The New Supreme Court Commentators: The Principled, the Political, and the Philosophical

By LAURENCE E. WISEMAN*

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* A.B., 1978, Harvard University; M.A., J.D., 1982, Ph.D. candidate (Jurisprudence and Social Policy), University of California at Berkeley. The author wishes to express his gratitude to Professor Martin Shapiro for his guidance throughout the writing of this article.

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Introduction

The power of a United States Supreme Court Justice to change American society has inspired much scholarly debate. That five individuals could, without obstacle, prohibit racism, sexism, unfair treatment, and economic injustice within the country, is like a dream. That five individuals could, without concern for that which the country desires, and without restraint of the majority voice, create policy that is merely a reflection of their particular prejudices, is a nightmare. Academics have sought to determine whether the power available to the Justices of the Supreme Court is more likely to lead to a dream world or a nightmarish existence.

In order to determine whether we should be under the influence of a few superdecisionmakers, we must decide whether the decisions will be made correctly. This question may be split into two parts. First, is there such a thing as a right answer or a correct decision? Second, are the Justices of the Supreme Court the people best situated to attempt to pronounce "correct" decisions? Although the Supreme Court can decide only specific cases or controversies,[1] the precedential weight of its decisions causes them to have widespread influence in our society. The Justices of the Supreme Court must view their decisions as having general application, and therefore must consider the questions at hand on an abstract and theoretical level. Consequently, the determination of the correct answer to any specific question often involves the Court in consideration of the broader question of what are the principles and values of our government.

In the recent past, the academic commentators of constitutional law have tended to favor the view that there are no right answers to value questions independent of those answers that result from the majoritarian processes in our country.[2] Therefore, if any body is fit to

1. U.S. CONST. art. III, § 2.

2. *See* Wright, *Professor Bickel, The Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769, 772-75, 781-83 (1971).

make governmental decisions, it is the state or federal legislature, and not the Court.[3] Having the Court assert its decisions at the expense of those made by the legislature is, in their view, nightmarish. In the more recent past, however, several constitutional law commentators have argued that indeed, where questions of values are raised, there are answers whose validity is independent of legislative decision, and that, further, the Court is the governmental body best fit for deciding such questions.

Constitutional law commentators are not alone in asserting the existence of values whose validity does not rely on a formalized monitoring of consensus.[4] Recent work in moral philosophy has shown a trend away from utilitarianism—essentially, a system of deciding moral questions according to a tally of the preferences of every member of the society—toward the assertion of determinate values as the basis of moral systems. This article analyzes the relationship between the development of value-asserting theories among constitutional law commentators and the development of nonutilitarian theories in moral philosophy. Part I provides the background of moral philosophy and discusses several philosophers who have abandoned utilitarianism. Part II describes the nexus between moral philosophy and constitutional law commentary. Part III analyzes the traditional constitutional law commentary; and part IV presents and analyzes the new theories emerging in constitutional commentary. Finally, this survey of authors is used as a basis for comment on the foundations of these value-asserting constitutional theories. It will be argued that, to the extent modern philosophers are correct in attacking utilitarianism, the new constitutional law commentators are correct in their attacks on the traditional commentary.

I. The Background in Moral Philosophy

H.L.A. Hart recently described the ongoing transition among philosophers, from a focus upon utilitarianism to concern with a doctrine of basic human rights:

> I do not think than [*sic*] anyone familiar with what has been published in the last ten years, in England and the United States, on the philosophy of government can doubt that this subject, which

3. *See generally* Brubaker, *From Incompetent Imperialism to Principled Prudence: The Role of the Courts in Restoring "the State,"* 10 HASTINGS CONST. L.Q. 81 (1982).

4. The word "formalized" is used here to acknowledge that some of the recent anti-utilitarian moral theories assert values on the basis that they are almost universally held. *See, e.g., infra* text accompanying notes 55-62, 82, and 115. This may be seen as involving an appeal to consensus, but such consensus is not strictly a function of individual inputs as is the utilitarian calculus. *See infra* text preceding note 152.

> is the meeting point of moral, political, and legal philosophy, is undergoing a major change. We are currently witnessing, I think, the progress of a transition from a once widely accepted old faith that some form of utilitarianism, if only we could discover the right form, *must* capture the essence of political morality. The new faith is that the truth must lie not with a doctrine that takes the maximization of aggregate or average general welfare for its goal, but with a doctrine of basic human rights, protecting basic liberties and interests of individuals, if only we could find some sufficiently firm foundation for such rights to meet some long familiar objections.[5]

Tracing the development of this philosophical movement over the past ten years is a topic too broad for the present discussion. It is possible, however, to gain insight into the movement and its effect on constitutional law commentary by examining the works of several philosophers abandoning utilitarianism who are most often cited in the recent works of the new constitutional law commentators. This group comprises professional philosophers and law faculty writing philosophy, and includes John Rawls,[6] Thomas Nagel,[7] Bernard Williams,[8] Ronald Dworkin,[9] T.M. Scanlon,[10] Robert Nozick[11] and Charles Fried.[12]

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5. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 828 (1979) (emphasis in original). *See* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 71 (1977); Barry, *And Who Is My Neighbor?*, 88 YALE L.J. 629, 630-32 (1979).

6. Works citing Rawls include: Fiss, *Groups and the Equal Protection Clause*, in EQUALITY AND PREFERENTIAL TREATMENT 84, 126 n.65 (M. Cohen, T. Nagel & T. Scanlon eds., 1977) [hereinafter cited as *Groups*]; Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1, 49 n.219 (1976); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 n.18 (1977); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 *passim* (1973); Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383, 388 n.25 (1977); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1168 n.14 (1977); Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1328 n.63 (1974); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 243 n.57 (1973).

7. Works citing Nagel include: M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 104 n.* (1982); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 13 n.29 (1979); Tribe, *supra* note 6, at 1330 n.71.

8. Works citing Williams include: Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1103 n.220 (1981); Karst, *supra* note 6, at 6 n.23.

9. Works citing Dworkin include: Brest, *supra* note 8, at 1074 n.75; Fiss, *supra* note 7, at 9 n.24; Karst, *supra* note 6, at 42 n.228; Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1043 n.74 (1978); Perry, *Substantive Due Process Visited: Reflections On (And Beyond) Recent Cases*, 71 NW. U.L. REV. 417, 447 n.189 (1976); Sandalow, *supra* note 6, at 1166 n.11; Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072 n.41 (1980); Wellington, *supra* note 6, at 222 n.1.

Their works,[13] taken together, suggest criticism of the old faith and formulations representative of the new faith.

A. The Criticisms of Utilitarianism

1. Bernard Williams

Bernard Williams's criticism of utilitarianism[14] has been cited by constitutional law commentators and by several of the philosophers just mentioned.[15] Williams addresses act utilitarianism or "direct" utilitarianism,[16] as well as other forms of utilitarianism,[17] as a possible foundation for personal morality. He argues that act utilitarianism must be a theory about how people should be motivated, since it is a theory about which acts are right. That is, act utilitarianism, by

10. Works citing Scanlon include: L. TRIBE, AMERICAN CONSTITUTIONAL LAW 581 n.15 (1978); Brest, *supra* note 8, at 1091-92 n.171; Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 633-34 n.46 (1980); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 306 n.196 (1981); Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1121 n.86 (1979).

11. Works citing Nozick include: Fiss, *supra* note 6, at 126 n.65; Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 153 n.36 (1977); Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 299 n.77 (1981); Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFFAIRS 66, 93 n.72 (1972).

12. Works citing Fried include: Karst, *supra* note 10, at 633-34 n.46; Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 681 n.110; Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689, 733 n.203 (1976); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 291 n.66 (1975).

13. It is interesting to note that several of these philosophers address legal audiences specifically by occasionally writing for law journals. This is true of Nagel, Dworkin, Scanlon, Nozick, and Fried.

14. Williams, *A Critique of Utilitarianism* in J. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973); *see also* Sen & Williams, *Introduction*, in UTILITARIANISM AND BEYOND 1-21 (A. Sen & B. Williams eds. 1982).

15. Examples of citations to Williams's essay by philosophers mentioned in this article are: C. FRIED, RIGHT AND WRONG 197 (1978); T. NAGEL, *Subjective and Objective* in MORTAL QUESTIONS 205 n.10 (1979); Barry, *supra* note 5, at 630 n.3; Hart, *supra* note 5, at 829 n.1; Scanlon, *Rights, Goals and Fairness*, in PUBLIC AND PRIVATE MORALITY 96 n.3 (S. Hampshire ed. 1978).

16. Act utilitarianism is defined as "the view that the rightness of any particular act depends on the goodness of its consequences . . . where the goodness of the consequences is cashed [*sic*] in terms of happiness." Williams, *supra* note 14, at 118-19. Indirect utilitarianism, on the other hand, (for example, rule utilitarianism) takes into account the utility of rules, institutions, or dispositions of character. *Id.* at 119.

17. Williams appears more concerned with criticizing act utilitarianism than other forms, since it is in some ways the "paradigm of utilitarianism," *id.* at 128, and since Williams's counterpart, J.J.C. Smart, writes in defense of act utilitarianism. *See* Smart, *An Outline of a System of Utilitarian Ethics*, in J. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973).

describing which acts are right, must prescribe the choice of right acts. Yet, he finds no reason to believe that the *actor* would be able to recognize the rightness of the act. If act utilitarianism cannot be a statement of motivation, then it is trivial: stating that right action should be maximized, without stating how.[18] Furthermore, the assumed goal of utilitarianism—that society's good be maximized—does not result as a matter of necessity from the maximization of right acts as defined by the act utilitarian. It is possible, for instance, that a society could attain its maximum utility only if its members could be spontaneous, i.e., not driven by concerns of utility.[19] Williams also provides arguments against the position that utilitarianism could provide a decision procedure for social choice. He states that the assumptions on which such a decision procedure is based are dubious. For instance, it is questionable that the resulting welfare of the individual can be quantified in such a procedure, that the welfare of various individuals can be compared, or that there can be a function which will adequately determine social preference, even assuming that quantification of individual welfare is possible and that a means of comparison exists.[20]

The most pervasive argument in the essay, however, relates to the incompatibility of utilitarianism with common notions of moral integrity. This criticism forms not only the bulk of Williams's general attack on utilitarianism as a theory of personal morality, but also forms part of the argument against act utilitarianism, and part of the argument against utilitarianism as a decision procedure for social choice. Williams argues that a necessary feature of utilitarianism is the attribution of "negative responsibility," which holds the actor equally responsible for states of affairs that obtain because he or she did not prevent them, as for states of affairs that the actor brings about.[21] If such were the case, the "projects" of others would weigh quite heavily on one's decisions as to which act is the right act. In fact, the projects of others could be expected, from time to time, to weigh so heavily that the actor would be required to give up his or her own projects, even the "commitments" to which the actor's whole life is devoted. This type of moral requirement would serve to alienate the actor from the actor's own actions and convictions.[22] Further, utilitarianism causes the actor to regard his or her moral feelings as mere objects of the utilitarian value. In this way, utilitarianism causes one to be alienated from one's

18. *See* Williams, *supra* note 14, at 124-29.
19. *See id.* at 129.
20. *See id.* at 140-48.
21. *See id.* at 95.
22. *See id.* at 115-16.

moral identity.[23] In short, Williams's criticisms lie in the fact that moral actors are whole and distinct beings. It is not the case that the world is made up of disembodied happiness causers and happiness recipients. The goals and needs of the individual actor, that is, the identity of the individual actor, must be relevant to the morality of the actor's actions.

