value judgment by the Framers.\textsuperscript{134} Noninterpretivism, Perry maintains, occurs when the Supreme Court determines "constitutionality by reference to a value judgment other than one constitutionalized by the Framers."\textsuperscript{135} Perry asserts that from the interpretivists' perspective "all [such] noninterpretive review is illegitimate."\textsuperscript{136} He concurs with the interpretivist assessment to the extent that he agrees that "[t]he decisions in virtually all modern constitutional cases of consequence . . . cannot plausibly be explained except in terms of noninterpretive review, because in virtually no such case can it plausibly be maintained that the Framers constitutionalized the determinative value judgment."\textsuperscript{137}

Perry further clarifies the issue. Unlike other noninterpretivists, he believes that "nothing [is achieved] by pretending that interpretivism is not a forceful theory,"\textsuperscript{138} and that, it simply will not be tolerated either to misrepresent or to fail to understand adequately the interpretivist position.\textsuperscript{139} Perry then carefully states and rebuts several criticisms currently lodged by other commentators against interpretivists. First, to the assertion that interpretivists have unrealistic majoritarian assumptions on the electoral accountability of legislative and executive branches, Perry responds by emphasizing that such bodies are accountable, and by de-emphasizing their "degree of responsiveness."\textsuperscript{140} The judiciary, he adds, is "not electorally accountable at all."\textsuperscript{141} Second, Perry rejects as unsup-
portable attempts to equate interpretivism with literalism. Third, and equally unfounded, according to Perry, is the noninterpretivist argument that the Constitution should be "construed broadly." Perry observes that this argument fails to consider that there is a distinction between power granting and power limiting clauses, and at most McCulloch constitutes an admonishment to the courts to defer to legislative choices. Fourth, Perry rejects the belief that the Framers never intended to constitutionalize particular value meaning in various clauses but instead left it to the Court to redefine those values consistent with evolving perceptions. Perry maintains that there is no evidence to support such a position. He adds: "most political practices banned by the Supreme Court in human rights cases, including freedom of expression and equal protection cases, cannot plausibly be characterized as simply modern analogues of past, constitutionally banned practices." Perry admonishes:

Those who seek to defend noninterpretive review—"judicial activism"—do it a disservice when they resort to implausible textual or, more commonly, historical arguments; nothing is gained but much credibility is lost when the case for noninterpretive review is built upon such frail and vulnerable reeds.

Perry further maintains that the only possible justification for non-interpretive review must be functional because "the implications of inter-

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133 Id. at 280-81.
134 Id. at 282. Perry points out, as has Berger, that Marshall's opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406-20 (1819), has been abused by modern proponents of judicial power. Perry, supra note 113, at 283. The emphasis in Marshall's opinion should fall on judicial deference to exercise of legitimate legislative power. See R. Berger, Death Penalties: The Supreme Court's Obstacle Course 67 (1982); R. Berger, supra note 74, at 373-79; see also infra notes 247-48 & accompanying text.
135 Id. at 282-83.
136 Id. at 297-98. Berger has been very critical of judicial power proponents who substitute "speculation" for evidence. See Gangi, supra note 2, at 7 & nn. 57-65.
137 Id. supra note 113, at 301 (emphasis in original).
138 Id. at 275.
139 Id. Professor Perry sets forth his criteria for functional justification:

If noninterpretive review also serves a crucial governmental function that no other practice can realistically be expected to serve, and serves it in a manner that accommodates the principle of electorally accountable policymaking, that function constitutes the justification for [non-interpretive review].

Perry, supra note 13, at 282 (footnote omitted).

Perry's formulation of the criteria above differs somewhat from his statement in his previous article. Perry, supra note 113, at 275. Preceding the text quoted, Perry noted that "there is likewise no airtight textual or historical justification for most interpretive review." Perry, supra note 13, at 282 (emphasis in original). This unexplained comment constitutes Perry's first curve ball. In effect, it hints that even traditional judicial review may not have been intended by the Framers. Perry does not square that judgment with an earlier one, that "[n]o contemporary constitutional theorist . . . seriously disputes the legitimacy of in-
pretivism are so severe," meaning that they would require the overruling of most Supreme Court cases.\footnote{138}

Perry's justification of noninterpretive judicial review lies in his attempt to establish the Supreme Court as serving "a crucial governmental function that no other practice can realistically be expected to serve," and to demonstrate that the Court "serves [that function] in a manner that accommodates the principle of electorally accountable policymaking."\footnote{141}

Regarding the first part of the justification, Perry assigns to the noninterpretive review." Perry, \textit{supra} note 113, at 265; see also Perry, \textit{supra} note 13, at 334-35. He may be alluding to those who claim to be interpretivists, for example, Ely, Bork, and Rehnquist.\footnote{138} Perry, \textit{supra} note 113, at 292. Perry adds:

Interpretivism necessitates the conclusion, given the original understandings of the first and fourteenth amendments, that most "first amendment" doctrine—much of which is revered even by those quick to criticize most other constitutional doctrines wrought by the modern Court—is the tainted fruit of noninterpretive review and thus illegitimate.

\textit{Id.} I do not review Perry's effort to show that other noninterpretivist justifications have failed, namely those proposed by Professors Grey and Ely, \textit{id.} at 266-75, 301-17, or Perry's assertion that Professor Bork's and Justice Rehnquist's alleged interpretivist positions are inconsistent with their positions on freedom of expression and desegregation, \textit{id.} at 277-78, 290-96. Finally, Perry describes Berger as a "consistent interpretivist," but one who recoiled from the logical necessity of having to overrule \textit{Brown v. Board of Educ.}, 347 U.S. 483 (1954), \textit{id.} at 293-94, and Bork, who, according to Perry, inconsistently defends the ruling in \textit{Brown}, \textit{id.} at 294-95. See also Perry, \textit{supra} note 13, at 296-301. But see Gangi, \textit{supra} note 2, at 38 n.318, 50-52, 57 n.448; R. Berger, \textit{supra} note 133, at 82-83 n.29.

My own view is that states should first begin to shore up items of concern that are subjects of federal constitutional retrenchment. Second, Professor Berger's work further reveals the need for an amendment prohibiting state discrimination on the basis of race with respect to school attendance, miscegenation and serving on grand juries. See Gangi, \textit{supra} note 2, at 4-5. Third, while courts may not strike down legislation on the basis of morality and/or wisdom, they should defer to the legislature where the authority may be doubtful. See Address by C. Wolfe, \textit{supra} note 97, at 23.\footnote{139} Perry, \textit{supra} note 13, at 282; see \textit{supra} text accompanying note 138. At least with respect to what he terms "human rights cases," Professor Perry asserts that the function of noninterpretive review is to maintain an accommodation between our commitment to electorally accountable policymaking while struggling simultaneously to discover right answers to basic political-moral problems. \textit{Id.} at 295. Included in the term "human rights cases" are freedom of expression cases, equal protection cases, \textit{id.} at 280, freedom of religion cases, and cases involving administration of the criminal law, \textit{id.} at 317.\footnote{140} \textit{Id.} at 282. It is suggested that Professor Perry's position amounts to nothing more than stating that, since his accommodation function "works," it is constitutional. The desired results are obtained, and that fact legitimizes non-interpretive review. See \textit{supra} text accompanying note 9. On the contrary, an interpretivist should reject this position on the ground that the Framers intended the Court's constitutional function to be solely the policing of constitutional boundaries. See \textit{infra} text accompanying note 152. It is submitted also that Perry's judgment "that function constitutes the justification for the practice," Perry, \textit{supra} note 13, at 282, is extrinsic to Professor Perry's definition of noninterpretive review.

Court the function of prophecy.\footnote{See Perry, supra note 13, at 291. Professor Perry states: "[j]udicial review represents the institutionalization of prophecy. The function . . . is to call the American people—actually the government, the representative of the people—to provisional judgment." Id.} This function falls to the judiciary because “electorally accountable policymaking institutions are not well suited to deal with such issues in a way that is faithful to the notion of moral evolution, and, therefore, to our religious understanding of ourselves.”\footnote{Id. at 293. According to Professor Perry, the “fundamental political-moral” issues with which the Court has had to grapple in recent years include racism, sexism, capital punishment, and human sexuality. Id. Perry suggests that the executive and legislative branches do not deal adequately with the problems because members of these branches are more concerned with reelection. Id.} Only from the perspective of that function do Supreme Court decisions over the past 100 years make sense, as “an organic political development in response” to the failure of other branches.\footnote{Id. at 294-95.} The Court transcends “established moral conventions” and enables us to maintain our commitment to democracy as well as “to struggle incessantly to see beyond, and then to live beyond, the imperfections of prevailing moral conventions.”\footnote{Id.} Whatever prevailing conventions exist, Perry argues, we are “open as a society to the possibility that there are right answers to political-moral problems. In any event, we should be open to that possibility.”\footnote{Perry, supra note 13, at 309-10, 313.}

Having established the Court’s function, that of prophecy, Perry then attempts to reconcile that function with electoral accountability.\footnote{Perry argues that a right answer is “evidenced, in part at least, by its location at a point of convergence among a variety of moral systems.” Id. at 305. Unlike the skeptics of our generation, he believes man has experienced moral growth. He states, for example, that man “is not ‘finished’. . . . [r]ecognizing Man’s openness means admitting he is . . . not (yet?) finished, absolute, definitive.” Id. at 300 n.80 (quoting R. Panikkar, Myth, Faith and Hermeneutics 208 (1979)); cf. supra notes 37 & 57 and accompanying text. Perry concludes that while the Court could not justify decisions on “a single moral system to resolve moral problems . . . [i]t can explain and justify a policymaking institution . . . that resolves moral problems not simply by looking backward to the sediment of old moralities, but ahead to emergent principles in terms of which fragments of a new moral order can be forged.” Perry, supra note 13, at 307. Elsewhere he adds: My own view is that noninterpretive review in most substantive due process cases . . . mainly consists of right answers to the questions the courts have addressed.} While in the past the Court has given wrong answers, that fact should not lead to total rejection of the Court’s function as described.\footnote{See supra text accompanying notes 142-43.} Perry contends,
however, that the moral decisions of the Court must ultimately be ratified by the legislature.\footnote{Perry, supra note 13, at 331-52. According to Professor Perry therefore, if Congress fails to limit its jurisdiction, Supreme Court decisions then are held to be authoritative.}

Perry unquestionably contributes to the quality of debate surrounding judicial expansionism. First, because of his principled explication of the interpretive-non-interpretive terminology, free of historical self-deception, two modes of judicial review clearly come into view: "traditional" (interpretive) and "modern" (noninterpretive).\footnote{Perry recognizes that what the Court does presently in non-interpretive review is "coercive." \textit{Id.} at 325. He rejects three arguments often put forth by other noninterpretivists claiming to have reconciled contemporary non-interpretive judicial review with electoral accountability: (1) the people have consented to non-interpretive review, \textit{id.} at 328; (2) the possibility exists of amending the Constitution to negate court decisions, \textit{id.} at 328-30; and (3) there exists the possibility of expanding the number of justices, \textit{id.} at 330. Perry takes the position that his effort to reconcile accountability with the prophetic judicial function he describes is applicable "only [to] noninterpretive review." \textit{Id.} at 335. "My position is not that Congress may use its jurisdiction-limiting power as a means of preventing the federal judiciary from enforcing value judgments constitutionalized by the Framers." \textit{Id.} at 334. I assume Perry means that Congress could not remove jurisdiction (a) with respect to "the structure of American Government," see supra text accompanying note 128, specifically meaning federalism and separation of powers cases, or (b) if the removal evinced diminution of rights below those constituted by the Framers, for example, with respect to freedom of speech and equal protection. See Perry, supra note 113, at 284-97.}

Furthermore, Perry confirms that traditional judicial review has dominated much of our history and most clearly reflects historiographical materials as best we know them with respect to the Bill of Rights and the fourteenth amendment.\footnote{These terms also have been used by Professor Wolfe, see Address by C. Wolfe, supra note 97. Therefore, when referring to Professor Wolfe's definitions, the words "modern" and "traditional" will be placed in quotation marks.} Modern judicial review, on the other hand, goes beyond the values constitutionalized by the Framers of the respective documents. The symbol of judicial review throughout our history comes closest to the traditional (interpretive) mode. It has limited scope. The Supreme Court power was primarily intended to police constitutional boundaries, and is, at most, a

These answers approach or even reach an emergent point of convergence among a variety of systematic moral theories. This is not necessarily to say that the judiciary has given answers for which there is a present "consensus" among the American people, since the moral sensibilities of the pluralistic American polity typically lag behind, and perhaps are more fragmented than, the developing insights of moral philosophy and theology. \textit{Id.} at 317 (emphasis added).