2. John Rawls

John Rawls presents several attacks on utilitarianism in *A Theory of Justice*.[24] Some of these are in the same spirit as Williams's major attacks. Rawls states that classical utilitarianism approaches decisions for an entire society as if that society were a single person. All people and their levels of satisfaction are merged into one by virtue of the simple aggregation of satisfaction levels accomplished by the utilitarian calculation. Consequently, the distinctions among persons are not taken seriously.[25] Along the same theme, Rawls notes that the acceptance of utilitarianism requires very strong identification with the interests of others, since many individuals will be denied advantages for the greater good of the society as a whole. Without such strong identification the society would be unstable.[26]

Another major criticism presented by Rawls involves his concept of the "original position." Basically the original position is the hypothetical initial situation in which citizens are to choose the principles of justice for their society.[27] Rawls sets up various constraints to insure that the parties choosing are equal and unprejudiced by their future positions in the society, that they rationally weigh the alternatives, and that they choose rules which can function appropriately.[28] Rawls argues that one who is choosing principles of justice in the original position, and who therefore has no knowledge of his or her ultimate place in the society, would choose a system which guarantees from the onset protection of liberties and a satisfactory standard of living for each individual.[29] Since classical utilitarian theory cannot guarantee that any individual will be allocated even a minimum level of liberties or wealth, it would not be chosen by those in the original position as the

23. *See id.* at 103-04.
24. J. RAWLS, A THEORY OF JUSTICE (1971).
25. *Id.* at 27.
26. *Id.* at 177-78.
27. *See id.* at 118.
28. *See id.* at 118-50.
29. *See id.* at 150-61, 168-72, 175.

foundation for conducting the actions of society.[30]

It appears that the general point which Rawls makes here is that a system of morality or a system of justice cannot be merely a procedural notion. One cannot simply assume that a procedure (such as the utilitarian tally) will somehow lead to reasonably even allocation of rights and resources, so that no one will be forced to accept an intolerable lot as the condition of adopting such a system of justice.[31] Rather than relying on various uncontrolled natural facts which will, like an invisible hand, guide the procedural system, it is preferable to have an ethical system or a system of justice that has *substance*. It is preferable, that is, to have a moral system which is constructed with specific concrete results in mind. "Convictions of justice" should be embedded in the first principles of the system.[32]

3. Charles Fried

The two major themes discussed thus far also appear in Charles Fried's criticism of utilitarianism. He agrees with Williams that utilitarianism, because it focuses on the aggregation of undifferentiated pleasure, strips the individual of moral significance. For Fried, the individual, rather than an abstraction like happiness or excellence, should be the "ultimate entity of value."[33] In addition, he states that utilitarianism, even in its modern sophisticated formulation as "the economic analysis of rights," is fundamentally incomplete as a moral theory. According to Fried, "[t]he economic analysis of rights seeks to discern which assignment of rights in the real world of costly and impacted bargaining best approximates the attainment of efficiency, that Pareto-optimal situation which would obtain in the frictionless world of costless bargaining."[34] He argues that although the allocation of resources and rights dictated by the economic analysis of rights (EAR)

30. Rawls develops a theory that he believes is preferable for use by those in the initial position. *See infra* notes 50-62 and accompanying text.

31. *See* J. RAWLS, *supra* note 24, at 156, 170-71.

32. *Id.* at 161. Note, however, that Rawls states his aim in employing the original position as using "the notion of pure procedural justice as a basis of theory." *Id.* at 136. Nozick remarks that it is odd for Rawls to insist on substantive, "end-state" principles to guide society when his method for generating such principles—the original position—is a process, and "*any* principles that would emerge from that situation and process are held to constitute the principles of justice." R. NOZICK, ANARCHY, STATE, AND UTOPIA 207 (1974). *See also id.* at 208. Nozick himself favors invisible hand explanations and procedural principles of justice. *See id.* at 18-22, 149-82. See *infra* text accompanying note 63, for Rawls's use of the original position.

33. C. FRIED, *supra* note 15, at 33-34.

34. *Id.* at 92. Pareto-efficiency, which is equivalent to Pareto-optimality, is defined by Fried as follows: "[A]n allocation of resources among competing uses is efficient, if no

may conform with notions of efficiency, and although we may agree that efficiency is desirable, such a solution to the problem of allocation is a function of the initial situation, and thus the solution will be proper only if the initial distribution is proper.[35] Fried also argues that EAR, which is based on a model of bargaining in the market place, assumes that each party is the best judge of what his or her price should be, that each has sufficient information to be a good judge, and that bargains are made voluntarily. These assumptions are necessary to the outcome of EAR, but, he points out, cannot be justified or explained by EAR.[36] Similarly, EAR is deficient because it does not explain the assumed "background entitlements which guarantee the integrity of the bargainers as intelligent, free agents."[37] Both the criticism concerning distribution and the criticism concerning initial assumptions may be seen generally as objections to the lack of content or initial judgments that systems of ethics or of justice arguably require.[38]

Fried brings up two additional criticisms which stem from a perceived dissonance between the common view of morality and the consequences of a utilitarian theory. The first is that utilitarianism does not leave the actor any choices that are not dictated by the moral system. He asserts that there is one right answer to every possible choice, and there is moral responsibility for all of the consequences of one's actions.[39] The second criticism is that utilitarianism views certain acts—for instance, rape and theft—as morally neutral, and bad only contingently.[40] People generally, however, view such things as bad in themselves.[41] These arguments do not suggest theoretical deficiencies in utilitarianism, as did the above arguments, but rather express distaste for the implications of utilitarian thought.

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change in that allocation may be effected which would improve the situation of any of the parties without worsening the situation of any of them." *Id.* at 89.

35. *See id.* at 93-94.

36. *See id.* at 100-04.

37. *Id.* at 100.

38. It is interesting to note that Fried sees his criticism of the initial assumptions as a variation of the criticism concerning the moral integrity of the person. *See id.* at 104.

39. *Id.* at 13, 34.

40. That is, for a (direct) utilitarian, whether an instance of rape, for example, can be considered "bad," depends on the circumstances. Only in those circumstances where the utility accrued by the rapist happens to be less than the disutility resulting to the others affected will the rape be bad.

41. C. FRIED, *supra* note 15, at 104.

4. Ronald Dworkin

Arguments like these, that utilitarianism simply comes up with the wrong answers, are common in the philosophical literature. Ronald Dworkin, for instance, sets out a criticism of utilitarianism that does not seem to dispute the foundations of the theory, but rather suggests that utilitarianism can be corrupted.[42] Dworkin states that a utilitarian calculation is corrupted if it takes into account "external preferences," which are preferences "for the assignment of goods and opportunities to *others*," as opposed to "personal preferences," which are preferences for an individual's "own enjoyment of some goods or opportunities."[43] Dworkin's objection to the use of external preferences in the calculus is that the result may lead to inequality, or may deny equal concern and respect.[44] This dissatisfaction with the result seems to be all that lies behind the criticism.[45]

5. Summary of Criticisms

One can see three major lines of criticism that have developed among the writers viewed. The first is that utilitarianism is not consistent with the observation that people are distinct beings with "moral integrity." The second is that utilitarianism does not provide a complete moral system or system of justice, and that it cannot do so without the injection of values or greater substantive content. The third line of criticism is that the view of morality resulting from utilitarian theory, or the results of decisions based on utilitarian theory, are simply wrong.

B. New Foundations

1. John Rawls

The trend in philosophy being discussed may be noted not only for its criticism of the old faith, utilitarianism, but also for its constructive work in laying the foundations of the new faith,[46] which perhaps may be called theory with content.[47] Especially important to the establishment of the legitimacy of the movement as a whole is the manner in which justification is sought for the methods used to arrive at the con-

42. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 231-38, 274-77 (1978). As Dworkin sees it, however, his criticism of utilitarianism, which seemingly only attacks the results of utilitarian decisionmaking, cannot be taken as the expression of approval of the foundations of utilitarianism. *See id.* at 257.

43. *Id.* at 234 (emphasis added).

44. *See id.* at 236, 275.

45. *See* Hart, *supra* note 5, at 841-45.

46. *See* Barry, *supra* note 5, at 632-33.

47. *See* B. WILLIAMS, MORALITY 80-82, 86-88 (1972).

tent presented in the new moral theories. The moral systems presented by philosophers of the new faith can all be seen as attempts to form nonutilitarian theories that could not be considered to be forms of "intuitionism" as Rawls has defined it. According to Rawls, intuitionist theories

> consist of a plurality of first principles which may conflict to give contrary directions in particular types of cases; and second, they include no explicit method, no priority rules, for weighing these principles against one another: we are simply to strike a balance by intuition, by what seems to us most nearly right.[48]

Rawls explains that intuitionism, which does not allow for an "objective" means of ordering principles, and thus for a systematic way of deciding moral issues, is a type of pluralism.[49] The philosophers of the new faith desire to establish what is morally correct without using one very abstract principle, as is done in utilitarianism, and without throwing up their hands in despair and deciding what is right (or what is to be its surrogate) by taking a popular vote.

Certainly, among the works of modern constitutional scholars, the most widely cited attempt to construct a moral theory with content is John Rawls's *A Theory of Justice*.[50] Rawls presents a theory that incorporates two principles which are lexically ordered:[51]

> First: Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.[52]

These principles are the substantive basis for Rawls's theory. They "primarily apply . . . to the basic structure of society. They are to gov-

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48. J. RAWLS, *supra* note 24, at 34.

49. *See id.* at 35.

50. The book is more often cited for its theory than for its criticism. *See supra* articles listed in note 6.

51. *See* J. RAWLS, *supra* note 24, at 42-44. Lexical ordering, as applied to moral principles, provides that a principle of lower priority cannot be applied unless each principle of higher priority is either satisfied or inapplicable. This is reminiscent of the way that words are ordered when they are alphabetized.

52. *Id.* at 60. This is actually only a tentative formulation of the principles. The final formulation, with two rules for the ordering of these principles, is in *id.* at 302-03. It reads as follows:

> *First Principle*
> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
> *Second Principle*
> Social and economic inequalities are to be arranged so that they are both:
> (a) to the greatest benefit of the least advantaged, consistent with the just savings principle [i.e., that a generation cannot unduly burden a future generation,

ern the assignment of rights and duties and to regulate the distribution of social and economic advantages."[53] The principles are intended to vindicate the "convictions of common sense" that "each member of society . . . [has] an inviolability founded on justice or, as some say, on natural right, which even the welfare of every one else cannot override."[54]

Rawls presents an elaborate framework, and an explanation of the framework, in order to show the reader why and to what extent these principles, and the system developed around them, are justified. At its base, the theory seeks justification from hypothetical consensus. The principles of justice are justified because everyone accepts them, or would accept them after proper philosophical reflection.[55] Rawls's "original position"[56] acts as a guide to proper philosophical reflection by providing reasonable constraints on that reflection. In doing so it provides an environment from which the validity of the two principles is more readily appreciated. Thus, through the use of the original position Rawls appeals to "consensus on reasonable conditions."[57] That the theory relies on "some consensus" for the justification of moral principles should not be surprising, for "[t]his is the nature of

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but rather each generation must carry its "fair share of the burden of realizing and preserving a just society," *Id.* at 289], and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity.

First Priority Rule (The Priority of Liberty)

The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases:

(a) a less extensive liberty must strengthen the total system of liberty shared by all;

(b) a less than equal liberty must be acceptable to those with the lesser liberty.

Second Priority Rule (The Priority of Justice over Efficiency and Welfare)

The second principle of justice is lexcially prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the difference principle. There are two cases:

(a) an inequality of opportunity must enhance the opportunities of those with the lesser opportunity;

(b) an excessive rate of saving must on balance mitigate the burden of those bearing this hardship.

General Conception

All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.

53. *Id.* at 61.

54. *Id.* at 27-28.

55. *See id.* at 21.

56. *See supra* text accompanying notes 27-28.

57. J. RAWLS, *supra* note 24, at 582.

justification."[58]

In general, according to Rawls, a conception of justice finds justification to the extent that it causes our various considered opinions of justice to converge.[59] This approach to moral theory is not intuitionist under Rawls's definition, because it operates under the assumption that consensus supporting a coherent conception of justice at least can be approached.[60] By focusing on structuring our moral deliberations, Rawls hopes to bring our considered judgments closer to a consensus,[61] and thereby to show that skepticism is unwarranted.[62]

Rawls thus employs the construct of the original position as a theoretical tool to lend validity to the substantive principles. Those principles of justice that are recognized as likely to be chosen in the original position are the "correct" principles of justice. The reason for this is that the conditions for choice in the original position are intended to be "fair." No consideration can be made for advantages stemming from chance or contingencies, and no one can choose principles to favor oneself to the exclusion of others.[63] But the original position, too, must be subject to justification.[64] This system is not validated by appealing to self-evident first principles from which the system is deduced.[65] Rawls is adamant that principles of justice cannot be derived from necessary truths.[66] Rather, justification is sought through an appeal to the overall coherence of the various components of the theory.

Another philosopher, Joel Feinberg, explains that theories of justification that appeal to overall coherence—"coherence theories of ethical justification"—appeal to philosophers like Rawls who do not believe it possible to base an ethical system on self-evident first principles.[67] Coherence theories dispense with the need for immutable first principles.