While concerns for economy do not permit a detailed examination, it should be pointed out that Perry demonstrates elsewhere weaknesses in natural law, progress and the use of myth and symbols.
negative power: the Court plays the role of naysayer.\textsuperscript{163} Similarly, Perry implicitly supports Berger’s contention that the judiciary has usurped the amendment power.\textsuperscript{163}

Second, Perry contends that all prior attempts to justify modern (non-interpretive) judicial review have failed adequately to meet the counter-arguments of its traditional (interpretive) opponents.\textsuperscript{144} Not only does he agree that the latter is a viable theory, but he concretely and convincingly rejects several unsupportable modern (non-interpretive) arguments against it.\textsuperscript{165}

Third, Perry implicitly links the “traditional” and “modern” modes of judicial review to clearly discernible intentions, thereby linking “traditional” review with the aforementioned historiographical materials.\textsuperscript{166} Perry also acknowledges that where intentions cannot be ascertained, or where there is an absence of conclusive materials, even “traditional” review permits some judicial discretion regarding constitutional adjudication.\textsuperscript{167} For this reason I would suggest that intentionalist/nonintentionalist replace interpretive/non-interpretive terminology. The former terminology more precisely conveys the difference between the two contemporary positions on the proper scope of judicial review.\textsuperscript{168}

Fourth, Perry’s own justification for “modern” (pure non-interpretive/pure non-intentionalist) judicial review demonstrates his need to utilize all the symbols elsewhere identified.\textsuperscript{169} Insofar as he does so, Perry is open to interpretivist rebuttal.

\textsuperscript{163} However, even during its laissez-faire period, when the Court confined itself to the role of naysayer, that role was not completely free from the infusion of personal values.\textsuperscript{163}


Perry concedes that the prior and prominent non-interpretive justifications advanced by Ely, Dworkin, Bork, and Rehnquist have failed. Although Perry assumes his “functional justification” is sufficient to legitimize non-interpretive review, see Perry, supra note 13, at 275, his own analysis points out that other noninterpretivists have based their “constitutional” decisionmaking upon personal preferences and failed to label them as such. Id. at 266-317. All that remains is Perry’s “justification” which, I suggest, is also a personal preference. Indeed, the supposition that a “functional” criterion would be able to justify such non-interpretive review itself is a preference.

\textsuperscript{164} Perry supra note 13, at 266-75.

\textsuperscript{165} See supra notes 125-37, 150 and accompanying text.

\textsuperscript{166} See supra notes 121-24 and accompanying text.

\textsuperscript{167} Cf. Berger, supra note 1, at 613 (“[I]f the terms of a particular constitutional provision are ambiguous and no Framers’ choices are discernible, there is room for judicial policymaking.”). This article takes the position that absent a clear constitutional value, judges should defer to legislative assessments.

\textsuperscript{168} But see Alexander, supra note 69, at 10 (differing terminology suggested); Brest, supra note 87, at 204-05. For a discussion of Brest’s idea, see R. Berger, supra note 133, at 183-96.

\textsuperscript{169} See supra notes 3-19 and accompanying text.
Concerning Perry's justification for non-interpretivist judicial review the following objections may be raised: (1) Perry's justification is applicable to all human rights cases but not to issues involving federalism and the separation of powers.\(^{160}\) Upon what basis is the Constitution thus arbitrarily divided? Certainly, there is no historical evidence to support the position that the Framers constitutionalized any such view. The only support for such a distinction rests on Perry's personal preferences: elevation of human rights, yet fear of executive or legislative abuse. The Framers, however, designed a Constitution entailing both, in addition to providing for a limited judicial power.\(^{161}\)

(2) Despite Perry's claim that his non-interpretive justification is not applicable to the structures of American government,\(^{162}\) the function of prophecy he assigns the Court in fact constitutes a rewriting of the Constitution regarding the separation of powers and the judiciary. There is no evidence supporting such a role for the Court as part of "a complex of value judgments the Framers wrote into the text of the Constitution and thereby constitutionalized."\(^{163}\) Perry's attempts to make the judiciary eventually accountable indirectly by Congressional removal of jurisdiction fail to address the issue. His proposal may be a good system, even better than we have now, but the American people must consent to it. Until and unless they do so by the procedure authorized, we are bound by the Constitution as framed and ratified.\(^{164}\) To the extent that Perry's justification circumvents consent, his justification is inconsistent with traditional democratic theory, and his efforts to assure accountability are irrelevant. In this respect, compared to Perry's efforts, prior attempts to interpret particular constitutional clauses in open-ended fashion are child's play.

(3) Despite the immense sophistication of Perry's justification, its pivotal point is to avoid results that he finds distasteful. This fact becomes evident upon Perry's implication that our democratic institutions have failed or will fail. To equate constitutional law with beneficent results is fashionable with many of my most articulate colleagues. I join Raoul Berger in steadfastly refusing to do so, regardless of how laudatory those results may be believed to be. This dilemma is now, and has always been, part of the agony of being a constitutional scholar.\(^{165}\)

\(^{160}\) See Alexander, supra note 69, at 11; Perry, supra note 13, at 280; see also supra text accompanying note 149.

\(^{161}\) See generally Gangi, supra note 2, at 10-14 (discussing Raoul Berger's position). My own views are discussed in the final section of this paper. See infra text accompanying notes 293-313.

\(^{162}\) See Perry, supra note 113, at 261-63.

\(^{163}\) Id. at 263-64.


\(^{165}\) See Rehnquist, supra note 89, at 700-04; supra note 139.
(4) Perry makes no specific suggestions on how we should go about obtaining judges of the caliber he believes necessary.166 He does suggest that interpretivists have an equal right to seek like-minded appointments.167 Are we to add to the appointment process potentially divisive theological-philosophical issues? Would a Catholic who believes abortion is murder, or a Mormon who believes in the importance of family, be disqualified? It appears that the only qualification that makes judges better suited to deal with moral-political policymaking is the fact that they are not electorally accountable.168 From an interpretivist position, expertise neither confers power nor constitutes a defense against the charge of usurpation.

(5) Perry's views bristle with ill-defined conceptions of contemporary progressivist views, such as open society, man as evolving, and predictable future.169 How does Perry distinguish the truth of his assumptions against the falsity of those previously held with equal fervor? Is not the truth of his "converging" views nothing more than the shared opinions of the liberal elite? Is that not convention in itself? We are entitled to know why one opinion was once true but now false, while the new opinion will always remain true. From the intentionalist point of view, abandoning original choices demands a concrete and extraordinary amending procedure.170

(6) Presumably, Perry's canons of construction continue to apply to federalism and separation of powers. Do they equally apply to the judicial prophecy function in freedom of expression and human rights cases?171

While Perry is correct in asserting that an interpretivist must be logically consistent, Perry supra note 113, at 293, and that this position could lead to the reversal of Brown v. Board of Educ., 347 U.S. 483 (1954), Perry, supra note 113, at 293-94, it is possible to stop short of this possibility and still remain a logical interpretivist by looking at Raoul Berger's work for suggestions for constitutional reworking, see supra note 139. The non-interpretivist position can also lead to logical inconsistency. For example, Perry accepts Berger's view that the fourteenth amendment does not incorporate the Bill of Rights, Perry supra note 113, at 285-87, yet he never suggests that this admission should require consistent noninterpreta-

tivists to overrule Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (fifth amend-

ment is intended solely as a limitation on the power of the federal government, and is not applicable to the states).

166 See Perry, supra note 13, at 350 ("Noninterpretive review cannot serve the function I have attributed to it unless the Court is staffed by persons capable of subjecting established moral conventions to critical reevaluation. The justices need to be thoughtful, deliberate individuals who are not wedded to a 'closed' morality").

167 Id. at 349.

168 See id.

169 Perry, supra note 13, at 301-18; cf. supra notes 35-52 and accompanying text.

170 See Gangi, supra note 2, at 66-67.

171 See Address by C. Wolfe, supra note 97, at 305; supra text accompanying note 91. Perry is a very principled scholar; his fidelity to the Constitution—those parts he considers absolutely essential—even supersedes his personal desire to accomplish results he believes to be essential to morality and justice. He stated:
(7) From an intentionist point of view, Perry's conclusions inevitably lead him to expand the judicial power beyond the values constitutionalized by the Framers. In Perry's case, however, it leads, not only to the LegisCourt, but also, despite his disclaimer, to a LegisChurch. I say this because, even under his scheme of electoral accountability, the Court speaks first, and with the coercive power of the state. Thus, it would violate the schema constitutionalized by the Framers.

In conclusion, however, I accept Professor Perry's thesis that most contemporary decisions by the Supreme Court rest not on any "traditional" concept of judicial review, but on a modern one—one lacking historical support. The latter and its progeny cannot be defended by any criteria constitutionalized by the Framers.

Even if it were conclusively established that the Framers did not ordain the jurisdiction-limiting power I claim Congress has, my basic point remains: noninterpretive review, as a matter of democratic political theory, is legitimate in human rights cases only if that power is conceded to Congress.

Perry, supra note 13, at 339.

I conclude two things from his statement. First, he is not prepared to go so far as to offer non-interpretive justification for the exercise of judicial power that would permit negating essential constitutionalized values—democratic structure—that he considers at the heart of the Constitution. Some intentions of the Framers are important to him. I wish I could share his belief that his justification is consistent with those intentions. Second, he is prepared to grant the Court power to make non-interpretivist decisions, resting ultimately on citizen consent. Judicial imposition constitutes an injection of values to which the citizen must consent. Again, I understand Perry's humane instincts, but I remain unconvinced that they can be squared with the Framers' intentions. For Perry's earlier discussion of canons of construction, see Perry, supra note 4, at 689.

17a See Perry, supra note 13, at 291-92. He states, "[t]he Supreme Court is not an American Chair of Peter, such that when a majority of the Justices speak ex cathedra on matters of political faith and morals, they speak infallibly." Id. at 291. Further, it is suggested that it is dangerous in today's world to underestimate the tendency to merge politics and religion. See generally A. Camus, The Rebel 112-33 (1956); H. Delubac, The Drama of Atheist Humanism 77-187 (1963).

17b See Perry, supra note 13, at 308-09. Perry never comes to grips with the question of where he gets the authority to propose a justification for a judicial power not granted by the Framers. See Gangi, supra note 2, at 28-29. The prophets, for example, were granted authority, and could not simply claim it for the good of the people. The following passage is illustrative of that point:

I will send them a prophet like you from among their own people; I will tell him what to say, and he will tell the people everything I command. He will speak in my name, and I will punish anyone who refuses to obey him. But if any prophet dares to speak a message in my name when I did not command him to do so, he must die for it.

Deut. 18:18-20.
II. THE BASIS FOR AN EMERGING CRITIQUE

Criteria of Relevance

Criticism of judicial power has escalated from the familiar accusations of misuse of history and precedent to the much more serious charge of usurpation. Several developments have impacted on contemporary scholarship. Scholars have enormous difficulty keeping up with and mastering only one aspect of one specialty. The problem is not simply the enormity of available materials, or the further impossibility of studying the entire history of each discipline, but the interrelationship of the disciplines. Only these disciplines represent an understanding of the totality of realities, past and present.

All historical studies are executed by selection and omission of facts. More often than not, such studies eventually are found deficient. Nevertheless, between explication and subsequent judgments of deficiency, these studies are relied upon by scholars in other fields, creating in those fields what are then considered criteria of relevance. Even legitimate insights frequently become distorted or overextended by later practitioners. In fact, the practitioners of modern "science" (physics, biology, economics) once believed they possessed the ability to explain the totality of reality. Each discipline eventually retreated, in large measure, to study only its proportionate part of reality. In summary, who among us is capable of mastering the insights provided by each discipline, applying those insights to other disciplines, and also competent to judge, eventually, that the insight originally perceived is in fact defective or, perhaps, has been unprincipally extended too far? This question is at the core of the debate over the proper role of the judiciary under our Constitution.

Currently, a consensus on criteria to be employed in the examination of historical materials is nonexistent. We are in the midst of a scholarly reassessment, regarding both the appropriateness of various methodologies and the need to free ourselves from progressivist assumptions.

See generally R. Berger, supra note 74, at 5 (limited objectives of Reconstruction).
See G. Gilmore, supra note 22, at 99-111.
Cf. Anamnesis, supra note 30, at 143-46.
Professor Tuveson notes "'t]he real history of the idea of progress,' it has been remarked, 'is not written yet.' The reason is not hard to find. Historians who have written on the subject have themselves been so deeply permeated by the progressivist faith that they could hardly view it objectively." E. Tuveson, supra note 23, at 2-3 (citation omitted).

Perceptions of what is going on around us are that our times no longer contain the same
Scholarship cannot recreate the past: some facts must be considered pertinent while others are best ignored. Scholars develop criteria of relevance to distinguish the important from the unimportant. They also realize that even significance regarding particular facts may vary from discipline to discipline.\textsuperscript{179}

The bane of scholarship, of course, is that it is practiced by humans: unsupported assumptions are frequently made which affect the set of facts a scholar may find important. For instance, take the scholar, convinced that history has been evolving along the path of increasing actualization, dissemination, and expansion of liberty, who decides in 1946 to study free speech during the revolutionary period.\textsuperscript{180} When he examines the historical data, our scholar may find it impossible to free himself from his own assumptions and knowledge of those events occurring between 1776-1947. First, his criterion of liberty may lead to selection of some facts without fully appreciating how other facts—those he “knows” eventually were abandoned—modified the former in practice. Second, his conviction that history reveals the unfolding of liberty could lead to limiting his selection of facts only to those that he again knows will eventually emerge victorious.

In short, it is quite natural, almost inevitable, once one is convinced a progressive development is occurring, to smooth out the rough edges, to demonstrate a natural continuity. History then takes on the characteristics of a good novel. Revolutionary events become the seeds of liberty that eventually “grow” and find fruit in what is or should be the public posture in 1948.\textsuperscript{181} By the same token, such a perspective offers adherents optimistic flavor prevalent during the last two centuries. I allude to the possibility of nuclear warfare, terrorism, potential long-range decline in the standard of living, world hunger, environmental pollution, decline of the ability of the United States to influence world affairs for the “better,” and fear of violent crime, to name a few. All these experiences have already changed our view of the world to a view less optimistic than our progressivist and New Deal predecessors. These experiences are not outside the critique of progressivist assumptions made herein. Indeed, they are part of the experience of reality which makes such a critique possible.

Paralleling the experiences regarding progress in general, I suggest, is an increasing skepticism with respect to judicial power to remedy injustice. Thus, the simple justice at stake with respect to school desegregation and public accommodations under the Civil Rights Act of 1964 is not seen by most citizens as the same principle involved when they consider busing or affirmative action. The phenomenon I describe is typified by “the Odyssey of Alexander Bickel.” Ely, supra note 13, at 54.

\textsuperscript{179} For instance, what the economist considers unimportant, the theologian may find most revealing. Different subjects require both different methods of inquiry and criteria to distinguish the important from the unimportant. See New Science, supra note 30, at 4-6.

\textsuperscript{180} See, e.g., Z. Chafes, Free Speech in the United States 1-35 (1948).

\textsuperscript{181} See, e.g., L. Levy, Legacy of Suppression vii-xii (1960). Levy, after studying historical evidence, “reluctantly” concluded that the Framers of the Bill of Rights did not envision a broad protection of the freedom of speech from governmental prosecution. Id. at vii. How-
a perfect vantage point from which to judge "reactionary" proposals. Who may legitimately stand in the way of the inevitable? The possibility that assumed criteria will affect the selection and interpretation of facts is compounded when the words used, for example, "free speech," are the same in 1787 and 1948. Historical events are not self-defining. Interpretation of mere words is inadequate. We must require further information in order to determine what was intended when the words were employed.188

In order that historical studies be considered acceptable, at least three criteria should be employed:

(1) The author of the work in question must attempt to understand the principles enunciated by the historical figures as they themselves understood them.183

(2) The perception of opinions which developed after the period studied must be exorcised from any purported reconstruction.184

(3) Should different perceptions exist during the period studied, the author must attempt to determine the relative extent of adherence to the different perceptions.185 Thus, regarding our earlier example, it is recognized today that when "free speech" was used by those framing the first amendment, they did not intend to supersede the common-law doctrine of seditious libel.186

Should it be demonstrated that scholars fail to adhere to the minimum criteria described above, their conclusions become suspect. It would be necessary to examine the original materials with a less prejudiced eye.

ever, he went on to state that the Framers fashioned the language of the first amendment so as to permit future interpretations to broaden its scope. Id. at xii. Therefore, Levy viewed the progressivist attempt "to breathe a liberality of meaning into [the first amendment], in keeping with the ideals of our expanding democracy" as legitimate. Id. (emphasis added).


184 See generally R. BERGER, supra note 74, at 5-6. Nothing has distorted historical materials as frequently as relating past events through present perceptions, or equally fallacious, interpreting history from the presumed vantage point that one knows its direction or end. See G. GILMORE, supra note 22, at 99-104; see also supra text accompanying note 56 (comment that Warren Court believed future generations would validate its advancement of "egalitarian society").

185 See, e.g., L. LEVY, supra note 181, at 313-20 (questioning actual impact of Lockean principles on eighteenth century thought in America); Gangi, supra note 2, at 3-5 (discussing Raoul Berger's conclusions on proper interpretation of the fourteenth amendment).

186 See L. LEVY, supra note 181, at vii-xii.
Self-Interpretation Through Traditional American Symbols

Man is not and has never been a rock. Unlike a rock, he can articulate what he is about. Each in his own way perceives the various phenomena around him. Man has always raised fundamental questions concerning the meaning of his existence. The questions specifically raised, and the answers each man renders, constitute, in effect, the story of his life as lived in the concreteness and circumstances of his actions.187 Reality (the objects around man) may stay the same, but man’s consciousness (the way he perceives those objects) itself changes and becomes a part of reality.188 Men, thus, are capable of perceiving the same objects around them differently.189 Societies also develop, raise, and answer questions about their existence similar to those raised by individuals.190 Voegelin calls this process “self-interpretation.”191 The study of the questions raised and the answers rendered, individually and collectively by societies, may for our purposes be called the history of self-interpretation.192 Neither man nor society, Voegelin explains, waits for science to explain life.192 Instead, the earliest expressions of societal self-interpretation are to be found in myths and symbols.194

Myths195 and symbols196 are the earliest means by which man at-

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187 Since each individual lives during a specific period in time, in a particular place and society, the manner in which a person wishes to live out answers to these fundamental questions (Who am I; Where am I going; What is true, etc.) may or may not be possible in his particular society, during that particular period in history. See ANAMNESIS, supra note 30, at 200-05.
188 Id. at 165.
189 Id. at 158-59. Professor Voegelin makes clear:

[t]he differentiating experience . . . can be so intensive that the man to whom it occurs feels transformed into a new being. The new image of the world resulting from the experience can be misunderstood as a new world; and the process of change itself can turn into a structural datum of reality that can be extrapolated into the future. As that changeability that is experienced in participation mutates into images of a changeable reality comprising the poles of participation, we have the roots of the phenomena of metastic beliefs: The gradualistic idea of infinite progress in the time of the world . . . .

Id. at 166.
190 See NEW SCIENCE, supra note 30, at 27-28.
191 Id. at 27.
192 Id. at 27.
193 See id. at 28.
194 Id. at 27.
195 Id. at 27-28. Professor Voegelin adds: “The symbols in which a society interprets the meaning of its existence are meant to be true; if the theorist arrives at a different interpretation, he arrives at a different truth concerning the meaning of human existence in society.”
Id. at 53.
196 “A true myth describes an archetypal event in words. . . . while a ‘sign’ . . . evokes the event simply by being shown.” M. ELIADE, PATTERNS IN COMPARATIVE RELIGION 413 (1965).
197 “The symbol reveals certain aspects of reality—the deepest aspects—which defy any
tempts to represent to himself and those around him the truth that he has experienced in his concrete existence. However, both myths and symbols can change, be degraded, and abused. A dynamic process is at work:

A people that has given itself a set of symbols does not just leave it at that. With the passing of time it develops its symbols; perhaps enriching or impoverishing them, perhaps giving them new twists, perhaps emphasizing this symbol at the expense of that one, or even perhaps dropping old symbols and replacing them with new ones.

Kendall and Carey, authors of *The Basic Symbols of the American Political Tradition,* for the first time bring contemporary scholarship and new criteria of relevance to bear on American historical experience. They challenge existing perceptions in such an audacious manner that it is difficult to ignore the problems they raise. The authors begin by describing what they call the “official literature,” the viewpoint that liberty and equality constitute the very core of the American tradition. More specifically, the “official literature” consists of the great body of

other means of knowledge.” M. Eliade, *supra* note 176, at 12; see also M. Eliade, *supra* note 195, at 448-50 (use of symbols in various aspects of religion).

\[^{107}\] See *Anamnesis,* *supra* note 30, at 93-97. Eliade writes:

Images, symbols and myths are not irresponsible creations of the psyche; they respond to a need and fulfill a function, that of bringing to light the most hidden modalities of being. Consequently, the study of them enables us to reach a better understanding of man—of man "as he is," before he has come to terms with the conditions of History.

M. Eliade, *supra* note 176, at 12. Eliade has stated that myths and symbols have the larger, common aim of integrating the individual into society and the universe, an experience which is important "not only to man's magico-religious experience, but to his experience in general." M. Eliade, *supra* note 195, at 451-52.

\[^{108}\] M. Eliade, *supra* note 176, at 18 (degradation of images of man in modern society); see M. Eliade, *supra* note 195, at 440-46 (how religious symbols have been degraded). "A myth may degenerate into an epic legend, a ballad or a romance, or survive only in the attenuated form of 'superstitions,' customs, nostalgias, and so on; for all this, it loses neither its essence nor its significance." M. Eliade, *supra* note 195, at 431.

\[^{109}\] See Tonsor, *The Use and The Abuse of Myth,* 15 *INTERCOLLEGiate Rev.* 67, 69-70 (1980). Furthermore, it is suggested that legal writers often employ or allude to symbols without any systematic discussion of their nature, structure, or significance. See, e.g., Amsterdam, *supra* note 110, at 400; Kamisar, Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?, 67 Geo. L.J. 1, 83-92 (1978). Similarly, there is a failure to explicate the use of the term "myth." Never is there an attempt made to probe the structure, evaluate the quality, or note the distinctions of myth. See generally M. Eliade, *supra* note 176, at 17-21.


\[^{201}\] See *supra* note 182.

\[^{202}\] Id.

secondary writings which asserts that the Declaration of Independence marks the beginning of that tradition and that there is a consistency between it and subsequent expressions of self-interpretation: the Constitution, Federalist Papers, and Bill of Rights. In light of contemporary scholarship, the authors contend that the consistency assumed by the "official literature" is extremely doubtful. To find such consistency necessitates suppressing relevant questions and ignoring facts that did not quite fit into the scheme assumed.

What then is a tradition? When does one begin? How can we tell? If, as often proposed, the Declaration of Independence marks its beginning, of what relevance, if any, is the 150 years of colonial history that preceded it? Have we perhaps had more than one tradition: a colonial tradition which ceased with the Declaration; a tradition commencing with the Declaration and ceasing with the Articles of Confederation; that tradition in turn ceasing with the adoption of the Constitution, only to be succeeded by another tradition following the adoption of the Civil War Amendment? How should we proceed today to make such inquiries, commencing as we do some 350 years after the founding of the first settlement in the New World?