58. *Id.* at 581. Rawls's appeal to "some consensus" is not unusual. We might think of justification as an appeal to a consensus of the knowledgeable and perceptive among us, or to a consensus of all of us in "our better moments." Yet note Socrates's warning that "the holy is loved [by all the gods] because it is holy, and is not holy because it is loved." PLATO, *Euthyphro* 10e in THE COLLECTED DIALOGUES OF PLATO 179 (E. Hamilton & H. Cairns eds. 1961).

59. *See* J. RAWLS, *supra* note 24, at 44-45, 579.

60. *See id.* at 50.

61. *See id.* at 44.

62. *See id.* at 39.

63. *See id.* at 12.

64. *See id.* at 579-80.

65. *See id.* at 578.

66. *See id.* at 21.

67. Feinberg, *Justice, Fairness and Rationality*, 81 YALE L.J. 1004, 1019 (1972).

> The individual who is trying to make up his own mind begins with the set of moral beliefs and sentiments he already has, for better or worse. . . . He places his beliefs then in an order of conviction. . . . He then reaches the level of general principle by extracting from his most confident convictions their apparent rationale. Then he applies his newly discovered principle to the more difficult cases and decides them as the general principle directs. All goes well until his general principle directs him to a judgment in a particular case that runs counter to one of his most confident convictions. Then there is a crisis and something will have to give. The problem for practical reason in such a crisis is to reformulate the general principle . . . in such a way that it still faithfully summarizes the whole body of one's singular convictions and no longer yields an unacceptable result.[68]

This method can be used to discover one's own formulation of moral principles, and also to prove the validity of principles to another, by calling into question the coherence of the other's accepted principles.[69] Attaining an integrated moral theory as the result of this "back and forth" process of justifying the original position through its conformance to basic accepted principles, and justifying principles by appealing to the original position, Rawls calls approaching "reflective equilibrium."[70]

Among the philosophers viewed in this essay, Rawls presents the most detailed attempt at justifying the assertion of foundational principles or statements of value. It will be helpful, however, to view the theories of other philosophers who also can be assumed to have had an impact on the constitutional law commentators.

2. Ronald Dworkin

Ronald Dworkin's works are widely cited by the new constitutional law commentators.[71] He presents a theory of rights that is "anti-utilitarian" because it provides for rights that must be respected by the government even if it would not be in the general interest to do so.[72] Accordingly, these rights are not dependent on majoritarian justification for their existence.[73] In his view, the function of rights is to protect

68. *Id.* at 1019-20.

69. *See id.* at 1020.

70. J. RAWLS, *supra* note 24, at 20.

71. *See supra* note 9.

72. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 191, 269 (1978); *see also* Regan, *Glosses on Dworkin: Rights, Principles and Policies*, 76 MICH. L. REV. 1213, 1216-17 (1978).

73. *See* R. DWORKIN, *supra* note 72, at 236-38, 255, 276-77. *See also* Nickel, *Dworkin on the Nature and Consequences of Rights*, 11 GA. L. REV. 1115, 1118-19 (1977).

individuals in specific ways from the dictates of the tally of interests.[74] Dworkin does not distinguish legal rights from moral rights, for he sees no fundamental distinction between legal standards and moral standards.[75] All rights are political rights; that is, they justify specific kinds of decisions by society in general or by political institutions.[76] Thus, rights are most properly topics of political debate and features of political theories describing and analyzing the institutions and sentiments of that particular society.[77] They are not metaphysical entities. Nor is there, even in theory, a mechanical procedure for determining exactly which rights a person has.[78] However, some arguments concerning rights are better than others, and some political theories are better than others. It is important that an attempt is made at good political theory by political officials, especially judges, and that legal opinions are challenged and assessed as the manifestations of such political theory.[79]

The foundational right in Dworkin's moral theory is the right of each individual to be treated with equal concern and respect by the government.[80] The justification for other rights lies in the protection they afford to the central right to equal concern and respect.[81] The justification for the central right itself is manifold. Four different strains of argument in support of the existence of the right can be found in Dworkin's writing. First, Dworkin states that anyone who takes rights seriously must accept (and thus it appears that rights by their very nature assume) that people are deserving of a kind of dignity by virtue of their humanity, and that, therefore, all citizens are deserving of the same concern by their government despite their economic standing.[82] Second, Dworkin appears to justify the existence of rights with utilitarian arguments cleansed of external preferences, as discussed earlier.[83] Dworkin states in his reply to critics that he does not endorse this modified utilitarian approach as a constructive theory, but only as a criticism of utilitarianism.[84] He does state, however, that his idea of individual rights is "parasitic on the dominant idea of utilitarianism,

74. *See* R. DWORKIN, *supra* note 72, at 85, 277.
75. *See id.* at 7, 46, 60.
76. *See id.* at xi-xii, 93.
77. *See id.* at 79, 87, 92.
78. *See id.* at 81.
79. *See id.* at 86, 116-18.
80. *See id.* at 272-73.
81. *See* Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 136 (S. Hampshire ed. 1978); Regan, *supra* note 72, at 1219.
82. *See* R. DWORKIN, *supra* note 72, at 198-99.
83. *See supra* text accompanying notes 42-44.
84. *See* R. DWORKIN, *supra* note 72, at 357.

which is the idea of a collective goal of the community as a whole,"[85] and his idea of rights

> allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals.[86]

Third, it appears as if perhaps Dworkin's view of rights is justified by establishing its connection with the essence of "liberalism." Dworkin argues that the right to equal concern and respect is central to liberal thought,[87] but it is not always clear whether he seeks by this connection to establish the value of liberalism or to establish the existence of this central right.

More important, perhaps, is Dworkin's more theoretical justification for the scheme of rights. He appeals to coherence theory as presented by Rawls and then clarifies it.[88] He argues that the "deep theory" or essence of Rawls's fundamental position, including the notions of reflective equilibrium, leads to the preferable rights scheme.[89] Rawls's views of reflective equilibrium and coherence theory in general are interpreted by Dworkin to imply a "constructive model," as opposed to a "natural model," for moral principles or principles of justice. As Dworkin explains the distinction, the constructive model

> treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulated features of a general theory to be constructed, as if a sculptor set himself to carve the animal that best fits a pile of bones he happened to find together. This 'constructive' model does not assume, as the natural model does, that principles of justice have some fixed, objective existence, so that descriptions of these principles must be true or false in some standard way. It does not assume that the animal it matches to the bones actually exists. It makes the different, and in some ways more complex, assumption that men and women have a responsibility to fit the particular judgments on which they act into a coherent program of action, or, at least, that officials who exercise power over other men have that sort of responsibility.[90]

85. *Id.* at xi.

86. *Id.* at 277.

87. *See id.* at vii; Dworkin, *supra* note 81, esp. 123-26.

88. *See* R. DWORKIN, *supra* note 72, at 160; Nickel, *supra* note 73, at 1119.

89. R. DWORKIN, *supra* note 72, at 158, ch. 6 *passim*.

90. *Id.* at 160.

One should have no trouble recognizing that the constructive model describes the concept of rights as features of a political theory, as discussed earlier.[91] It should also be apparent that the constructive model provides a role for a governmental decisionmaker, like a judge, whose decisions, fairness dictates, must flow from a body of convictions shaped by both the requirement of consistency and public debate.[92] Dworkin argues that the constructive model of moral principles, and not the natural model, can be supported by a coherence theory justification because the constructive model is consistent with the constant adjustment of principles and moral convictions required by coherence theory.[93]

Dworkin finds the deep theory behind Rawls's notion of the social contract to call for a deontological, "right-based" theory.[94] Social contract theory in general demands a right-based moral theory as opposed to a goal-based theory or a duty-based theory, because the essence of social contract is that the individual (theoretically) makes a choice concerning the nature of the future society based on his or her projected interests.[95] Rights protect these interests, while social goals or duties might subjugate such individual interests. The concept of rights that emerges from the deep theory behind contract theory, according to Dworkin, is a concept of "natural" rights. By this, he means that "they are not the product of any legislation, or convention, or hypothetical contract," which follows from the assumption that "the best political program, within the sense of [the constructive] model, is one that takes the protection of certain individual choices as fundamental, and not properly subordinated to any goal or duty or combination of these."[96] Given the premise that contract theory in general requires natural rights, the deep theory behind Rawls's formulation of the contract—agreement in the original position—will place restrictions on what kind of natural rights may exist. Because people in the original position are ignorant of their interests, they are left to choose some abstract rights. The two most likely to be chosen are the right to liberty and the right to equality. Since the right to liberty does not ensure much protection for the people in the original position, they would choose equality. Since

91. *See supra* text accompanying notes 76-79.

92. R. DWORKIN, *supra* note 72, at 162-63.

93. *See id.* at 164-66.

94. *Id.* at 169, 171. For a definition of "deontological" see J. RAWLS *supra* note 24, at 30. According to him, a deontological theory "either does not specify the good independently from the right, or does not interpret the right as maximizing the good." *Id.*

95. *See* R. DWORKIN, *supra* note 72, at 174-75.

96. *Id.* at 176-77.

equality of treatment by the government is more fundamental than equality of wealth, Dworkin finds that the deep theory behind Rawls's original position leads to the right to equal concern and respect as the fundamental moral right.[97]

For further illumination of Dworkin's theory of rights, it is important to view some aspects of his theory of adjudication. Since Dworkin sees no fundamental difference between moral standards and legal standards, he finds judges to be in the business of moral as well as legal decisionmaking. An examination of his theory of adjudication reveals that, despite the centrality of the notions of natural rights and political theory in his concept of morality, the concept incorporates constraint by community morality. This is clear from Dworkin's view of the task of a law judge. The judge is not left to make decisions based on his own personal preferences, but is to find preexisting rights and base his or her decisions on them.[98] Rights are primarily features of a political or moral theory and therefore it is the task of the judge to create a theory that can accommodate the existing rights in a coherent manner.[99] Yet, this theory must be constructed so as to fit or explain as well as possible the relevant case law precedent, the relevant statutory law, and, in addition, the judge's sense of the community morality.[100] Community morality, like law, is a matter of the best theory that can explain all agreed upon applications of a concept like fairness.[101] One looks to the clear cases of, for instance, recognized fairness, familiar to each who speaks the language spoken in that community, as well as to one's own convictions as a member of that community, as the available data for constructing a theory describing the community morality.[102] Therefore, the role of the judge is to devise a theory incorporating a coherent explanation not only of what courts and legislators within the jurisdiction have described as a binding contract, but also of what the commu-

97. *See id.* at 178-80. This theoretical justification provided by Dworkin for his rights scheme seems to fill out or explain the rights scheme more than it seems to provide justification for it. If indeed chapter six (pp. 150-83) of TAKING RIGHTS SERIOUSLY is intended to provide justification for the rights scheme, and not merely to be an interesting but unconnected gloss on Rawls, then Dworkin's approach to justification is quite interesting. He does not appeal to coherence theory itself as a foundation for the rights scheme as much as he appeals to Rawls. Rawls's book appears to be treated as the primary source of validity, and coherence theory is granted a subordinate position. This is not the last time that an appeal to Rawls as a standard and not just another theorist will be seen in this essay. *See infra* text accompanying notes 463-474.

98. R. DWORKIN, *supra* note 72, at 81, 84-85, 87.

99. *See id.* at 105.

100. *See id.* at 116-17, 128-29.

101. *See id.* at 128-29.

102. *See id.* at 127-28.

nity has considered to be fair, when, for instance, deciding a case upon unconscionable contracts. The theory, which must involve legal doctrine and also political and moral philosophy,[103] can be expected to adjust its conception of various rights with the advent of new precedent, and can be expected to differ from judge to judge.[104]

What emerges is a notion that the judge is free to theorize about rights, but can do so correctly only if the basis of the theory is found in the various "conceptions" the community has had of general moral and legal concepts.[105] Thus, while the theory of natural rights frees the judge from the need to rely on the preferences of the community revealed in any given poll, and also frees the judge from explaining why a theory and not the poll should be heeded in decisions about rights, it does not allow action on the basis of a theory relying solely on, for instance, perceived universal moral truths. The theory must be based on community morality and on legality revealed within the community by the historical development of its social institutions and public sentiments. Thus, the moral theory of Dworkin seems to be tethered between something reminiscent of Burkean conservatism, calling for slow, organic change of social norms,[106] and modern liberal reformism,[107] marching under the banner of moral rights such as equal concern and respect.