The authors believe the issues are illuminated by the fact that people detail their experiences and express them in myths and symbols. The process, they note, is a continuing one:

The original symbols are likely, Voegelin teaches us, to be compact, that is, compressed, by comparison with that which they will become with the passing of time—by which we may understand him to mean that the original symbols hold within themselves the potentiality of development, unpredictable development one may add, in this direction or that one—much as the child is a compact version of the man that he is to become, and becomes

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See id. at 3-29, 119-36. The authors observe that other scholars made prior attempts to detail the American political tradition, but assert that these attempts were inadequate since those authors assumed what they were attempting to prove. Id. at 8-9 & nn.6-9.

W. KENDALL & G. CAREY, supra note 182, at 8-10.

See id. at 10-17. The authors point to five fundamental questions that the "official literature" fails to answer: (1) Why did the Framers oppose the adoption of the Bill of Rights?, (2) Where did the reference to God go in the period between the Declaration of Independence and the Constitution?, (3) Were the natural rights claimed in the Declaration of Independence identical to those rights later ratified in the Bill of Rights, and if so, why (1) above?, (4) Why does the Constitution remain silent about equality, after having been asserted in the Declaration of Independence?, (5) Was the American Revolution fought to secure for the Americans the traditional rights of Englishmen? If so, what were those rights, and did Englishmen in fact have them? Furthermore, were they incorporated into the Bill of Rights? If the answer to the latter question is yes, then why did the Framers oppose the Bill of Rights? Id.

See id. at 7-8.

See id. at 17-24.
that man by developing this potentiality or that one in this way or that. Put otherwise, the original symbols are full of alternative possible meanings which in due course may be seized upon, now this one and now that one, and developed. Voegelin calls the process by which the alternative meanings separate off from the original symbols, *differentiation*, a process the understanding of which is indispensable for our subsequent analysis of the American tradition.¹⁰⁹

Thus, the problem of tradition in the American political system parallels its self-interpretation.¹¹⁰ For if it is to be said that a tradition exists, there should be a continuity of expression found in the symbols identified. While exact meanings of original compact symbols may be somewhat unclear, subsequent differentiation—additional detail representing choices—helps us to grasp more clearly what was intended.¹¹¹ The symbols presumably exist in constant tension.¹¹² Conversely, should introduction of symbols be discordant with earlier ones, or if it can be established that an earlier tension was redefined or abandoned or that meaningful continuity does not exist among various expressions, then it may be said that a tradition does not exist. Instead, there may be a number of traditions.¹¹³

Kendall and Carey suggest two additional rules that might be helpful when considering the question of whether there is one American tradition:

(1) Begin the inquiry at the beginning.¹¹⁴ Beginning too early results in finding symbols not associated with the people we seek.¹¹⁵ Starting after the beginning could result in finding symbols already differentiated.¹¹⁶ Thus, we could fail to understand what and why other potential choices contained in earlier and more compact expressions did not survive, were modified or ignored.

(2) If, as presumed, a people considers itself distinct from all others in attempting to express its perception of truth, there should exist an

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²⁰⁹ *Id.* at 24 (emphasis in original).
²¹⁰ *Id.* at 22-25.
²¹¹ *Id.* at 24.
²¹² *Cf.* ANAMNESIS, *supra* note 30, at 103. "The life of reason in the classic sense is existence in tension between life and death. The concept of the tension will sharpen the awareness for this 'in-between' character of existence." *Id.* Voegelin asserts that the tensions are lost, by moving to either of the poles. There is a danger of losing part of the truth knowable to people, or of presumptions of knowing truths beyond human comprehension. *Id.* at 105-111; see *supra* note 30.
²¹³ *See* W. KENDALL & G. CAREY, *supra* note 182, at 25-26. Although the authors phrase the question differently, it is suggested that the "official literature," the position that liberty and equality mark our tradition, points to the phrasing used in the above text.
²¹⁴ *Id.* at 26.
²¹⁵ *Id.*
²¹⁶ *Id.*
illuminating correspondence between the symbols it selects and the actions it takes.” Conversely, “[u]nless we can see a correspondence between the symbols we have in hand and the people's action in history, the symbols we have in hand do not in fact represent that people, and we must look a second time for the symbols that do in fact represent them.”

The suggested criteria focus our attention on an enormous body of raw materials—the history of a people's actions. Historical data becomes crucial to our understanding of symbols. History is a factor not given adequate attention today. Instead, discordant facts (actions) have been shunted aside because they do not fit into the assumptions employed: criteria assuming the progress of liberty and equality. Kendall and Carey explore four documents generally conceded relevant to a study of American history and conclude that there is considerable continuity among symbols expressed as early as the Mayflower Compact, subsequent symbolizations, and the Constitution of the United States. Whatever its importance, the Declaration of Independence is certainly not the beginning of our tradition.

The development of traditional American symbols is relevant to the subject of the contemporary role of the Supreme Court for several reasons. First, if from their earliest moments societies develop a process to express truths through symbols, then at least four questions come to mind: (1) What are the symbols?, (2) How do we know them?, (3) Where would people put them?, and (4) Who is authorized to change them?

Second, as noted, symbols are capable of change as well as open to manipulation and abuse. One need only mention the phrases “due process,” “equal protection,” or “free speech” to suggest that if clearly discernible intentions of the Framers constitute an authorized meaning of a symbol, contraction or expansion may constitute an abuse. Similarly, if judicial review meant one thing originally, and “judicial integrity” con-

\[\text{\textsuperscript{217}}\text{\textsuperscript{Id.}}\text{\textsuperscript{,}}\text{\textsuperscript{\textit{For example,}}\text{\textsuperscript{today “Americans”} consider themselves different from the “Russians” or the “English” because they believe in different truths (principles), or at least rank them differently.}}\]

\[\text{\textsuperscript{218}}\text{\textsuperscript{Id. (emphaisis in original).}}\text{\textsuperscript{The problem, then, it must be emphasized, lies with us—our ability to understand the symbols, not with the people they represent.}}\]

\[\text{\textsuperscript{219}}\text{\textsuperscript{See id. at 3-10.}}\]

\[\text{\textsuperscript{220}}\text{\textsuperscript{See id. at 30-74; 96-136. These four documents are: the Mayflower Compact (1620); the Fundamental Orders of Connecticut (1639); the Massachusetts Body of Liberties (1641); and the Virginia Declaration of Rights (1776).}}\]

\[\text{\textsuperscript{221}}\text{\textsuperscript{Id. at 66-67, 75-95. The authors assert that the Declaration of Independence has “been interpreted in such a way as to cause a derailment in our tradition.” Id. at 84.}}\]

\[\text{\textsuperscript{222}}\text{\textsuperscript{See supra notes 198-99 and accompanying text.}}\]

veys something quite different today, it may well constitute a symbol's manipulation.224

Third, a theorist may choose to study changes in a symbol's meaning, or trace how the process of authorizing, promulgating and changing a society's symbols moved from the hands of one institution to another. Can a constitutionalist be as neutral an observer? I think not, and suggest that such a distinction is what the current debate over judicial power is all about.225

Historical materials, properly understood, are essential to adequately comprehending a people's symbolization. In light of the above developed criteria, it is no longer legitimate for scholars to infer hypocrisy or ignorance to the participants of an era because a discrepancy exists between the symbol expressed by the participants and the actions taken under that symbol. This approach, on principle, is defective for at least two reasons:

(1) Assumptions of discrepancy fail to perceive how the people then understood those symbols by substituting criteria developed later. In short, it is projecting contemporary understanding retroactively to historical materials. For example, during much of our history "freedom of the press" simply meant freedom from prior restraint.226 It will not do, when researching the people's concurrent actions, to judge those actions or malign their intelligence by employing the contemporary "clear and present danger" criteria. To proceed in such a fashion reveals the inadequacies of the researcher and not the ignorance of the participants.

(2) Criteria of hypocrisy or ignorance cause the researcher either to distort what was meant, or to attribute a meaning not perceived by those who utilized the symbols. It is precisely by studying the people's actions that we can better understand what those "symbols" meant.227 Moreover, in attempting to grasp what the people meant by the symbols they expressed, it is illegitimate to discern that meaning by pursuing abstractly the internal "logic" of the symbols. What the people meant by those symbols can and must be discerned only by studying their actions. To put the

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224 For example, there are those today who argue that the exclusionary rule is necessary to protect "judicial integrity," see Bennett, Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule, 20 UCLA L. Rev. 1129, 1136-37 passim (1973), whereas, what occurs is a redefining of judicial review and representative democracy, cf. supra notes 59-108, and accompanying text (discussing generally the tension between judicial interventionism in policymaking and representative democracy).


226 See L. LEVY, supra note 181, at 126-309; Perry, supra note 13, at 287.

227 See W. KENDALL & G. CAREY, supra note 182, at 26; cf. Alexander, supra note 69, at 5-6 (meaning of symbols cannot be interpreted theoretically).
matter bluntly, many of our historical studies are defective because we often have failed to understand the significance of those actions. Instead, what we have done is to discuss constitutional provisions "logically," a standard defective *per se*, as well as potentially dangerous.

Accordingly, much of the secondary historical literature today must be subject to reevaluation in order to determine whether an author's "assumptions" prompted selective choices of facts. To the degree that secondary literature reflects either of the two defects discussed above, it is suspect and should be given little credence regarding the "history" allegedly explored. Each of us, of course, remains free to express personal preferences, or, to put it in terms of my own criteria of relevance, to articulate our conscience on matters "thought most meete and convenient for the generall good." While confusing our conscience with constitutional provisions may be effective in obtaining "results," it ultimately undermines the existence of scholarship. At a minimum, if scholars must express preferences, they are obliged to state them as such, without suggesting that those preferences are part of the American political tradition. Indeed, when the distinction between preferences and historical reality is not made, it is legitimate to press such advocates to prove that the preferences they espouse have indeed been recognized.

Kendall and Carey concluded that among the primary symbols which emerge in American government are self-government, the supreme representative assembly, and higher law, not individual rights. These

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290 See, e.g., Amsterdam, *supra* note 110, at 410.
291 Mayflower Compact (1620).
292 See, e.g., L. Levy, *supra* note 181, at xii-xiii (actual American political tradition was not strongly libertarian).
293 W. Kendall & G. Carey, *supra* note 182, at 66-68. The one "indubitable, inalienable, and indefeasible right" to emerge from the one hundred and fifty years preceding the American Revolutionary War was the right of the people to self-government. *Id.* at 67 (quoting Virginia Declaration of Rights). The "rights of all individuals will be safest if first the rights of the people are assured, and above all the right or rights of the people to govern themselves. . . ." *Id.* at 66 (emphasis in original). It is the right of the people to modify or abolish an existing system of government that precedes all others. Thus the "provisions of the Virginia Declaration are clearly the core of Article V of our Constitution which gives the majority of the American people the right in question." *Id.* at 67.
294 Once a body politic grows too large to discuss issues of common concern, a process of representation must be developed. The process developed is intended to encourage those best capable of making important decisions on human affairs to make decisions. See *id.* at 57. In day-to-day activities, therefore, it is the representative assembly which exercised the people's right to self-government. It obtained the people's consent to do so, and it was held accountable. It is the symbol of the supreme representative assembly that emerges as the body entrusted with the responsibility to deliberate "on the delicate topics touched upon, to
symbols have been authorized by the people as a whole and can be found
pass laws in the sensitive areas from the standpoint of freedom." Id. at 55. In short, in
governing itself, the people gave to its representatives the responsibility for making judg-
ments regarding the common good, thereby defining and balancing, in particular circum-
stances, often conflicting views on individual rights, duties, justice and social order. Id. at
56-60.

Kendall and Carey point out that the symbol of the "supreme representative assembly," dis-
cussed above, "at first blush" appears to result in "an omnicompetent and legal omnipo-
tent deliberative assembly." Id. at 53. However, as expressed first in Massachusetts, repres-
sentatives of the General Court (the legislature), when deliberating, were called upon to do
"that which is humane, civil and Christian." Id. Furthermore, there is "no hint of a sugges-
tion that the General Court is entitled to improvise when dealing with the question: What is
humane, . . . civil . . . and Christian?" Id.