3. Charles Fried

Charles Fried presents a quite different theory of rights in *Right and Wrong*. He describes a moral system based on norms of right and wrong that are "categorical." The fact that certain consequences follow from acts that are right or wrong does not alter the acts' status as such, except in extreme cases.[108] Therefore, Fried's theory is nonconsequen-

103. *See id.* at 117.

104. *See id.* at 116-17.

105. In Dworkin's system, "concept" describes a notion like fairness for which a number of standard cases accepted by the community exist. "Conception" describes the theory of an individual community member that takes into account the standard cases and attempts to explain why each standard case is in fact a case of, for instance, fairness. Differing theories of what constitutes fairness within that community—that is, differing conceptions of fairness—cause individuals to take opposing views on whether borderline, controversial cases are cases of fairness. *See id.* at 134-35.

106. *See* E. Burke, *Reflections on the Revolution in France* in REFLECTIONS ON THE REVOLUTION IN FRANCE & THE RIGHTS OF MAN, 66-78 (1973).

107. *See, e.g.* the description of Earl Warren in G. WHITE, EARL WARREN: A PUBLIC LIFE 327-69 (1982).

108. *See* C. FRIED, RIGHT AND WRONG 10-11 (1978). An example of an extreme case is where "killing an innocent person may save a whole nation." *Id.* at 10.

tialist.[109] Of course, these rights are not merely subjectively valid, and thus this theory must be seen as nonintuitionist (in Rawls' sense).[110] The foundation of this moral system is the Kantian "[r]espect for persons, for their integrity as free, rational, incorporated agents."[111] This is the basis for the existence of negative rights as well as positive rights.[112] The latter, however, can be identified and catalogued only with the aid of a full economic and political theory.[113]

The way in which Fried seeks to justify his categorical norms contrasts with the theories viewed up to this point. Rather than justify his view by appealing to some feature of the structure of his theory, Fried seeks to justify his theory by appealing to history and to conventional moral sense. Thus, Fried presents a theory that seeks validity from the fact that it is grounded in traditional Judeo-Christian religious and social morality.[114] Fried states this outright at the beginning. In the first sentence of chapter one, he states, "This is the central concept of my work. Ordinary moral understanding, as well as many major traditions of Western moral theory, recognize that there are some things which a moral man will not do, no matter what."[115] It is somewhat surprising that this is the fullest treatment rendered the question of justification.

4. Other Theorists

Other members of the group of philosophers discussed in this essay have presented theories that do not deal at length with the question of justification. Robert Nozick, in *Anarchy, State and Utopia*, creates a libertarian political theory which is derived from Kantian notions that

109. *See* Barry, *supra* note 5, at 629-32. For an example of nonconsequentialist constitutional law commentary, see Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227 (1972).

110. *See* C. FRIED, *supra* note 108, at 167. For Rawls's definition of "intuitionism," *see supra* text at note 46.

111. *Id.* at 114. *See id.* at 118. One may note in the writings of several of the modern moral philosophers, as well as in the writings of the new breed of constitutional law commentators, renewed appreciation for the Kantian perspective in moral philosophy. *See, e.g.*, J. RAWLS, *supra* note 24, at 179-83; R. DWORKIN, *supra* note 72, at 198-200; B. ACKERMAN, *supra* note 5, at 71-72; R. NOZICK, *supra* note 32, at 30-31; Michelman, *supra* note 11, at 149-52.

112. Fried explains: "A positive right is a claim to something—a share of material goods, or some particular good like the attentions of a lawyer or a doctor, or perhaps the claim to a result like health or enlightenment—while a negative right is a right that something not be done to one, that some particular imposition be withheld." C. FRIED, *supra* note 108, at 110.

113. *See id.* at 118.

114. *See* Barry, *supra* note 5, at 633.

115. C. FRIED, *supra* note 108, at 7. For more explicit references to appeals to sense or intuition, see *id.* at 20, 150-53.

persons are ends and not means, that persons are inviolable, and that persons have existences separate from society and separate from each other.[116] According to this theory the individual possesses rights akin to Locke's natural rights. These rights arise by virtue of personality, and not by virtue of association with a state or community.[117]

T. M. Scanlon, in *Rights, Goals, and Fairness*, presents a modified or limited utilitarian approach in which the value of the consequences of acts determines whether those acts are right, except that certain rights may be specified to alter the outcome of a simple utilitarian calculation.[118] This "two-tier" modified utilitarian approach results from Scanlon's assertion that subjective preferences do not provide the sole basis for the valuation of acts and outcomes, but rather objective "benefits and burdens" are to be placed in this role. Scanlon submits that happiness or the fulfillment of personal preferences is not the only good, but that in addition the maintenance of fair procedures and the promotion of equality in distribution are also to be valued, for they are "moral goals" and are "among the properties that make states of affairs worth promoting."[119] As a result, certain rights, such as the guarantee to basic material entitlements and to certain civil liberties, are derived from this consequentialist scheme. The determination that such moral rights exist is supported by an empirical determination that in the absence of such rights the resulting society would be unacceptable.[120]

Thomas Nagel, in *The Fragmentation of Value*, voices skepticism that any single theory or method could provide a means for finding which decisions are morally correct. The reason for this is the existence of diverse sources of values that are relevant to such determinations.[121] It is for this reason that Nagel finds fault with any form of utilitarianism.[122] The fact that the success of a general theory of morality seems doubtful does not mean, however, that work cannot be done in moral philosophy, but only that the scope of any particular investigation must be narrowed. The reason one must understand this limitation is so that, among other things, one may avoid "romantic defeatism," which causes one to abandon pursuit of a rational moral theory "because it

116. *See* R. NOZICK, *supra* note 32, at 30-33. *See also* Hart, *supra* note 5, at 831-32; Nagel, *Libertarianism Without Foundations*, 85 YALE L.J., 136, 142 (1975).

117. R. Nozick, *supra* note 32, at 6-12, 45-51, 57-58.

118. Scanlon, *supra* note 15.

119. *Id.* at 98-100. *See id.* at 95, 97.

120. *See id.* at 103.

121. T. NAGEL, *The Fragmentation of Value* in MORTAL QUESTIONS 132, 134 (1979) (article first published in 1977).

122. *See id.* at 131-32.

inevitably leaves many problems unsolved."[123]

One type of moral approach that Nagel favors is described in *War and Massacre*.[124] In this essay Nagel examines the conflict between two types of moral reason—"utilitarianism" and "absolutism." Utilitarianism, which involves maximizing the good, entails that "if faced with the possibility of preventing a great evil by producing a lesser, one should choose the lesser evil."[125] Absolutism, on the other hand, concerns what people deliberately do, as opposed to what people bring about.[126] Thus, if an act is forbidden, an absolutist ought not commit the wrong no matter what the resulting benefits might be. These two types of moral reasoning stem from two different approaches to the moral self.

> Absolutism is associated with a view of oneself as a small being interacting with others in a large world. The justifications it requires are primarily interpersonal. Utilitarianism is associated with a view of oneself as a benevolent bureaucrat distributing such benefits as one can control to countless other beings . . . . The justifications it requires are primarily administrative.[127]

Nagel presents "a somewhat qualified defense" of absolutism.[128] He defends absolutism because he finds that "it underlies a valid and fundamental type of moral judgment—which cannot be reduced to or overridden by other principles."[129] The defense is qualified because he finds that when utilitarian and absolutist considerations conflict, and when the utilitarian considerations are "overpoweringly weighty and extremely certain" then "it may become impossible to adhere to an absolutist position."[130] Nagel concludes that when tragedy will result unless a great wrong is committed, there may be "no moral course for a man to take, no course free of guilt and responsibility for evil."[131] It is possible, that is, that these two forms of moral intuition, absolutism and utilitarianism, cannot be placed into one comprehensive, coherent moral theory.[132]

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123. *Id.* at 137.

124. T. NAGEL, *War and Massacre* in MORTAL QUESTIONS 53 (1979) (article first published in 1972).

125. *Id.* at 55.

126. *Id.* at 59.

127. *Id.* at 68.

128. *Id.* at 56.

129. *Id.*

130. *Id.*

131. *Id.* at 73-74.

132. *Id.* at 73.

A review of the theories of this group of anti-utilitarian philosophers shows constructive attempts to break away not only from the tradition of utilitarianism, but also from intuitionism—the view that there can be no standard moral justification. Some of these nonutilitarian theories appeal for justification to the coherence of principles, postulates, and new information. Some appeal to traditional notions of morality. All of them (except perhaps for that of Nagel) assert that there are basic rights or basic values which can support a system of moral norms.

II. The Nexus Between Moral Philosophy and Constitutional Law Commentary

As seen in the previous section, the trend in modern moral philosophy is to reject utilitarianism as the basis of ethical systems.[133] The destructive achievements of the critics of utilitarianism left moral philosophers in danger of having no theoretical support for their ethical judgments. Consequently, in order to escape intuitionism, the development of new theories with nonutilitarian justifications was necessary.

The question that must be confronted at this point is why the movement among certain philosophers away from utilitarianism and intuitionism and toward rights-based moral theories would be of interest to academics concerned with constitutional law. The answer is that constitutional law commentators are concerned with the ability of the Supreme Court to make decisions in a manner consistent with notions of democracy. Theories of utilitarianism and of intuitionism bear both upon the validity of our notions of democracy, and upon the ability of the Supreme Court to make correct decisions.

One value which seems to have been accepted by all constitutional law commentators is the value of having a sufficiently democratic government. John Hart Ely, an opponent of the search for values that has begun in constitutional commentary, states:

> We have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government.
>
> Our constitutional development over the past century has . . . substantially strengthened the original commitment to control by a majority of the governed. Neither has there existed among theorists or among Americans generally any serious challenge to the general notion of majoritarian control."[134]

133. *See supra* text accompanying notes 15-45.

134. J. ELY, DEMOCRACY AND DISTRUST 5, 7 (1980).

Therefore, for the purposes of inquiry into matters of constitutional law, in general that which upholds democracy is good, and that which restricts democracy is bad.

Part of the constitutional law commentators' interest in the rise and fall of utilitarianism is generated by the perceived link between utilitarianism and democracy.[135] Utilitarianism can be seen as providing some reassurances that majoritarian processes are indeed as valuable as believed. Utilitarianism, therefore, appears to be good. Attacks on utilitarianism are worrisome. Ely states that an important means of defending or justifying our attachment to democracy is by establishing the connection between democracy and the philosophical tradition of utilitarianism.[136]

> What is important to an attempt to understand the seemingly inexorable appeal of democracy in America is that whether we admit it or not—which is largely a function of whether our descriptive eye is distracted by the side constraints and distributional corrections or rather remains on the underlying system being corrected—we are all, at least as regards the beginnings of our analysis of proposed governmental policy, utilitarians.[137]

This begins to reveal some of the fire that may lie behind the utilitarian controversy. Is Ely claiming, in the interests of democracy, that Rawls, Fried and Nozick are not American or merely that they are distracted?

Ely presents several connections between utilitarianism and democracy. He draws an analogy between the registering of preferences in the utilitarian calculus and the registering of choices in voting. He also points out that both systems assume that only the individual can determine what makes him or her happy. Ely further analogizes the metering of strength of preference in the utilitarian calculus to the ef-

135. Even in the early stages of the development of utilitarian theory, the connection with the democratic process was perceived. In an essay suggesting certain types of parliamentary reform, Jeremy Bentham states, "Take for the description of the ultimate end, advancement of the universal interest. In the description of this end is included—comprehension of all distinguishable particular interests . . . with exception to as small an extent as possible, interests all to be advanced: without any exception, all to be considered. 1. In the character of a means, in this same description is moreover included—if it be not the same thing again in other words—practical equality of representation or suffrage." J. BENTHAM, *Parliamentary Reform Catechism* in A BENTHAM READER 310, 324 (M. Mack ed. 1969). See also *id.* at 320-21, where Bentham equates the "democratical interest" with the "universal interest."

136. *See* Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 405 (1978). One should not think that Ely's attachment to utilitarianism is a function of ignorance of the modern literature attacking utilitarianism. He cites some of it during the discussion being reviewed. *See, e.g., id.* at 405-06, nn.24-27.