The symbol of a "higher law" reaches its full differentiation in the Virginia Declaration
of Rights (1776). There the authors concluded that if the document is properly read, there is
a careful separation between the "sphere of government and the sphere of society." Id. at
73. The separation of the two spheres "in due course will become explicit in The Federalist,
of a Christian society with a secular, that is, precisely not religious, form of government." Id. (emphasis in original). Thus, while the legislature was considered supreme, "its
supremacy, its right or power, is simultaneous with its obligation to subordinate itself to
standards not of its own making—standards embodying . . . the truth of the soul and of
society as that truth has been made known to us by the great philosophers. . . ." Id. at 71-
72 (emphasis in original). In no sense should we assume by separation of the two spheres
that the authors of the Virginia Declaration or the Constitution "understand or inter-
pret[ed] themselves as less Christian, less committed to the truth of the soul and of society
as that truth comes to us through Revelation, than, say, the signers of the Mayflower Com-
 pact." Id. at 72.

To conclude, insofar as deliberation occurred, its participants were not "positivists"
subject only to their own will. On the contrary, legislative participants were obliged then—
as in fact they continue to be today—to call upon and subordinate themselves to our philo-
sophic and religious heritage when deliberating on what is "thought most meet and conven-
ient for the general Good." Mayflower Compact (1620).

The right to self-government is not equivalent to individual rights but precedes their
specifications. See W. Kendall & G. Carey, supra note 182, at 59-60. The liberties often alluded
to in our colonial history were common-law guarantees primarily against judicial and
executive officials. They refer in large measure to those eventually contained in the first
eight amendments of the Bill of Rights. See R. Berger, supra note 133, at 64. These com-
mon-law rights had well settled, specific and limited meaning. See Shattuck, supra note 223,
at 375-76; cf. R. Berger, supra note 133, at 59-76 (Founding Fathers generally employed
common-law terms to create a "fixed" Constitution). In addition, the Bill of Rights was, to a
great extent, an expression of federalism. In the modern sense there simply were no rights
against the legislature. It "was conceivable to protect the common-law liberties of the people
against their rulers, but hardly against the people themselves." Berger, supra note 225,
at 177 n.41 (quoting G. Wood, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 63
(1969)). Specifically, there were certain liberties that citizens insisted be written down and
absolutely followed by executive and judicial personnel. But with respect to rights "we
might expect to be guaranteed against legislative encroachment or violation . . . [there were]
escape clauses." W. Kendall & G. Carey, supra note 182, at 52 (emphasis added); see also
Berger, supra note 80, at 124. "Each of the relevant guarantees is, so to speak, a verbal
parachute that from the standpoint of the official literature would reduce it to meaningless-
in the documents representing the people's expression as such. It is suggested, therefore, that only the people collectively, by processes ordinary and extraordinary, are authorized to change the meaning of symbols, or to abolish them and substitute new ones.237

III. An Intentionist View of Constitutional Law

There remains the task of enunciating those principles traditionally associated with judicial power. The Constitution states that "the judicial Power . . . shall be vested in one supreme Court,"238 and implicitly recognizes judicial review.239 Judicial review is a legitimate power authorized by the Framers of the Constitution. They perceived it as a negative power functioning to curtail executive or legislative overreaching.240 Since the power granted is limited in nature, it is certainly abused when members of the judiciary go beyond the authorized scope. The power of judicial review, when properly exercised, serves to preserve allegiance to the Constitution.241 It was intended to be the last institutional means whereby the legislature was to be kept within the powers granted by the Framers.242 While exercising even this narrow, negative power of review, the laissez-faire Court still managed to abuse it by basing its judgments, not on what was intended by the Framers, but instead on the Justices' personal views as to what was beneficial economic policy.243 Today, the scope of judicial review goes well beyond that of a naysayer; for the first time in

See generally Gangi, supra note 2, at 10-14.
238 Berger contends that although the Constitution is silent as to judicial review, the Framers intended its inclusion, evidenced by language found in articles III and VI of the Constitution. R. Berger, supra note 74, at 305 n.25. See id.
240 See infra text.
our history, the Supreme Court initiates legislation.\textsuperscript{244}

Judicial power applies the legislative will expressed in statutes to the realities created by a "case" or "controversy." Judges were never intended to initiate legislation;\textsuperscript{245} to do so legitimately they would have to be authorized by the people. The Supreme Court, basing its decision on the Framers' intentions, may find legislation to be beyond the powers granted, but may never strike down legislation merely because it is unwise or immoral.\textsuperscript{246} The Constitution is the standard against which all else is to be measured. The Justices also have to be particularly cautious, lest, by prohibiting legislative discretion, they unnecessarily limit the people's ability to cope with changing circumstances. The Constitution should not be abused by contraction, for to do so would inhibit its ability to endure. This approach is what Marshall intended to convey in \textit{McCulloch v. Maryland}\textsuperscript{247}—judicial deference to legislative means where those ends or means are not clearly prohibited.\textsuperscript{248}

The judicial power of review makes sense only in the context of a Constitution with "fixed" meaning.\textsuperscript{249} To accomplish that end, the Fram-

\textsuperscript{244} See R. Berger, supra note 74, at 305-06; see also Roe v. Wade, 410 U.S. 113, 152-54 (1973) (extension of right of privacy); Miranda v. Arizona, 384 U.S. 436, 467-73 (1966) (breadth of fifth amendment privilege against self-incrimination).

\textsuperscript{245} See R. Berger, supra note 133, at 86. Berger inquires:

What then is the proper role of the Court? It is not wrapped in mystery. Fearful of the greedy expansiveness of power, the Founders sought to confine their delegates to the power conferred. To insure that their delegates would not "overleap" those bounds, the courts were designed to police those boundaries. No reference to judicial review beyond that policing function is to be found in the records of the several conventions; there is not the slightest intimation that the courts might supersede the legislature's exercise of power within its boundaries.

\textit{Id.} at 86-87 (emphasis in original) (footnotes omitted).

\textsuperscript{246} See id. at 81. Berger draws a distinction that was also made earlier by Chief Justice Marshall, then defending the \textit{McCulloch} decision, that "an unwise law is not necessarily unconstitutional." \textit{Id.} (footnote omitted).

\textsuperscript{247} 17 U.S. (4 Wheat.) 316 (1819). \textit{McCulloch} contains the often repeated remarks of Chief Justice Marshall that "it is a constitution we are expounding," \textit{id.} at 407, a constitution that is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs," \textit{id.} at 415 (emphasis in original).

\textsuperscript{248} R. Berger, supra note 133, at 67.

When \textit{[McCulloch]} came under attack, [Marshall] defended that he was pleading for elasticity in Congress' "choice of means" to execute existing powers and denied any "constructive assumption of powers never meant to be granted." Again and again he repudiated any claim for "extension by construction" and flatly disclaimed a judicial "right to change that instrument."

\textit{Id.} (emphasis in original) (footnotes omitted). For additional details of Marshall's constitutional philosophy, see R. Berger, supra note 74, at 373-78.

\textsuperscript{249} Berger notes that in construing the Bill of Rights, reference should be made to the common law from which it evolved. R. Berger, supra note 133, at 64 (citation omitted). "These decisions reflect a fundamental purpose: common law terms \textit{served to delimit} delegated
ers used many well-known, common-law phrases "which required no explanation." It is to those meanings we remain bound; only in such context can the Framers' objective of a "fixed" constitution be realized. This view was shared by those framing the fourteenth amendment. Why else would the Constitution contain the means, and the amendment procedure, by which changes may occur, if not to provide succeeding generations the opportunity to evaluate the wisdom, or depart from the folly, of earlier generations.

The preceding is the meaning of constitutionalism as has been traditionally understood. If it has changed, we are entitled to know who authorized that change and when it occurred. The burden of proof is on those arguing that, as a nation, we abandoned rule by consent and replaced it with rule by judges. Nor can that consent be assumed, or implied, since "an opinion which is . . . to establish a principle never before recognized, should be expressed in plain and explicit terms." Modern power." Id. (emphasis in original). This approach marked early decisions of the Court, see id. at 64-67, and was understood, as such, by the Framers of the fourteenth amendment: "A construction which should give the phrase . . . a meaning different from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution," id. at 67 (quoting S. Rep. No. 21, 42d Cong., 2d Sess. 2 (1872), reprinted in The Reconstruction Amendments' Debates 571-72 (A. Avins ed. 1967)).

See R. Berger, supra note 133, at 63 n.19; see R. Berger, supra note 74, at 366-67. "The Founders resorted to a written Constitution the more clearly to limit delegated power, to create a fixed Constitution; and an important means for the accomplishment of that purpose was their use of common law terms of established and familiar means." R. Berger, supra note 133, at 61.

See R. Berger, supra note 133, at 62-63. Berger admits, however, that there may be situations in which the Framers' intent is difficult to discern. See Berger, supra note 225, at 174-75. Berger states, "I consider that if the terms of a particular provision are ambiguous and no Framers' choices are discernible, there is room for judicial policymaking." Berger, supra note 1, at 613.

The Senate Judiciary Committee Report in 1872 declared: "In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed it and the people who adopted it." S. Rep. No. 21, 42d Cong., 2d Sess. 2 (1872), reprinted in The Reconstruction Amendments' Debates 571-72 (A. Avins ed. 1967).

See R. Berger, supra note 133, at 85. Compare R. Neely, supra note 102, at 4-22 (dangers of judicial legislation), with R. Berger, supra note 74, at 249-54 (substantive due process as government by judiciary).

R. Berger, supra note 133, at 45 (quoting Chief Justice Marshall, United States v. Burr, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693)). Berger adds: "A departure from accepted practice cannot rest on mere speculation." Id. How can we have consented without ever being informed that rule by judges was at stake? Are we to attribute a lesser standard of disclosure than we would demand for purchase of a consumer item? Are we to assume that the legislature can demand that the "buyer beware" maxim not rule the marketplace, while the judiciary may take away the right of the people to govern themselves? See Gangi, supra note 2, at 46-47.
proponents of judicial power have not and cannot carry that burden. Judges were never authorized to substitute whatever meanings they wished for common-law phrases whose meanings were well-settled at the time of their constitutionalization.

Opposition to contemporary judicial lawmaking, therefore, should not be confused with opposition to judicial review. Judicial review is legitimate, judicial law initiation is not. Judge-made law, absent clear intentions or expression of legislative will, is legitimate, while judicial substitution of personal beliefs for those of the Framers or legislators is not.

We are bound by the clearly discernible intentions of the Framers; no other position is consistent with the Framers’ specific anticipation. Submission to the clearly discernible intentions of the Framers is in fact what distinguishes “interpretivists” from “non-interpretivists.” For this reason, the terminology of intentionists versus nonintentionists offers a clearer perception of those differences. In addition, despite the immense sophistication and complexity of the nine arguments currently employed to justify increased judicial power, these nine arguments fail in their objective. Such arguments cannot justify repeated judicial usurpation of the legislative power and circumvention of the amendment process. Moreover, current democratic theory apparently considers irrele-

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36 Berger stated that:

the words of the Constitution are not to be “extended to objects not . . . contemplated by its framers.” What was “not intended” was “not contemplated,” and hence was not authorized. . . . Then too, the burden is on one who claims power to show where it “is enumerated in the Constitution. . . .” If there is no “peculiar” judicial qualification for policymaking before enactment, it is not miraculously conceived when judges sit in judgment on the statute.

R. BERGER, supra note 133, at 84-85 (quoting Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting)). Berger contends that judicial policymaking contrary to the intentions of the Framers, including the common-law meanings adopted, “is foreclosed by the historical evidence.” R. BERGER, supra note 133, at 85. He summarizes this evidence as follows:

(1) the Founders’ belief in a fixed Constitution of unchanging meaning, alterable only by the people, not the courts; (2) the inferior place of the judiciary in the federal scheme, deriving from the suspicion of the innovative judicial review by judges therefrom regarded with “aversion”; (3) the Founders’ “profound distrust” of judicial discretion; (4) their attachment to the separation of powers and insistence that courts should not engage in policymaking but act only as interpreters, not makers, of the law.

Id. at 85-86 (footnotes omitted).

36 The intentionist position in principle is different from noninterpretivism, which today dominates the literature. Still, it cannot answer all questions, particularly where the original intentions are unclear, or where flexibility was “written in.” For example, there is flexibility for the legislature to legislate what is “necessary and proper.” See U.S. Const. art. I, § 8, cl. 18; supra note 158 and accompanying text.

367 See supra notes 3-18 and accompanying text.
vant, or fails to comprehend, the Framers' perceptions regarding the nature and dangers inherent in a democratic republic, the respective judicial and legislative roles, and the relationship between majority rule and majority tyranny.268

Fear that governmental power could be abused was not equivalent either to the withholding of plenary powers granted, or to distrust of the people. While the Framers feared majority tyranny, they recognized that the people would not have consented to be governed under any other but a democratic regime.269 The Constitution details the boundaries of tension between fear of majority tyranny and desire for democratic rule.270 For the Framers, neither the Bill of Rights nor the judiciary could ultimately provide protection against a people bent on exceeding the boundaries to which they had agreed when ratifying the instrument. The character of the people would be reflected in the types of representatives they selected. While certain academicians might prefer a less democratic form

268 Elsewhere, I suggest that these non-majoritarian features were intended by the Founders to delay and temper popular passion from immediate injection into legislative public policymaking and thereby pose a barrier to majority tyranny. See Gangi, supra note 2, at 59-60. The Framers recognized and relied on the fact that it was the nature of emotion to be temporary. Part of the price the majority chose to pay when it adopted the Constitution, created in part to assure protection from majoritarian tyranny, was to create a barrier to the enactment of "good" legislation based on good popular passion. Furthermore, if the popular passion felt was "good," then, within 4 years, a supporting nationally based majority could overcome any of the obstacles put in its path. Such a majority could then control each government branch, and indeed, amend the Constitution itself.

How then did the Framers plan to diminish the possibility of majority tyranny while retaining, consistent with the American spirit, the necessity of majority rule? The Founders incorporated into the Constitution a "mixed regime" of institutional devices, comprised of the division of power between the federal government and the states, and the separation of powers among the executive, legislature, and judiciary, which would at least delay ill-considered measures and at most prevent them altogether. Two additional devices were the Court's responsibility to see that the other branches remained within the boundaries of delegated authority and the difficult amendment process. Those who proposed and ratified the Constitution accepted these limitations on the exercise of majority rule, thereby binding themselves and future generations. These temporary institutional barriers, geared to assuring deliberation, coupled with the people's collective loyalty to the instrument and their sense of justice, were believed to be the best protections possible capable of preserving majority rule while minimizing the potential for majority tyranny. I contend that the above description of majoritarianism is what was intended by the Founding Fathers and is most consistent with historical facts. See generally W. Kendall & G. Carey, supra note 182, at 96-118; Kendall & Carey, Introduction to The Federalist v-xx (1966).

269 See supra text accompanying note 16. If the people believe that the original constitutional limits are no longer necessary, they have the ability to discard these limits. As scholars, we cannot rewrite history in order to avoid obtaining the consent of the governed; nor may the judiciary. Gangi, supra note 2, at 62.

270 See Gangi, supra note 2, at 59-60; see also M. Diamond, W. Fisk & H. Garfinkal, The Democratic Republic 11-12 (1966) (insistence on majoritarian arrangement with protections of individual liberties).
of government, such preference is clearly inconsistent with the intent of the Founders.

**Constitutionalized Values vs. Personal Preferences**

While specialists tend to have particular tools or skills, they too, as mere citizens, hold views on public issues. Not one of us would bow to the opinion of a surgeon, for example, on matters of taxing and spending, simply because he possesses medical expertise. The opinions of all citizens stand on equal footing. Similarly, the fact that one purports to be a constitutional scholar does not *per se* entitle his personal preferences to greater weight than any other citizen. When he addresses public matters, he must have an expertise *distinct* from the subject discussed, or his views are entitled to no more weight than those of the surgeon. The views of a constitutional scholar are not entitled to greater “authority” because no expertise is thereby demonstrated. Furthermore, if he merely *disguises* personal preferences by clothing them in constitutional terminology, the scholar both coerces and deceives his fellow citizens. He pretends to address a matter of public concern on the basis of expertise, when, in fact, he really brings to the discussion nothing more than his own biases.

What must distinguish the constitutional scholar from others voicing mere opinions is concern for and fidelity to the clearly discernible intentions of the Framers. Should my fellow citizens come to unanimous agreement on deviating from those intentions, I would stand fast against their right to violate the clear intentions of the Framers, except by those procedures specified in the Constitutional text. The fact that I may think that the proposed deviation is *better* than the Framers’ original intentions should be irrelevant to my conclusion.

Members of the judiciary have been offered special responsibilities and have accepted an opportunity to combine expertise with coercive power. Accepting the responsibility of exercising coercive power necessarily entails the added obligation to exercise it prudently. The responsibility to exercise power prudently is the characteristic which distinguishes members of the judiciary from other constitutional scholars. All constitutional scholars, including judges, derive their expertise from the same

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See Berger, *supra* note 225, at 188-92. Berger asserts:

[O]ne may have “philosophical preferences for limited government,” or may prefer, as anarchists do, no government at all, or a judicial oligarchy to an elective democratic system based on majoritarian rule. . . . But we are not writing on a clean slate, free to make such choices *ab initio*. They were made by the founders and ratified by the people. It is not for academicians to repudiate those choices . . . .

*Id.* at 193.

Each member of the judiciary “shall be bound by Oath or Affirmation, to support [the] Constitution.” U.S. Const. art. VI, cl. 3.
source, acquiring as best one can, knowledge relevant to the intentions of the Framers.

The intentionist rejects an expanded judicial role. An expanded judicial role requires members of the judiciary to become experts on topics ranging from anatomy to zoology—to presume an expertise sufficient to resolve differences of opinions within each field, as well as to evaluate periodic challenges to essential assumptions therein. The intentionist recognizes that such expertise is inherently presumptuous and leads to the probability that members of the judiciary will substitute personal preferences for those of the Framers or legislators. The judiciary's responsibility is to guard constitutionalized principles and not to decide the common good where those principles are not at issue. In summary, the intentionist believes that it is quite enough for a judge to be required to have constitutional competency and to exercise judicial power prudently. The Constitution did not burden members of the judiciary with more. On the historical record, the intentionist believes the Framers were correct, for experience has taught that when members of the judiciary do not so confine themselves, they have become neither competent nor prudent.

While disagreement among intentionists is inevitable, all recognize that the task minimally requires a focus on the passive judicial virtues, attention to the entire text of the Constitution and the purposes for which it was framed, adequate criteria of relevance, respect for principled precedents, enunciation of canons of construction and appreciation for prudence. There is an attempt to marshal evidence and to employ logic illuminated by concrete action, not logic fed by speculation or imagination. To the extent that the principles constitutionalized by the Framers can be discerned, intentionists attempt to protect and preserve them.

While the intentionist is serious about preserving and protecting principles constitutionalized by the Framers, he must be equally diligent in recognizing those principles which have not been constitutionalized. By demanding allegiance only to constitutionalized values there is a greater prospect for assuring fidelity to them. Alternatively, when the intentionist concludes that some principles were not constitutionalized by the Framers, he makes no judgment as to whether they should become public policy. Aside from protecting the principles constitutionalized, the intention-

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[174-86 and accompanying text.]
[87 and accompanying text.]
[93 and accompanying text.]
[111-98 (1962).]
ist recognizes that self-government is precisely about disagreements over what is in the interest of the common good. In the republic created by the Constitution, the responsibility for such deliberation lies with those held electorally accountable.

Politics: As Art or Folly

Changes that occur in public attitudes or politics, do not, by themselves, constitute conclusive proof that accompanying proposals are better or worse for the common good than preceding policies. Reference to future political, social, or economic trends, real or imagined, certainly offers no legitimate perspective for the constitutional scholar. Since constitutional law concerns the intentions of the Framers, the primary object of a scholar should be to discern those intentions: a text illuminated from the perspective of those who framed it, with attention given to the people’s action.

The reader must not be deceived; a constitutional law issue cannot be assumed to be correctly decided simply because five Justices on the Supreme Court so contend. Nevertheless, many scholars have focused their attention on five votes. As a result, regarding the appointment process for a Supreme Court Justice, it has become crucial to observe in which areas the nominee is an activist and in which areas the nominee believes restraint is more appropriate. Thus, if a particular nominee is confirmed, we can predict which “scholars” will get their way and which others will be relegated to crying in the wilderness. While some scholars may choose to perceive these issues as exhausting the meaning of constitutional law, the intentionist understands these realities as mere symptoms and not the disease. The disease is the absence of a principled per-

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888 Purported knowledge of the “future” changes any inquiry from “what is just?” to the question, “what is coming next?” Once the future is perceived as inevitable an inquiry into “justice” is irrelevant. See generally G. NIEEMEYER, supra note 30, at 74-75 (patterns of historical progress). Evidence, not speculation, is the ultimate criteria, because “evidence begets proof.” See Gangi, supra note 2, at 7. Much of non-interpretative review today makes insubstantial assertions about our history as it pursues believed beneficial results.

876 The personal views of the Justices were always a matter of concern. Even under the best circumstances it takes a particular temperament, not to mention faith in the instrument, for men to separate their personal opinions from their expertise. As fewer distinctions are made between the two today, greater injection of personal views must be anticipated. Indeed, the danger is that, as the original distinction between personal opinion and judicial duty fades, there is less reason to treat Justices any differently than politicians: to limit the judicial terms, or elect the Justices. This step, while a natural democratic response, would again endanger the “mixed regime” character. See supra note 258. Professor Berger, for example, clearly advocates and establishes the legitimacy of removing areas from Supreme Court appellate jurisdiction. That course may be pursued separate from impeachment. See generally R. BERGER, supra note 133, at 153-172, 201-04 (Congressional contraction of judicial jurisdiction).
spective, the failure to inquire into and be confined by the clearly discernible intentions of the Framers.

Similarly, the intentionist does not get his bearings from public opinion polls, the apparent ultimate reference point for validating contemporary judicial usurpations. Opinion polls merely register affirmative or negative responses to questions usually defective in construction, and if not defective, certainly not equivalent to deliberation. They record initial attitudes, usually based on insufficient or inaccurate information. These opinions lack reflection prompted by opposing arguments. For example, if the following questions were asked: “Do you believe in capital punishment?” and “On a scale of 1 to 10, how strongly do you hold your positive or negative reply?,” I suggest that it still might be possible, after deliberation, for intensely negative and affirmative respondents to reach a consensus. There will probably be some respondents on either side unwilling to budge, but in the deliberative process they either participate to preserve as much of their position as they can when measured against those who are more pragmatic, or they are ignored. To fervent opponents or supporters of capital punishment, such “pragmatists” lack principle. The intentionist, however, absent a constitutionalized principle, stands aside in his capacity as a scholar. If approached regarding the constitutionality of the proposed public policy regarding capital punishment, his criteria are always the same: the clearly discernible intentions of the Framers.