137. Ely, *supra* note 136, at 406. For a contrasting view, see Rawls, *Social Unity and Primary Goods*, in UTILITARIANISM AND BEYOND 182-83 (A. Sen & B. Williams eds. 1982).

fects of persuasion launched by one who is especially activated by a cause or candidate.[138]

One may argue that the more the virtues of democracy are accepted, the less one should accept the intrusion of the Supreme Court into various controversies.[139] This is especially true when the effect of the intrusion is to invalidate or supercede the commands of a popularly elected legislative body. All of this assumes, however, that "democracy" means allowing as many decisions as possible to be made by the people, or perhaps, by their representatives. It is not clear that everyone accepts this meaning of democracy, nor is it clear how allegiance to a constitution can be incorporated into this kind of democracy. Part of what characterizes the positions of the new wave of constitutional law commentators is that they are not satisfied with these notions of democracy, nor with trends in decisions made under the present version of democracy which reflect these notions. Thus, it becomes important for them to attack such notions of democracy and their foundations, or at least to weaken the influence of these notions on theories of judicial review.

Striking parallels exist between the dissatisfaction with the results of the majoritarian process on the part of the new constitutional law commentators, and the dissatisfaction with the results of utilitarianism as noted by Williams, Dworkin and Scanlon. Even Ely finds that uncorrected utilitarianism leads to improper results.[140] Ely's response to this is to attempt to correct the analogue of the utilitarian system—the democratic system—by making it more democratic. However, another course is possible. As Dworkin and Scanlon argue, one can correct the process through the assertion of values despite the utilita-

138. *See* Ely, *supra* note 136, at 407-08. Drawing an analogy between the monitoring of preferences in the utilitarian calculus and the monitoring of preferences in a vote, in legislative decisionmaking, or in the marketplace, is central to many of the observations made in this article. It is not the case, however, that all utilitarian theorests view the utilitarian calculus as an aggregation of preferences. Some, like Scanlon, see it as an aggregation of "benefits and burdens." Scanlon, *supra* note 15, at 95-98. Such theories do not provide close analogies to voting, etc. Also, even if one conceives of utilitarianism as the monitoring of preferences, the utilitarian calculus cannot necessarily be identified with the vote or market outcomes. Those types of preference monitoring may be perceived as not sufficiently accurate or comprehensive.

139. *See* Sandalow, *supra* note 6, at 1163, 1165. The democracy being discussed here is "pure (representative) democracy" and that which comes closest to approaching it. Certainly it may be argued that judicial activism is necessary and desirable for the furtherance of the values of "constitutional democracy." *See* Wright, *supra* note 2, at 787-88. It will be important throughout the perusal of these various arguments to discern exactly what each theorist means by "democracy."

140. *See* Ely, *supra* note 136, at 406.

rian/democratic tally. This alternative course has been adopted in various ways by the new trend constitutional law commentators. This option is undoubtedly undemocratic in the "pure" sense, but possibly not undemocratic in the broader, "constitutional" sense.[141]

Dissatisfaction with strictly majoritarian notions of democracy and with the results of the majoritarian process is the first link between the new commentators and the anti-utilitarian philosophers. The commentators could look to the philosophers' criticism of utilitarianism to help convince themselves and others that strict adherence to the results of popular or representative votes is not necessarily the ultimate answer to political questions. The second link is the commentators' need to convince themselves and others that the Supreme Court has the ability to make correct decisions, that is, that values other than the values of strict majoritarianism could and should be asserted by the Court. This possibility is supported by the development of new nonutilitarian theories and the fight against intuitionism waged by the philosophers.

Ely has chosen a "representation-reinforcing" orientation as opposed to one calling for the judicial imposition of "fundamental values," not only because in his estimation the latter is "inconsistent with representative democracy,"[142] but also because he feels that there is no foundation for the assertion of such values. Such values are not justifiable; they are not sufficiently universal.[143] These two reasons imply that the only "true" values are those that result from the majoritarian process. Ely's doctrine is an example of the pluralism that Rawls found closely linked to intuitionism.[144] On the other hand, to the extent that the philosophers can provide nonutilitarian, nonintuitionist moral theories, support is thereby provided to the constitutional law commentators who wish to argue for the assertion of values by the Court and the abandonment of the various versions of representation-reinforcement theory.

Aside from democracy, there is another source of legitimacy which can be attacked through an attack on utilitarianism—the free marketplace.[145] Just as democratic notions may grant legitimacy to certain

141. *See supra* note 139.

142. J. ELY, *supra* note 134, at 101-02. For a discussion of Ely's representation-reinforcing approach to judicial review, see *infra* text accompanying notes 201-05.

143. *See* J. ELY, *supra* note 134, at 43-72, esp. 56-69. Other traditional constitutional law commentators would agree that the wholesale injection of values by the Court is undemocratic and unjustifiable, but unlike Ely, might turn to extreme judicial restraint rather than to the support of representation-reinforcing values. *See* Wright, *supra* note 2, at 773-83.

144. *See supra* text accompanying notes 48-49.

145. The similarities between democracy and the free market system, because of their similarity to utilitarianism, can be seen (although they are not commented on) in

laws no matter how unfair, approval of the free enterprise system may grant legitimacy to the present economic situation, no matter how uneven the distribution of wealth within the society. The economic analysis of rights (EAR) strikes Charles Fried as a sophisticated utilitarian theory in urgent need of refutation.[146] EAR is an analogue to, or application of, utilitarianism that attempts to justify the allocation of rights made by an unencumbered, frictionless market situation. Just as utilitarianism seeks to structure society so as to lead to the greatest aggregate pleasure as measured by the utilitarian calculation, EAR seeks to allocate rights so as to maximize efficiency and thus approach Pareto-optimality.[147] Thus, where the utilitarian finds pleasure, happiness, or the fulfillment of preferences to be the only source of good, analogously the EAR theorist finds wealth or the fulfillment of preferences to be the only source of good. The only reliable guide to what will fulfill the preferences of the individual is the bargaining behavior of the individual in the marketplace. Therefore, in the ideal situation (i.e., in which there are no transaction costs),[148] the good comes about as the result of bargaining in the perfectly free marketplace.[149]

The EAR theorist is concerned with the proper entitlement of rights in the real world, as opposed to the ideal world—one free of transaction costs. However, the EAR theorists would like to achieve a market situation that approximates the ideal, unrestrained market; thus they will argue for an allocation of rights that would cause an actual market to tend to function like an ideal market and, consequently, would maximize efficiency.[150]

Accordingly, EAR may legitimate the present workings of the market in three ways. First, to the extent that the present market approaches the frictionless, unrestrained market, the market is good, for it will correctly allocate goods. Second, since preferences are the only indication of the good, and preferences are evidenced faithfully only in bargaining in the marketplace, then whatever is purchased is at least prima facie good and thus the results of bargaining in the market are prima facie good. Third, since efficiency is the moral goal, the collec-

Michelman, *Politics and Values or What's Really Wrong With Rationality Review*, 13 CREIGHTON L. REV. 487, *passim.* (1979).

146. *See* C. FRIED, *supra* note 108, at 85-86.

147. *See id.* at 89, 92. For a definition of Pareto-optimality, see *supra* note 34.

148. Transaction costs are "the costs of effecting a transfer of rights," presumably property rights. R. POSNER, ECONOMIC ANALYSIS OF LAW 30 (2d ed. 1977). *See* C. FRIED, *supra* note 108, at 89.

149. *See* C. FRIED, *supra* note 108, at 89-91.

150. *See id.* at 92.

tive goal of business—to maximize profit—is at least prima facie good, so long as externalities are kept low. Thus, EAR and utilitarianism can be seen to legitimate the current workings of the market, at least in the eyes of those who will argue that the current market is as close as can be expected to either a frictionless market, or to a market without significant externalities. Or, alternatively and perhaps more in keeping with the intent of the EAR theorists, it could be argued that no alteration of the society's economic situation can be allowed under EAR unless those alterations further the efficiency of the marketplace. More important, EAR supports a view that workings of the unencumbered market provide the only indication we have of what is to be valued.[151]

The new constitutional law commentators may wish to discredit the results of the workings of the marketplace. The marketplace may deny rights that the commentators find implied in the Constitution or implied in the function of the Supreme Court. Most notably, various welfare rights might find legitimacy if the marketplace, which denies these rights, were not itself seen as morally legitimate. To the extent that utilitarianism (and thus EAR) can be discounted, the present workings of the marketplace can be discredited, leaving room for the assertion of various welfare rights. It should be noted, in addition, that the evils of the workings of democracy and the evils of the workings of the marketplace are not isolated. One of the perceived problems of modern democratic systems might be the extent to which wealth influences the outcome of elections and legislative decisions. Because of advertising and lobbying, in fact, it is difficult to separate the two. Therefore, those who are disheartened by the present status of legal rights would be well served by a theory which could discount the legitimacy of both democratic processes and products of the marketplace.

The nexus that has been suggested is a theoretical nexus only; the theories of the philosophers can be seen to fit the theoretical needs of the commentators. The new commentators would like to assert that the Court has the right in some cases, especially when fundamental rights are threatened, to nullify legislative commands. They would like to assert that the Court can rectify situations that deny fundamental rights. Their cause would be bolstered by the presentation of good arguments supporting first, the existence and force of such fundamental

151. Some economic analyses conclude that legislatures on the whole do not promote economic efficiency. *See* Michelman, *Constitutions, Statutes and the Theory of Efficient Adjudication*, 9 J. LEGAL STUD. 431, 440-41 (1980). This renders the analogy between legislative action and classical utilitarianism, which would uphold the prima facie validity of legislative action, more complicated. It is possible, then, that a utilitarian would prefer the economic analogue to the legislative one, and place trust (for day to day issues) solely in the market.

rights, and second, the assertion that in many cases the Court is more qualified than a legislature to discern and enforce those rights.

Within the utilitarian perspective, there exist no rights except those which would maximize the society's aggregate pleasure. If one assumes that pleasure is the fulfillment of an individual's preferences, and that each individual knows best what his or her respective preferences are, then there exist no rights other than those which would be favored as the result of monitoring the preferences, either through polls (or representatives) or through the market. From this perspective there would be no rights over which the Court could claim dominion. Arguments discounting the utilitarian perspective and supporting the existence of objective rights, discerned through some exercise of reason, would meet both of the needs of the new commentators. Such arguments would claim the objective existence of fundamental rights, and would give a reason why the Court might be more qualified than the legislature in discerning those rights—because the Court is a detached, reasoning body.

Whether there is any type of causal relation between the theories of one and the writings of the other may only be surmised. Three types of relations may be involved. First, since the work of at least one of the philosophers viewed[152] (if not his most relevant work) was cited by each of the commentators, it is possible that the writings of the philosophers actually influenced some commentators and thus directly or indirectly influenced others. All of the philosophical materials reviewed in this article are quite accessible to any individual commentator. Second, this trend in philosophy as well as this trend in constitutional law commentary may reflect some great change in social perspective, and may be epiphenomena of some more basic intellectual shift. Third, there may have been some conditions that forced a change among commentators, which, coincidentally, is well serviced by a parallel trend in moral philosophy.[153]

III. The Traditional Commentary

The trend currently developing in theories of Supreme Court adjudication that favors an appeal to determinate values, provides an exam-

152. The philosopher is, of course, John Rawls, who is cited for his book, A THEORY OF JUSTICE (1971).

153. Martin Shapiro has suggested that the younger commentators' exposure to the Warren Court and lack of exposure to the Court's role in the New Deal may be responsible for this recent trend toward the assertion of values among the Supreme Court commentators. *See* Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values* in THE BURGER COURT (V. Blasi ed. 1983).

ple of the seesaw effect in intellectual movements.[154] In some ways this new trend, which proposes that the Court may be justified in providing and asserting values rather than exercising deference to the various legislative bodies, can be likened to the formalism that dominated the theories of Supreme Court adjudication before the turn of the century. It was against this formalism that the legal realists launched their attacks.[155] In some ways, the present conventional constitutional law commentary is an extension of the realist tradition. The new movement toward the assertion of values is, in turn, a reaction to the skeptical doctrines of the realists and their progeny.