No other criteria but the intentions of the Framers permit the scholar to distinguish personal values from those contained in the Constitution. Perhaps another example will demonstrate my position. If I describe the Supreme Court as “disclos[ing] a disconcerting reliance on selective reasoning, manipulation and sometimes outright misstatement of controlling precedent,” would I be referring to the laissez-faire Court, the Warren Court, or the Burger Court? The intentionist recognizes that this assessment, to varying degrees, is true of all three Courts. The in-

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271 See, e.g., Constitutional Law, supra note 53, at 17-26 (discussing judicial review and democracy); Perry, supra note 13, at 351-52 (discussing public opinion and abortion).
272 Assuming representative valid samples, are we to equate responses to these questions with deliberation culminating in an end product called public law? Do such questions give us an opportunity to think about a hired killer, a mass murderer, or a crime of passion? Do they inform us in any detailed manner of the pertinent distinctions between, for instance, one who previously has been convicted of murder and one who kills a fellow inmate or prison guard while incarcerated? What are the present circumstances regarding the frequency of rapes, or repeated rapes, after prior convictions for the same offense? What does it tell us about assassination, terrorism, treason, or child murder?
273 See, e.g., R. Berger, supra note 133, at 178-80.
275 Admittedly, the Burger Court differs from the Warren Court, but my emphasis here is on the common tendency of these Courts to substitute personal opinions for those of legislators in death penalty, abortion, and trial by jury cases. Nor do I minimize the difficulty
intentions of the Framers offer criteria for assessing such changes. If they are consistently employed they transcend personal preferences. Absent this criterion, however, scholars become mere recorders of the latest manipulation of precedents by those players currently in power.

In the absence of the above criteria it is no wonder that the Supreme Court decisions have become a "mess." Indeed, there is no significant area of constitutional case law which is not embarrassing to the serious non-result-oriented scholar. The Supreme Court has become an embarrassment to the American political tradition for several reasons. First, its opinions often are inconsistent and unconvincing. The Justices are trying to put square pegs into round holes in order simultaneously to portray continuity and make the document "living." Second, the Court increasingly has gone beyond its legitimate power; its decisions rest on little more than personal opinion or judicial compromise, effectively replacing the national Madisonian scheme with the competing interests of nine individuals. Most of all, the opinions are embarrassing because a majority of the Court's members over the past 25 years has failed to recognize, or worse, have recognized and suppressed, the realization that the Court has elevated itself to the role of primary public policymaker. Surely the Justices must suspect that such a role is contrary to that envisioned for it by the Founding Fathers.

confronting a Justice committed to the intentions of the Framers, who finds himself among a majority not so inclined. These matters must await exploration at some future time. It is necessary, first, to establish governing principles.

See, e.g., A. Bickel, supra note 22, at 175-76; Kurland, Foreword to The Supreme Court 1963 Term, 78 Harv. L. Rev. 143, 162-76 (1965); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 20-27 (1959). But see Wright, Professor Bickel, The Scholarly Tradition, and the Supreme Court, 84 Harv. L. Rev. 769, 770 (1971). Judge Wright sympathizes with Professor Bickel's distaste for the logically weak, result-oriented decisions of the Warren Court, noting that Bickel went one step ahead of the majority of scholarly criticism which constantly "reappears in most professional commentary on the Court." Id. at 770-71. He argues that these essays have become "standard fare . . . but hardly 'an event in the law.'" Id. at 771; see also Holland, supra note 52, at 1026 n.5.

"Judge Wright dismissed Bickel as one of a coterie of 'scholastic mandarins' . . . whose '[i]deal Justices would become adept at sitting on their hands.'" Id.

See Forrester, supra note 19, at 1214-15.

The Supreme Court has evolved into a new institution . . . [which] can no longer be described with any accuracy as a court . . . . It is a governing body in the sense that it makes the basic policy decisions of the nation, selects among the competing values of our society, and administers and executes the directions it chooses in political, social, and ethical matters. It has become the major societal agency for reform.

Id.

Berger finds this "untethered" discretion on the part of the judiciary in opposition to our system of democracy, stating "[l]ittle did the Framers dream that the judicial power would be construed as a license to supersede the exercise of power by the other branches within
The Constitution embodied an experiential tension, balancing competing values in the midst of existing concrete realities. The subsequent addition of a Bill of Rights added little substance. Rather, it made explicit what had been presumed to be implicit: the applicability of common-law rights and the limited nature of powers granted to the federal government. For national and international purposes, the people were prepared to act as one. In other matters regarding public policy or human affairs, however, the states were left free to pursue their own course. Self-government entailed the competency to deal with any subject "thought most meet and convenient for the general Good." Therefore, when judicial interpretations reach conclusions rendering both federal and state governments incompetent to deal with issues of public concern, and there is a failure to locate the specific prohibition in the clearly discernible intentions of the Framers, that judicial interpretation is inherently misguided. Somewhere along the line, the judicial interpretation went astray and either illegitimate presumptions were made, or the Justices injected personal preferences into the constitutional text. The laissez-faire Court made this mistake. So have the Warren and Burger Courts. The essential mistakes of all three Courts have been the same: illegitimate presumptions regarding history and progress, and the substitution of personal preferences for those of the Framers with respect to the nature of rights. Where each specifically went astray is a matter of detail.

Deliberation vs. Judicial Review

To the extent that the adoption of the Constitution required the selection of certain principles over others, we are bound to those principles and any deviation from, at least, those that are clearly discernible must be addressed to the people who consented, thereby giving the instrument life.

"Mayflower Compact (1620).
See supra notes 75-78 and accompanying text.
See supra note 275.
See U.S. Const. art. V (amendment procedure). We must approach constitutional provisions in a differentiated manner. Permit me to illustrate this point, as well as those made in the text, by offering several examples:

1. Broad Sections: The Bill of Rights essentially must be construed as a limit on federal power, specifying procedures traditionally associated with minimizing executive and judicial abuses in criminal prosecutions. There is no basis for applying the first amendment to the states totally, by absorption or selectivity. There also is no constitutional basis for a preferred freedoms doctrine. See, e.g., R. Berger, supra note 133, at 10-28.

2. Several specifics: (a) Two year term in the House of Representatives—The Framers argued about the length of a congressman's term. The 2 year term selected, U.S. Const. art. I, § 2, cl. 1, must be viewed in light of the democratic character of the regime: consent
ers herein granted shall be vested in a Congress of the United

expressed in electoral accountability. The Framers did resolve the issue, constitutionalizing the accountability of those believed closest to the people by assuring greater frequency of selection than exists for a Senator or the President. While the length of Presidential terms offered greater possibility for unity of action, the frequency of representative election injected considerations of consent, and Senatorial terms prevented the injection of emotion, into legislation. The Supreme Court, of course, was the last line of defense against abandoning constitutionalized values. Not even the most open-ended exponents, see supra notes 85-110 and accompanying text, suggest that today we are no longer bound by a two year term for representatives. My point is not only that we are bound by this “clear” intention, but that the intention contained a value which was selected over others and which, in fact, is part of a tension, a balancing of considerations.

(b) Presidential Re-eligibility—The Framers argued rather vigorously over whether the President should be eligible for unlimited terms. See The Federalist Nos. 71 & 72, at 481-92 (A. Hamilton) (J. Cooke, ed.). Considerations of competent, effective leadership were weighed against the potential for abuse of power. The Framers won ratification because of the former qualities, which is an interesting fact in light of the modern belief that they considered man as having a “bad” nature. In any event, we were bound by the Framers' judgment on Presidential eligibility until our experience suggested exercising greater caution in the matter. See U.S. Const. amend. XXII. We still acknowledge today, however, that reeligibility has a good deal to say for itself. We wonder if perhaps the amendment was precipitous, prompted too much by particular political and historical experiences. Can a court today hold that such circumstances have passed and therefore, the 22nd amendment is null and void? Of course not. In fact, is that not the position today regarding most amendments, particularly the ninth and tenth?

We, as people, are bound by limited Presidential terms. In the same manner we have reached greater, if not complete, clarity regarding Presidential succession and disability. See U.S. Const. amend. XXV. While I am sure disagreement regarding interpretations will occur, there must be common agreement regarding important aspects of the specified Presidential succession and disability structures to which we are bound.

3. An “ambiguous” clause—Commerce—The Framers certainly meant something when they stated in the Commerce Clause: “with Foreign Nations, and among the several States.” U.S. Const. art. I, § 8, cl. 3. There was no history of the term's usage as there had been for the term “due process.” See Berger, supra note 225, at 183-84. From the language and accompanying actions this much may be concluded regarding the Commerce Clause: the Framers did not intend to give Congress control over all commerce, but only that “with Foreign Nations” and “among” the states. We are fairly certain, however, that control over commerce was not perceived in frugal terms, particularly in light of the failure of the Articles of Confederation and the “desire to form a more perfect union,” U.S. Constr. preamble.

After all, we are talking about phrases in the text: phrases, moreover, that must have had some meaning and implied some limits. Commerce, whatever it means precisely, is a constitutionalized judgment, not one pulled out of thin air, lacking any usage. See Crying Wolf, supra note 76, at 948-49.

I agree that the Court must have some input. Let us assume, however, good-faith adjudication of, and perhaps even some historical support for, a decision by the Court negating proposals of the people's representatives on the ground that, in the opinion of a majority, the judgment constitutionalized by the Framers was transgressed. See, e.g., Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935). Assuming there is a consensus that the Court is correct in that judgment, the option remains that we could change the instrument by passing a constitutional amendment. See Berger, supra note 1, at 564-65.
States. . . ." The essence of self-government is deliberation on matters concerning the common good. It is necessary, therefore, to affirm that consent must be obtained to change meanings previously constitutionalized, and to concede that, insofar as those principles have not been constitutionalized, the people are free to deliberate and act. If that were not the case, then a Constitution would not be meaningful or necessary.

The American tradition clearly identifies the representative assembly as having primary responsibility for deliberation on public policy matters. For example, each constituent congressional or senatorial district contributes an initial viewpoint on matters of public concern when it elects its representatives. In some instances, on some issues, citizens clearly express those opinions and hold them with fierce intensity, while in other instances the issues do not evoke intense feelings, and it is nearly impossible to determine upon what basis one candidate received more votes than his opponent. In a legislative assembly, opinions are sifted, and assessments of how much can be obtained or how much loss can be prevented, on each issue, are ascertained.

In brief, the Constitution contains values selected by the Framers. These values are not discernible with a sufficient degree of clarity. In that manner, as those intentions become less clear, there may be some room for judicial policymaking. See Sandolow, supra note 89, at 1189. Similarly, there may be more reason for judicial prudence requiring greater deference to those electorally accountable. In this manner, however, the paradigm is still before us—we know that the regime is a democratic republic, not a judicial obligarchy.

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384 See Gangi, supra note 2, at 45-47.
385 As traditionally understood, while the Legislature represents the highest political authority, each legislator must subordinate himself to a higher law. See supra note 31.
386 The remarks that follow in the text are limited to the federal legislative body. There is no principled difference with respect to state legislatures, except those identified by Madison, for example, in The Federalist, supra note 283, No. 10, at 61-64 (J. Madison). Each state has its own constitutional tension containing procedural and substantive values. If pretensions of federal minimum-rights standards are ignored, the intentionist position in itself poses no obstacle to those suggesting the desirability of more stringent protection of individual rights. If, however, judicial power on the state level similarly makes illegitimate presumptions, or annoints itself with a judicial role contrary to state charter, citizens are perfectly within their rights in taking whatever measures they feel are appropriate.

Professor Parker, for example, not only indicates dissatisfaction with current perspectives of "process-focused" adjudication, but hints that "substantive issues," relating to redistribution of wealth, are necessary for our system to work well. He addresses questions of social justice. Parker, supra note 92, at 236-39. He should, however, prove a historical case or abandon pretentions to our tradition. Likewise, he must convince the people of the case he makes and not seek to impose it through the judiciary by open-ended adjudication.

387 Principles of justice can, and often do, conflict with mere self-interest; passion competes with logic, and all represent concrete existences. Present also, of course, are institutional and Madisonian elements. See Choper, The Supreme Court and the Political Branches: Democratic Theory and Practice, 122 U. Pa. L. Rev. 810, 810 (1974). But see Parker, supra note 92, at 258. There are also frequent appeals to more universal standards—a higher
The intentionist acknowledges that elected representatives, charged with the responsibility of deliberating, may shirk that duty. The intentionist describes such shirking as perhaps symptomatic of the prevalent disease—judicial usurpation of the legislative power. First, he notes that while the fact of the deliberative power was specified, the Framers clearly perceived the role of deliberator as one of responsibility: power intimately associated with moral duty and subordinate to a higher law. Second, deference to executive qualities of unity, secrecy, and dispatch is legitimate, while abandonment of the responsibility to deliberate in favor of Presidential "mandates" or opinion polls is not. Third, and perhaps most important, is the intentionist's resistance to the legislators' convenient acceptance of executive or judicial usurpation because it relieves them from the need to deliberate and reach concrete decisions which may expose them to increased prospects of electoral defeat. The intentionist must, therefore, address his criteria of relevance to all public participants. He regrets the failure to attend to that duty on the part of any participant, but for that very reason, he cannot abandon his own.

law—real and imagined. There are attempted injections of principle and pretensions of the same when they happen to coincide with advocated self-interest. In short, there are competing values and needs, and all impact on concrete citizen existence. Hopefully, there are also principled considerations of justice, not simply on deductive reasoning from perhaps suspect premises, but by observation of actual concrete realities. In the eyes of some, it always will appear that self-interest triumphs too frequently over justice.

See supra notes 31 & 286. Professor Yarbrough indicates "the Framers' novel instance [was that] each branch of the government, and not just the lower house of the legislature, represents the people." Yarbrough, Thoughts on the Federalists' View of Representation, 12 NORTHEASTERN POL. SCI. A. 65, 66 (1979). In their scheme "the members of the learned professions, and more particularly, the lawyers," id. at 77, had a special place—for a special reason.

What Tocqueville, like Hamilton, seems to have in mind are lawyers schooled in the great common law tradition. A respect for procedure and tradition, as well as an appreciation of the importance of institutions in preserving liberty distinguishes them from both their country cousins, so acidly described by Edmund Burke in his Reflections on the Revolution in France, as well as the successful merchants and farmers whose interest is private and whose motive is profit.

Id. at 78 n.29.

It is necessary to make explicit what already has been implied: the American political tradition does not consist primarily of Presidential mandates. Presidential elections serve to introduce one participant in the debate over public policy options. He is an important participant in the debate and unquestionably performs an important constitutional role, but his position, I suggest, is intentionally second in the text for symbolic reasons. Congress, within its constitutional limits, is first. Upon Congress falls the central constitutional responsibility—deliberation for the public good.

See Gangi, supra note 2, at 23-33.

There is nothing preventing the intentionist from announcing his judgments regarding dereliction of responsibility in the clearest of terms. After all, like all citizens, he is entitled to voice his opinion. However, he must resist once again the temptation to confuse his per-
The intentionist, as a citizen, should vigorously add his opinion to the fray. He must take care, however, when doing so, to distinguish personal judgments from the key to constitutional expertise—identification and clarification of the Framers' intentions. It is precisely this expertise which may encourage an intentionist to advocate the abandonment of some of the selfsame intentions he helped to identify, but, of course, only by the appropriate procedures. Similarly, he will be the first among his colleagues to insist that the people are free to deliberate on matters others claim are closed because they allegedly constitute violation of "rights" guaranteed by the instrument. Violation of rights is a serious charge, but to make it, the accuser is obliged to demonstrate historically that the actions contemplated by the legislature are contrary to the meanings of rights as understood by those who framed them. Only to that meaning are we bound. If the accuser cannot do so, then no "right" is established, and the accuser confuses his personal judgment of what constitutes good public policy with that which fidelity to the instrument demands.

**Perspective on Stakes**

It is suggested that subscription to the intentionist position herein described would entail repudiation of almost every significant modern Supreme Court decision regarding, among other topics, due process, equal protection, and the Bill of Rights. Non-interpretivists make their point: they believe that many Court decisions in the past three decades were wise, good, just, and conducive to the public well-being. They support a view of judicial power without which such beneficial results may not have been achieved, or at least not achieved as quickly. However, after con-

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sonal opinion regarding responsibility of public officials on principles not constitutionalized, with those expert judgments on matters which he believes were constitutionalized. There is no institutional cure for dereliction of legislative responsibility except those processes that hold legislators electorally accountable for their actions. When, however, those who are politically accountable exceed their authority as discernible from the intentions of the Framers, an institutional cure is envisioned: the Supreme Court power of judicial review. See id. at 11-13, 24-26.


See Gangi, *supra* note 2, at 33-37. Noninterpretivists, it must be assumed, seek the public good. Their sincerity is not at all questioned, only the authority to impose their version of the good through "non-interpretative" judicial action is debated.

See Bridwell, *supra* note 95, at 473 n.14. Bridwell severely criticizes arguments favoring expansive judicial activism "structured around the horrible results that will allegedly occur without it. . . . What passes for a defense of a particular form of judicial power rests almost entirely upon the assumed advantage that would accrue to its existence." *Id.*
considering the beneficent results claimed, I contend that there are other issues of at least equal importance. Primary among those issues is whether our people have the right to self-government originally procured by the Constitution, and whether that right may be taken away or modified without their consent. These rights are at the center of our tradition, and the Constitution, together with all subsequent amendments, is its symbolic expression.

The stakes are indeed high, the penalties so severe that the intentionist must put them forthrightly on the table. First, if the judiciary is no longer required to be faithful to the Constitution, then the Constitution can no longer accurately be described as embodying our tradition. Government by judiciary constitutes a radical change in that tradition. Second, accordingly, no longer can democratic self-government be considered essential to either our tradition or the Constitution. These concepts evaporate once government by judiciary is defended as legitimate. Third, if judicial usurpation is sanctioned, no principled objection may be raised against similar action by another branch. Eventually, usurpations by the most powerful and numerous branch must be expected to prevail. Fourth, when that occurs, thereby eliminating any check on majority power, the most numerous branch may of course simply obliterate the results initially thought beneficent and imposed by judicial usurpation. Fifth, should the majority go further, attacking principles clearly intended by the Framers to be protected, no refuge may be sought in the instrument; fidelity to original intentions has been destroyed by the presumed beneficence of the first result imposed through judicial usurpation.

This projected scenario is not merely in the imagination of the intentionist. It is written in the history of prior republics and is an awareness, the intentionist believes, the Framers were far more attentive to than their non-interpretive successors. For this reason, the intentionist insists that it is necessary to separate constitutionalized values from those which were not constitutionalized to distinguish professional from personal opinions. In light of such distinctions the people are free to adopt by amendment or deliberation the results currently advocated by non-interpretive adherents. This would preserve for posterity the structures which make pursuit of such results perennially possible in the context of consent.

The intentionist, by focusing on intentions, cannot help but develop a historical perspective. The record of the past century is not a pleasant one to behold: one presumptuous wave of “progress” succeeded another. In each era, new “natural laws” spawned new systems and suppressed more questions related to the common good. In each era there has been

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98 Usurpations are not legitimized by either repetition or acquiescence, particularly when the latter is obtained by the subterfuge that the latest usurpations are allegedly required by the constitution. See Berger, supra note 1, at 544-45.
an unfailing belief in the "science" of law.\textsuperscript{297}

The intentionist maintains that law is an art, not a science. Our Constitution does not exhaust the art, but elevates some principles above others and demands fidelity to them by members of the body politic. Among those principles constitutionalized was judicial review.\textsuperscript{298} The judicial power is not the legislative power, and can never, therefore, legitimately offer final answers on matters left open to deliberation. For the following reasons, the intentionist insists that the judicial power, as all other powers and principles constitutionalized, must be interpreted with reference to the clearly discernible intentions of the Framers.\textsuperscript{299}

First, by its very nature, a Constitution consists of some principles, selected over others, to which all statutory law must be subordinated, and to which all public officials owe allegiance.\textsuperscript{300} The constitutionalized power of judicial review was narrow in scope when determining whether the other branches of government overstepped their limits.\textsuperscript{301} Second, by confining its judgments to an understanding of the clearly discernible intentions of the Framers, the likelihood of the judiciary constitutionalizing personal preferences or the \textit{zeitgeist} of the times is significantly reduced.\textsuperscript{302} Third, the responsibility for adapting the Constitution to changing needs was left in the hands of the people.\textsuperscript{303} The right of self-government was constitutionalized by the Framers, but there is no self-government without consent.\textsuperscript{304}

Fourth, since the intentionist confines the judicial role to the policing of constitutional boundaries, representative institutions are to be accorded, within the boundaries discernible from the Framers' intentions, the widest possible scope to deliberate on matters of public policy considered "meet and convenient for the general Good."\textsuperscript{305} There probably will exist competing views on what is necessary for the common good among a multiplicity of factions; it is impossible for the judiciary to assess how intensely, and by how many, such views are held.\textsuperscript{306} Assessment is possible only through the electoral process followed by deliberation.\textsuperscript{307} From

\textsuperscript{297} See supra notes 35-51 and accompanying text.
\textsuperscript{298} See supra notes 238-41 and accompanying text.
\textsuperscript{299} See Gangi, supra note 2, at 56-57.
\textsuperscript{300} See supra note 283.
\textsuperscript{301} See supra notes 241-43 and accompanying text.
\textsuperscript{303} See supra note 87 and accompanying text.
\textsuperscript{304} See Gangi, supra note 2, at 54.
\textsuperscript{305} Mayflower Compact (1620).
\textsuperscript{306} See Choper, supra note 288, at 833-39; Rehnquist, supra note 89, at 699-703.
\textsuperscript{307} Berger asserts that "the track record of the Court does not inspire confidence that it is a
deliberation emerges not necessarily truth or goodness but public policy choices for which the representatives are held electorally accountable.

Fifth, principles set forth by the Framers are not infallible; nor should they remain unchanged forever. The intentionist does contend, however, that the principles constitutionalized are binding on all three branches of government unless and until the people consent to revisions through the amending process. This position creates a substantial barrier, intended by the Framers as such, to the inevitable tendency of a people to infuse the newest wave of fashionable truth into the fabric of the Constitution. The need to confront and compare newly perceived principles with already constitutionalized ones prompts deliberation on the highest level: the difficult amendment process.

For the intentionist, judicial adoption and infusion of the newest truth into the Constitution, due to judicial failure to keep the intentions of the Framers properly before them, merely leads to the need for ridding the instrument of those incrustations, either found not to have been constitutionally required, or found unnecessary in the long term public interest, to deal with changing circumstances. The intentionist believes that repeated errors of this sort will inevitably lower the stature of those principles that were constitutionalized by the Framers.

Finally, the intentionist puts forth what may be called the fidelity argument: "This Constitution . . . shall be the supreme Law of the Land. . . ." Each member of the judiciary "shall be bound by Oath or Affirmation, to support this Constitution. . . ." The Framers did not believe that those taking this oath promised allegiance to vagueness, generality, or open-endedness. On the contrary, the Framers created a Constitution containing specific principles: their intentions help us understand those principles. Members of the judiciary have a special duty to remind those in all branches of the government, including themselves, of the clearly discernible intentions of the Framers.

The judicial "oath or affirmation" of constitutional fidelity is somewhat unique because, while all officials of the government take the same oath of constitutional fidelity, there is this difference: members of the legislature remain free to consider a "higher law" when deliberating on matters not preempted by having been constitutionalized. However, since
the judicial function is neither to deliberate upon, nor decide questions of public policy where principles have not been constitutionalized, the judiciary cannot legitimately appeal to any "higher law" than the Constitution to which they have sworn allegiance. Unlike the theorist who is free to perceive truth, members of the judiciary wear robes of constitutional fidelity. While a man may choose to wear either judicial or theoretical robes, he may not choose both when, pursuant to his oath, he acts in an official judicial capacity. Until the emergence of modern constitutional law, the significance of the judicial oath had been clear, and, for the most part, respected. The Supreme Court must revitalize that traditional understanding of its judicial duty and act accordingly.

CONCLUSION

The role played by the present judiciary is not significantly different from that played by its laissez-faire predecessor. Both infuse personal opinions into the constitutional text. Neither was elected; therefore, neither could have been, or is, politically accountable. Whatever the temporary beneficence of such behavior, it is inconsistent with the scheme of government born two centuries ago. The time of lying and self-deception has long passed: "the sovereign people . . . at long last are entitled to be told that the Court has taken over national policy making, and to be asked to ratify the takeover. That will be the moment of truth."313

313 Berger, supra note 1, at 575 (footnote omitted).