There is, however, a profound difference between those who subscribed to nineteenth century formalism and those who are forming this most recent movement. The difference is, basically, that a member of the former group would have believed that the values required for Supreme Court adjudication were to be found within the Constitution,[156] even if the Constitution was seen merely as the vehicle for enumerating "natural rights" which are independently valid.[157] The assertion of values from within the Constitution, although attacked by the realists since the early part of the century, still had an impact on decisions well into the new century.[158] Yet as the confidence in objective values waned, reliance upon democracy as the sole source of values took firmer hold. As time passed, however, restlessness with this crisis in values[159] and impatience with its material results have invited a rebirth in the assertion of values. This time, the values embraced are

154. Compare the Hart quote about the current shift away from utilitarianism in the text accompanying note 5, *supra*, with the following statement by Roscoe Pound: "There has been a notable shift throughout the world from thinking of the task of the legal order as one of adjusting the exercise of free wills to one of satisfying wants, of which free exercise of the will is but one. Accordingly, we must start today from a theory of interests, that is, of the claims or demands or desires which human beings, either individually or in groups or associations or relations, seek to satisfy, of which, therefore, the adjustment of relations and ordering of conduct through the force of politically organized society must take account." Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 1 (1943).

155. *See* Sandalow, *supra* note 6, at 1172-73; Wright, *supra* note 2, at 773-75. *See also* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 13-24 (2d ed. 1978).

156. *See* Sandalow, *supra* note 6, at 1164-73.

157. *See* Perry, *supra* note 12, at 696-97, esp. 696 n.38.

158. *See* Sandalow, *supra* note 6, at 1173.

159. *See* Fiss, *supra* note 7, at 16-17. See also Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 741 (1982) [hereinafter cited as *Objectivity*], in which he states, "The nihilism of today is largely a reaction to [the] reconstructive effort of the sixties. It harks back to the realist movement of an earlier era, and coincides with a number of contemporary phenomena— . . . [including] a social and political culture dominated by the privatization of all ends."

culled not from within the Constitution, but from without.[160] For this reason, the new assertion of values is more dissonant with democratic notions than was the assertion of values through nineteenth century formalism. At least if the values were claimed to have been derived from the Constitution, their use would be justified by virtue of the democratic adoption of the Constitution. In this situation, the justices could reply to attacks on the values used, "We didn't do it—you did."[161]

As with all blossoming intellectual movements, even small ones, the trend towards the assertion of values by constitutional law commentators can be better appreciated after acquaintance is made with the precedent theories. The doctrine developed by the predecessors, which, for the purposes of this article, may be called the "traditional commentary," has been shaped to some extent by the legal precedents of *Lochner*[162] and its comrades,[163] the historical conditions surrounding the New Deal,[164] and the culture's philosophical atmosphere,[165] which embraced what Rawls would call intuitionism.[166] Thus, the traditional commentary was developed in order to disfavor judicial activism because of its harmful results and because of the perceived absence of a possible theoretical foundation. Of course, judicial review is a tradition that cannot be done away with completely, and it is the task of any constitutional commentator, traditional or innovative, to carve out theoretical justification for the desired degree of judicial power.[167] Therefore, the traditional commentators are forced to justify some minimal

160. The author does not mean to imply that the new commentators see *no* connection between the Constitution and the asserted values. However, their definition of these values and support for the assertion thereof do not begin and end with the text of the Constitution. Those who seek to receive all guidance from the text of the Constitution have been labeled "interpretivists," and their opponents, "noninterpretivists." *See* J. ELY, *supra* note 134, at 1; Grey, *Do We Have an Unwritten Constitution*? 27 STAN. L. REV. 703 (1975). One should not assume that because the commentators who are now arguing for the assertion of values are noninterpretivists, all modern noninterpretivists belong to this group of value-asserting commentators. Ely, for instance, criticizes the assertion of values and is a noninterpretivist. There is doubt, however, as to whether a noninterpretivist can really create a theory devoid of asserted values.

161. Grey, *supra* note 160, at 705.

162. Lochner v. New York, 198 U.S. 45 (1905).

163. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Allgeyer v. Louisiana, 165 U.S. 578 (1897). *See also* Grey, *supra* note 160, at 711; Perry, *supra* note 12, at 702-03.

164. *See* Shapiro *supra* note 153.

165. *See* Wright, *supra* note 2, at 781.

166. *See supra* text accompanying note 48.

167. *See* Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1203 (1978).

amount of judicial review by calling on the only sure things in the modern world, democracy and the intellectual prowess of the lawyer.[168]

Many of the features of the conglomerate of theories comprising the traditional commentary can be seen in the opinions of Justice Frankfurter. The primary tenet to which the traditional commentators profess faith is the necessity of deference by the Court to legislatures and majoritarian decisionmaking. Frankfurter champions the cause of judicial modesty.[169] In his view, judicial review must be kept well confined, for it "prevent[s] the full play of the democratic process."[170] Thus, the Court, in deference to the democratically responsible organs of government, should set aside legislative pronouncements only in extreme cases—when, for example, there is no "reasonable basis" for the judgment below, or the statute to be reviewed is not sufficiently specific to meet the requirements of due process, or the procedure under review is unfair.[171] For Frankfurter, political problems are a matter of conflicting interests of the citizenry. Therefore, resolution of political problems, or creation of good policy, cannot be achieved by applying absolute rules, but only by "candid and informed weighing of the competing interests."[172] The idea that interest balancing is the proper means for making policy helps to explain not only how the Court is to make its decisions (seen especially in First Amendment cases), but also why deference must be paid to legislative decisions. Since there is no a priori hierarchy of interests, balancing should be done in a way that is most faithful to all of the interests of the society bound by the statute. Therefore Congress, or the state legislature, should be allowed its policy judgments, for it is more sensitive than the Court to the interests of the relevant society.[173] The Court, according to Frankfurter, may not divorce constitutional provisions from their historical contexts in order to justify the nullification of legislative judgments.[174] Thus, the country must trust in the fact that, except where constitutional provisions are clearly abridged, personal freedom is best protected by the majoritarian process, as long as that process remains unobstructed.[175]

168. *See* Wright, *supra* note 2, at 773-74.

169. *See* Shapiro, *Judicial Modesty: Down With the Old!—Up With the New?*, 10 U.C.L.A. L. REV. 533, 543-48 (1963).

170. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 650 (1943) (Frankfurter, J., dissenting).

171. *See* Dennis v. United States, 341 U.S. 494, 525-26 (1951) (Frankfurter, J., concurring).

172. *Id.* at 525.

173. *Id.*

174. *See* Minersville School Dist. v. Gobitis, 310 U.S. 586, 594 (1940).

175. *See id.* at 599.

Similar justifications for judicial modesty and deference to legislatures are presented by various other adherents of the traditional commentary. Learned Hand, for instance, preached extreme judicial modesty. Finding no basis for judicial review in the Constitution, Hand states that the only justification for the institution of judicial review is the practical need in our government for one organ to settle disputes among the federal branches, or between the federal government and the states, so that the system does not collapse. The Court may exercise its power to nullify statutes only when the responsible organ has overstepped its constitutionally granted power in enacting the statute.[176] The Court should not substitute its substantive judgments for those of the legislatures, for it has no basis for doing so. Policy choices are simply a matter of determining how much satisfaction will result in the society from the choice, after the conflicting preferences of individuals cancel each other.[177] Given the fact that democratic participation is indeed valuable, and that there is no reason to believe that any objective values exist, legislative choices must be favored, and the majoritarian process must be trusted to bring about a good society.[178]

Alexander Bickel argued for judicial modesty in a different way. Bickel, who in 1962 argued for the role of the Court as enunciating, ordering, and applying "certain enduring values of our society,"[179] retracted to a position of values skepticism and judicial modesty in 1969. Taking the stance that the Court functions properly only if its decisions are "effective," "good," and "acceptable to society,"[180] Bickel claims that the Court should not assert values and thereby make policy, for the Court cannot do so and function properly. According to Bickel, the Court acts legitimately only insofar as it decides on the basis of reason and immutable principles. Because the Court must must be bound by unyielding principles and because the Court is removed from the people, it cannot produce effective or good decisions by introducing policy that will be responsive to change, and to the changing interests of the people.[181]

Robert Bork agrees with Bickel that the Court may exercise its

176. *See* L. HAND, THE BILL OF RIGHTS 27-30, 66-67 (1958).

177. *See id.* at 38.

178. *See id.* at 73-74.

179. A. BICKEL, THE LEAST DANGEROUS BRANCH 23-27, 58, 235-36 (1962).

180. A. BICKEL, *supra* note 155, at 107. This book was first published in 1970.

181. *See id.* at 75. Bickel, incidentally, seems to have defied whichever forces have been at work to create the trend charted in this article.

power legitimately only when it makes principled decisions.[182] Further, Bork argues that the Court may use only such principles in its decisions as derive from the text and the history of the Constitution, and "their fair implications."[183] As long as the Court restricts the ambit of its power to interpretation of the Constitution, it cannot be said to be countermajoritarian, for the people have consented to the dictates of the Constitution.[184] Bork proclaims that the will of the majority, and the Constitution by virtue of its being adopted by the majority, comprise the only sources of values for principled decisionmaking, for "[t]here is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another."[185] Bork goes on to say,

> A right is a form of property, and our thinking about the category of constitutional property might usefully follow the progress of thought about economic property. . . . The modern intellectual argues the proper location and definition of property rights according to judgments of utility—the capacity of such rights to forward some other value. We may, for example, wish to maximize the total wealth of society . . . .[186]

Bork, then, provides a clear example of how utilitarian definitions of rights or values have become integral to the argument for judicial modesty in the traditional commentary. The utilitarian influence seen in the priority given to interest accommodation, is present also in these sketches of the theories of Frankfurter, Hand and Bickel.

The view that generalizable principles must guide the Court in its decisionmaking, seen especially in the approaches of Bickel and Bork, was given its classical enunciation by Herbert Weschler. According to Wechsler, the Court's decisions must be principled, for "the main constituent of the judicial process is precisely that it must be genuinely principled."[187]

> A principled decision, in the sense that I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this

182. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1-2 (1971). *See also* Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*," 78 HARV. L. REV. 143 (1964).

183. Bork, *supra* note 182, at 5-8. *See also id.* at 17.

184. *See id.* at 2.

185. *Id.* at 10.

186. *Id.* at 18.

187. H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 21 (1961). The essay also appears as an article at 73 HARV. L. REV. 1 (1959).

> kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive.[188]

This requirement constraining the choice of principles used in adjudication is presented as being perhaps more fundamental than the requirement that the Court base its decisions on the Constitution, for such "neutral principles" must be used in the interpretation of the Constitution.[189] Perhaps the underlying assumption is that the Constitution is fundamentally unclear, and therefore neutral principles may be the only truly meaningful restriction on the Court's decisionmaking. It was this sentiment to which Bork responded, reasserting the centrality of the text of the Constitution in Supreme Court adjudication.[190] Although it is not clear that this was Wechsler's intention, the "neutral principles" doctrine was used by the traditional commentators, especially Bickel and Bork, to argue for severe restraint by the Court.[191]

Wechsler's neutral principles criterion for proper judicial decisionmaking is characteristic of the traditional commentary because of its procedural nature. Much of the traditional commentary is aimed at defining a role for the Court in which substantive judgments are absent and procedural rules for decisionmaking suffice. Thus, Wechsler may be read as arguing that primary importance lies not with which principles are used by the Court, but rather with whether the Court follows the procedure of applying the same principles to like cases.[192] Indeed, Robert McCloskey has presented an argument for judicial modesty premised on the view that the Court should limit itself to "non-substantive scrutiny" consisting of "procedural fault-finding and statutory interpretation,"[193] because therein lies its competence.[194] McCloskey associates the policy of non-substantive scrutiny with Frankfurter.[195]

Certainly Frankfurter's notion of balancing interests is ostensibly a formula for non-substantive scrutiny. When the Court resorts to interest balancing, usually in First Amendment cases, it need inject no sub-

188. H. WECHSLER, *supra* note 187, at 27.

189. *See id.* at 23-24.

190. *See* Bork, *supra* note 182, at 7-8.

191. *See, e.g.*, A. BICKEL, *supra* note 155, at 96-100, 175-77; Bork, *supra* note 182, at 5-12.

192. *See* A. BICKEL, *supra* note 179, at 50, where he describes Wechsler's proposal as creating a "process" for judicial review.

193. McCloskey, *Useful Toil or the Paths of Glory? Civil Liberties in the 1956 Term of the Supreme Court*, 43 VA. L. REV. 803, 830 (1957) [hereinafter cited as McCloskey, *1956 Term*]; McCloskey, *The Supreme Court Finds a Role: Civil Liberties in the 1955 Term*, 42 VA. L. REV. 735, 758 (1956) [hereinafter cited as McCloskey, *1955 Term*].

194. *See* McCloskey, *1956 Term, supra* note 193, at 832-35; McCloskey, *1955 Term, supra* note 193, at 760.

195. *See* McCloskey, *1955 Term, supra* note 193, at 758.

stantive policy choice. It may simply determine the strengths of the conflicting interests—which presumably exist independent of the preferences of the Justices—and go through the procedure of balancing or comparing. When the raw materials for proper policymaking lie scattered among the populace—that is, when proper policymaking involves monitoring the preferences of the people—a contentless procedure is well suited for aiding the decisionmaker.

Since in utilitarian and majoritarian theories there can be no relevant input for policymaking besides the manifestations of personal preference, what a policymaker needs is a method for polling the preferences—a procedure—which will not betray the influence of other factors. Therefore, it is not surprising that those traditional commentators who hold theories of judicial modesty based on the belief that personal preferences form the only possible foundation for proper policy decisions, would defend a model for decisionmaking such as interest balancing on the basis of its procedure-like quality. Accordingly, Wallace Mendelson argues in support of interest balancing because in his opinion there can be no objective standards relevant to the proper resolution of First Amendment conflicts.

> It is largely because of the absence of defining standards, I suggest, that the Court has resorted openly to balancing in free speech cases. We have had too many opinions that hide the inevitable weighing process by pretending that decisions spring full-blown from the Constitution . . . . Open balancing compels a judge to take full responsibility for his decisions . . . . Above all, the open balancing technique is calculated to leave "the sovereign prerogative of choice" to the people—with the least interference that is compatible with our tradition of judicial review.[196]

Those attacking interest balancing, attack, at least in part, on the basis that it is merely a procedure without substance. First Amendment balancing has been attacked for reducing First Amendment rights to a calculation of expediency with respect to competing interests,[197] for removing the Constitution from constitutional matters,[198] and for being unprincipled, or at least not openly principled.[199]

196. Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821, 825-26 (1962).

197. *See, e.g.*, Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1440 (1962).

198. *See, e.g.*, Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729, 732-37 (1963).

199. *See, e.g., id.* at 732, 748-49. The possibility that mere "procedures" like interest balancing might be hiding something, like a "substantive" underpinning, becomes very important as the debate for and against value assertion progresses. It is important to decide

Another procedural model for judicial modesty characteristic of the traditional commentary is based on notions of legislative failure and Justice Stone's footnote four in *Carolene Products*.[200] John Hart Ely has developed a theory of judicial review based on the message of footnote four, which he takes to be that we should "focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted."[201] Under this theory, the Court steps into the policymaking fray only when the government is "systematically malfunctioning" because the political process, as facilitated through the representative organs, is preventing political change or systematically disadvantaging some minority. The Court is well equipped to play the role assigned by this "representation-reinforcing approach" not just because lawyers are expert in procedure, but because judges are removed from the political pressures which would tempt legislators into restricting the political process in the first place.[202] When there is a "stoppage" in the representational aspect of the political system the Court should "unblock" it.[203] Since the Court must affirmatively institute that which the hypothetical blocked system would have produced, it is unlikely that the Court under Ely's theory would be kept free of

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whether the procedure-substance dichotomy really makes any sense, or instead whether decisionmaking "procedures" are inescapably "substantive."

200. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). It reads as follows:

"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

"It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [Citations are given for cases] [o]n the right to vote, . . . on restraints upon the dissemination of information, . . . and . . . as to prohibition of peaceable assembly . . . .

"Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (citations omitted).

201. J. ELY, *supra* note 134, at 77. For an earlier footnote four analysis see M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW ch. 1 (1966).

202. *See* J. ELY, *supra* note 134, at 102-03.

203. *Id.* at 136.

substantive determinations.[204] Therefore, Ely's theory is not procedural in the sense that the judge's decision is merely a function of procedure, as in Frankfurter's balancing.[205] Rather, Ely's theory is like Wechsler's, in that a procedure defines the bounds of judicial prerogative. What all of these procedural theories have in common is the assumption that proper policy decisions will more likely be arrived at from reliance on (what might be called "contentless") procedures, including the procedure of polling preferences, than from reliance on the assertion of substantive moral premises.[206]

Finally, faithfulness to the text of the Constitution is another aspect of some versions of the traditional commentary. While Bickel and Ely construct their theories on the assumption that the text of the Constitution is not sufficiently informative to lead the Court to specific holdings on most issues,[207] Hand and Bork have assumed otherwise. Hand appears to have believed that whatever power the Court might have must be derived from the words of the Constitution and the "historical setting" in which the particular provision was written.[208] Being true to the text and to the historical setting makes it impossible to base decisions on some of the vague constitutional clauses, a consequence that fits well with Hand's extreme judicial modesty. As mentioned earlier, Bork agrees that the Supreme Court decisions must be based on the text and history of the Constitution.[209] Bork, however, who is willing to consider the "fair implications" of the text and history, and who finds the Constitution more useful in decisionmaking than does Hand, argues that faithfulness to the Constitution should be a guideline for judicial decisionmaking that would complement the neutral principles requirement. Hans Linde, who believes that constitutional law should

204. *See* Fiss, *supra* note 7, at 8-9.

205. Frankfurter does not appear to have been a fan of at least the first paragraph of footnote four. *See* Dennis v. United States, 341 U.S. 494, 526-27 (1951). He may, however, have endorsed footnote four's second paragraph. *See* H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 198 (1981).

206. See J. ELY, *supra* note 134, at 75 n.*, as to why he believes that his theory does not call for the assertion of a substantive moral premise—that is, why participation is not a value like other values. *But cf.* Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045-48 (1980) ("The fundamental difficulty with Ely's theory is that its basic premise, that obstacles to political participation should be removed, is hardly value-free." *Id.* at 1045.).

207. *See* A. BICKEL, *supra* note 155, at 177; J. ELY, *supra* note 134, ch. 2.

208. *See* L. HAND, *supra* note 176, at 3, 33-35. *See also* Perry, *supra* note 12, at 709-13. For another theory of strict construction, maintaining that the Court may only make decisions based on interpretation of the text of the Constitution in light of the intentions of the Framers, see R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

209. *See* Bork, *supra* note 182, at 5-8. *See also* Grey, *supra* note 160, at 704.

focus on what the government should do, and not what judges should do, argues that the dictates of constitutional law should be comprehensible to the government, so that a conscientious government official could understand how to comply with the dictates without the leadership of judicial decisions at every step. According to Linde, the idea that constitutional law is to be the concern of the entire government and not the Court alone necessitates that the emphasis in constitutional law be placed on the Constitution as the manifestation of "prior political law making" and not on the decisionmaking of the Court. Therefore, judicial review must be confined to "determining the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text."[210] Linde's view that the Court should anchor decisions in the constitutional text is to be contrasted with "another view that sees constitutional clauses as merely selections of more or less suitable pegs on which judicial policy choices are hung."[211]

Several themes may be discerned from the body of traditional commentary. In general, the purveyors of traditional commentary argue in favor of judicial modesty and legislative supremacy in the field of policymaking. The belief that values are inescapably personal and subjective, whether this belief is part of a utilitarian outlook or a strictly intuitionist outlook, supports the preference for judicial modesty. Since there exist no objective values, the best that can be done is to please most of the people most of the time, which will be best accomplished by listening to what the people or their representatives have to say.

The assumed absence of objective values leads the traditional commentators to put their faith not only in legislatures but also in (what they see to be) contentless procedures, as contrasted with substantive value choices. One such contentless procedure is the balancing of interests which, in most cases, is better left to legislatures. Other procedures are adherence to neutral principles in adjudication, and adherence to legislative failure or representation-reinforcing schemes of judicial prerogative. Neutral principles and legislative failure perspectives do not rid the Court of substantive decisionmaking, but severely restrict it.

Apart from the appeal to contentless procedures, the only justification for the assertion of values by the Court against the design of a legislature is a showing that the value assertion can be supported by the

210. Linde, *supra* note 109, at 251-55.
211. *Id.* at 254.

text of the Constitution. Some traditional commentators hold more trust in the ability of the Court to base decisions on constitutional provisions than others.

IV. New Theories in Constitutional Commentary

The traditional theory of the role of the Supreme Court is being challenged by a group of constitutional law commentators who have introduced and developed their rebellious theories in the past ten years. Kenneth Karst, Paul Brest, Terrence Sandalow, Michael Perry, Harry Wellington, Owen Fiss, Laurence Tribe and Frank Michelman have been chosen to represent this new trend in constitutional law commentary. As a group, they argue for a more activist stance by the Court in order to insure the establishment of certain rights or entitlements. Special attention will be paid to the way in which each justifies the establishment of such rights or entitlements. Justification of the existence of such rights, or of the accessibility to the Court of a scheme of rights and values, is the largest obstacle before the new commentators in their challenge to the traditional theory.

A. The Principled[212]

1. Kenneth Karst

Kenneth Karst has argued for various principles and values that he feels should carry weight in constitutional discussion, and which in some sense reflect truth. These principles and values presumably are valid despite disapproval manifested by a legislature. They are substantive; they reflect proper ends for processes. One of these principles is the "principle of equal citizenship."

212. The three classifications that this article imposes on the commentators—namely, the principled, the political and the philosophical—are not mutually exclusive. Rather, the three categories are used to emphasize a type of deviation from the traditional commentary which those assigned to the category exemplify. Thus, the principled create theories that assert specific substantive moral principles to be used in legitimate Supreme Court adjudication, in rejection of the insistence by the traditional commentators that substantive moral principles not embodied in the Constitution should not be asserted by the Court. The political create theories of judicial review that assert that the Court is a political organ with a policymaking function as legitimate as, although not identical to, a legislature's policymaking function. The concept of the Court as a political policymaker challenges the traditional commentators' notion of judicial modesty and legislative supremacy in policy decisions. The philosophical present philosophically sophisticated theories of judicial review which deal significantly with questions of the moral validity of and the philosophical justification for the values asserted in the process of constitutional adjudication. These theories directly challenge the reliance by the traditional commentators on utilitarianism.

> The essence of equal citizenship is the dignity of full membership in the society. Thus, the principle not only demands a measure of equality of legal status, but also promotes a greater equality of that other kind of status which is a social fact—namely, one's rank on a scale defined by degrees of deference or regard. The principle embodies "an ethic of mutual respect and self-esteem" [citing to Rawls]; it often bears its fruit in those regions where symbol becomes substance.[213]

This principle embodies the value of respect for one's basic humanity, as well as the value of allowing each to participate as a member of the community, and the value of holding each responsible to the community of which he or she is a member.[214] Karst presents this principle as a norm or guideline which a judge should use for guidance in decisionmaking.[215]

> [T]he principle [calls] for judicial intervention when economic inequalities make it impossible for a person to have "a fully human existence" and the political branches of government turn a blind eye.
>
> The judicial task, when presented with such a claim, is not deduction from an authoritative text, but the exercise of judgment. The two subordinate values of equal citizenship—participation and responsibility—may be aligned on opposite sides of the constitutional balance. But the more that a particular inequality tends to stigmatize or dehumanize its victims, or impair their ability to participate fully in the society, the more the principle of equal citizenship demands justification in terms of a governmental interest of compelling importance.[216]

It appears, then, that Karst is arguing for a means of social change which is antimajoritarian. He sets out a program in which the Court is to be guided not by notions of democracy or democratic failure, but simply by principles or values. These principles or values cannot be fully actualized merely by removing barriers to participation in the political process.[217] Rather something further, and by definition antimajoritarian, is required.

Karst is not explicit as to what justifies the use of this principle by the courts—that is, what makes this principle politically or morally (or legally) correct. Part of the justification he gives lies in the fact that the framers of the Fourteenth Amendment intended to make a principle of

213. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5-6 (1977).

214. *See id.* at 8.

215. *See id.* at 42.

216. *Id.* at 62-63.

217. *See id.* at 25-26.

equal citizenship part of the Constitution.[218] A foundation in the Constitution, however, is not Karst's primary intended source of justification for the principle. The actual language used by the Constitution in setting out the principle is relatively unimportant to Karst in this regard. Not only does Karst claim that those provisions supporting the principle were intentionally made vague so as not to restrict the application of the principle to each era's society,[219] but he further states that it does not "make much functional difference which clause the Court uses in protecting the values of equal citizenship. What does matter is that those values be protected, and that we recognize the legitimacy of their protection by the judiciary."[220] Clearly, then, the legitimacy of this principle has roots elsewhere than in constitutional language.

Perhaps justification for the principle of equal citizenship derives from some sort of underlying consensus.[221] It appears that consensus has at least some role in determining the scope of the principle. For instance, the rights and duties that arise out of responsibility to one's community are a function of "our sense of what it means to be a participant in the society."[222] Apart from through an appeal to consensus, application of the principle by the Supreme Court can be justified somewhat by the fact that some of the Court's decisions can be explained as applications of this principle, that is, that the principle organized a body of cases into a coherent whole.[223] Karst does not expend much energy convincing the reader of the moral or legal validity of his principle of equal citizenship. What seems important to him is that the principle is manifest in some decisions of constitutional law, that it can be applied to some extent as a neutral principle, that it explains and legitimates some Warren Court decisions, and that its use is a good thing.[224]

In addition to the principle of equal citizenship, Karst believes that

218. *See id.* at 17.

219. *See id.*

220. *Id.* at 27. *See also* Karst, *supra* note 10, at 652-53.

221. Karst hints in a later article that he does not find any necessary validity in the dictates of conventional morality. *See* Karst, *supra* note 10, at 690 n.299, 691-92 n.304. For a definition of "conventional morality," see *infra* note 303.

222. Karst, *supra* note 213, at 9-10. *See generally* Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 NOTRE DAME LAW. 183, 186 (1980) [hereinafter cited as Karst, *Equality and Community*].

223. *See* Karst, *supra* note 213, at 38-39.

224. *See id.* In a later article cleary influenced by sociological and social psychological writings, Karst supports his principle of equal citizenship by arguing that its enforcement or realization is necessary to the maintenance of modern government and to the viability of modern communities. Karst, *Equality and Community, supra* note 222, at 200-03, 206-07.

there exists a "principle of equal liberty of expression."[225] The central notion involved is that the government may not promote or inhibit speech because of its content.[226] The ambit of this principle extends to all of the "interdependent 'decision-making processes' of a complex society."[227] Also, in a more recent article, Karst argues for the existence of the "freedom of intimate association."[228] This freedom can be likened to one of his principles.[229] Of particular interest is the fact that he argues in favor of this type of freedom by listing specific values that are promoted by its existence. His list of values includes the ability to enjoy the company of selected others, the opportunity to care for and be committed to another, the opportunity for intimacy, and the ability to shape one's own identity. These values are submitted as the source of worth for this particular freedom.[230] In one sense, it is no more remarkable that Karst would present substantive values than that he would present substantive principles as a basis for constitutional decisionmaking. However, this does merit attention, since constitutional law commentators have always dealt with constitutional principles, and thus Karst's innovation is somewhat cloaked by that appellation ("principle"). When Karst speaks of values rather than principles, the pretense of conventionality is removed.

A court or commentator might recognize such principles and values from trends in Supreme Court case law. Trends are noted, principles found to exist, and then subsequent cases may be judged in light of the principles. This process is illustrated in a statement by Karst with reference to the principle of equal liberty of expression:

> Although the Supreme Court has only recently recognized the centrality of the equality principle in the first amendment, the principle was implicit in the Supreme Court's "public forum" decisions as well as in its decisions protecting the associational rights of political minorities. More fundamentally, the principle of equal liberty lies at the heart of the first amendment's protections against government regulation of the content of speech. Proper appreciation of the importance of the equality principle in the first amendment suggests the need for a reconsideration of the results reached by the Supreme Court in several doctrinal

225. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

226. *See id.* at 53.

227. *Id.* at 20.

228. Karst, *supra* note 10, at 624.

229. *See id.* at 627.

230. *See id.* at 629-37.

subspheres.[231]

These principles also may be found in works evidencing exemplary reasoning. Thus, Karst states that the principle of equal liberty of expression emerges from, or is at least supported by, such sources as the Declaration of Independence and the writings of Locke, Rawls, and Rousseau.[232] Once distilled, these principles and values may aid a court or commentator in solving "puzzles," or problems of doctrinal consistency raised by constitutional issues, by clarifying the purpose of the specific constitutional protections in question.[233] In other words, analysis of whether a situation fits within the ambit of a constitutional doctrine may be facilitated by viewing the values that motivate adherence to the doctrine. In addition, these principles and values may provide a court with needed substantive guidance in its task of "interest balancing." For instance,

> [t]he freedom of intimate association, like other constitutional freedoms, is presumptive rather than absolute. In particular cases, it may give way to overriding governmental interests. The freedom does not imply that the state is wholly disabled from promoting majoritarian views of morality. What the freedom does demand is a serious search for justifications by the state for any significant impairment of the values of intimate association. And, like the First Amendment, which is one of its doctrinal underpinnings, it rejects as illegitimate any asserted justification for repression of expressive conduct based on the risk that a competing moral view will come to be accepted. Because different governmental actions will invade the values of intimate association in different degrees, the influence of this freedom will vary from one case to the next.
>
> The freedom of intimate association is thus a principle that bears on constitutional interest balancing by helping to establish the weight to be assigned to one side of the balance.[234]

231. Karst, *supra* note 225, at 21. *See also id.* at 28-29; Karst, *supra* note 10, at 626-27. In particular, Karst notes: "There is a tension in this Article—as in most writing that addresses emerging legal doctrines—between advocating the recognition of a 'new' freedom and arguing that it is a freedom already protected sub silentio." Karst, *supra* note 10, at 626 n.8.

232. *See* Karst, *supra* note 225, at 23-25. It appears that Karst views these works as the manifestations of exemplary reasoning rather than as manifestations of evolving conventional morality.

233. *See* Karst, *supra* note 10, at 650-51. He also states: "We need help in these cases, and we aren't going to find it in conclusory statements about the appropriate standard of review. The only way to make sense of the equal protection and substantive due process jurisprudence of the future is to seek guidance in substantive values. And that is where the freedom of intimate association enters this dimly lit stage." *Id.* at 669.

234. *Id.* at 627. *See also id.* at 692.

These principles are not simply a means of rationalizing past decisions. They have moral worth, and should be used actively by the Court. Karst reveals a desire for judicial activism guided by such principles.

> Activism, it is often said, risks the independence of the judiciary. Judges who are "intransigent," Judge Hand warned, "will be curbed.". . . [N]ow, as we approach the end of the unusually activist decade of the 1960's, one detects in some of the critical writings a feeling approaching sadness that somehow, against all the formerly accepted rules, the Court has managed to get away with it. How can that be?
>
> The answer may be that there is something wrong with the thesis. Perhaps activism is not the only relevant variable. Perhaps, in other words, activism offers no particular risk to the judiciary's independence unless it is directed at the wrong substantive ends.
>
> . . . .
>
> Is it not clear that the achievements of the Supreme Court during the three decades of Justices Black and Douglas have been possible precisely because of the political strength the Court gained during its most activist years? It is reasonable to conclude that if the present Court is making the right historical choices, it will emerge from this period of activism and constitutional growth strong enough to make its contribution to the solution of the next generation's problems.[235]

Although as a proponent of judicial activism Karst favors a nonmajoritarian route to social change, he relates correctness of substantive judicial decisions to public support over time. Thus, he speaks of the test of the validity of the Court's decisions as being whether they are "right, in this historical sense."[236] Karst's notion of which principles are good, then, appears to involve, inter alia, an understanding of what the people *really* want. Perhaps this is not reflected well by any particular vote, or vote of representatives, but it can be perceived with the aid of the test of time.

In addition, Karst's notion of what is a good principle may involve an evaluation of the effects of the application of the principle. Thus, there are elements of consequentialism in Karst's writings. In an "ex-

235. Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716, 746-47 (1969).

236. *Id.* at 748. It is important to keep in mind the notion of true consensus as revealed over time, as being what people *really* want. Karst clearly is not swayed by ordinary consensus, as, for instance, in the case of women's desire still to be called "Miss" or "Mrs." instead of "Ms." *See* Karst, *"A Discrimination so Trivial:" A Note on Law and the Symbolism of Women's Dependency*, 35 OHIO ST. L.J. 546, 553 (1974) [hereinafter cited as Karst, *Women's Dependency*].

amination of the core values of a constitutional principle of equality," Karst writes,

> If a city segregates the races on a public beach, the chief harm to the segregated minority surely is not that it is deprived of the enjoyment of a few hundred yards of surf. Jim Crow was a system of degradation imposed by laws that were primarily aimed at symbolizing the inferiority of blacks . . . .
>
> Inequality is harmful *chiefly* in its impact on the psyches of the disadvantaged. . . . In modern constitutional parlance, race is a suspect classification *primarily* because the dignity of being recognized as a person—a citizen—is itself a basic right, a "fundamental interest."
>
> Furthermore, the dignity of citizenship is fundamental in the same way that the right to vote is fundamental: it is instrumental in the attainment of a wide range of other goods in an achievement-oriented society.[237]

Nevertheless, Karst does not specifically pursue a consequentialist theory. It is, in fact, difficult to pin Karst down as to how he would place his principles in a general theoretical framework. It appears, however, that Karst is not unhappy about his lack of theory concerning the justification of his principles. In a book review, Karst states:

> Innovation, by definition, is hard to justify by reference to the received wisdom. The beginnings of new judicial doctrine, like other human beginnings, often are more easily felt than syllogized. Ultimately, of course, if constitutional values are to be translated into constitutional law, coherent explanation must come to replace the vague sense of doing the right thing. But it is only a partial truth that "reason is the life of the law and not just votes [in the Court, presumably] for your side."[238]

Substance rather than form seems to be Karst's primary concern.

2. Paul Brest

Paul Brest argues, like Karst, for principles that should guide the

237. Karst, *Women's Dependency, supra* note 236, at 550-51. But see Karst, *supra* note 10, at 635, where he states, "[T]he core associational value of intimacy [a value which supports the freedom of intimate association] is not to be reduced to its instrumental uses. It is valued for itself, for the emotions it generates immediately, and not merely for 'the emotional attachments that derive from the intimacy of daily association.' " (quoting Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977)).

238. Karst, Book Review, 89 HARV. L. REV. 1028, 1033 (1976) (reviewing G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (9th ed. 1975)). Elsewhere, Karst states that intuition as well as reason guides the law, "and a justification for judicial review that rests on reason alone is an incomplete justification." Karst, *Equality and Community, supra* note 222, at 205. *But see* Karst, *supra* note 10, at 629-30.

Court in its decisions.[239] Brest presents a principle quite similar to Karst's—the "antidiscrimination principle."[240] "Stated most simply, the antidiscrimination principle disfavors race-dependent decisions and conduct—at least when they selectively disadvantage the members of a minority group. By race-dependent, I mean decisions and conduct . . . that would have been different but for the race of those benefited or disadvantaged by them."[241] This principle is one of many principles of justice, and applies by definition only to race-dependent decisions.[242] The Court, Brest claims, as one of the governmental policymakers, should apply this principle through judicial review. The Court is well suited to apply this principle, since it can consider the long range implications of racial policy decisions and employ its "studied reflection" in this tempestuous area of the law.[243] Furthermore, the Court, by its very nature, is a principled policymaker and must assert its influence as a guardian of values, especially in times of failure of majoritarian process or crisis.[244] To the extent that Brest intends policy decisions to be made through the application of principles that are not derived primarily from the Constitution, he intends nonmajoritarian enforcement of values.

Once again, of course, consensus enters through the back door as part of Brest's justification of his principles. It does not arrive through the constructive consensus embodied in the text of the Constitution, but rather through some underlying moral agreement.

> The antidiscrimination principle rests on fundamental moral values that are widely shared in our society. Although the text and legislative history of laws that incorporate this principle can inform our understanding of it, the principle itself is at least as likely to inform our interpretations of the laws. This is especially true with respect to the equal protection clause of the fourteenth amendment. The text and history of the clause are vague and ambiguous and cannot, in any event, infuse the antidiscrimination principle with moral force or justify its extension to novel circumstances and new beneficiaries. Therefore, the argument of this section does not ultimately turn on authority, but on whether it comports with the reader's reflective understanding of the an-

239. *See* Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 53 (1976).

240. *Id.* at 1. It might be more fair to state that Karst's principle is similar to Brest's, since Brest's article predated Karst's by a year.

241. *Id.* at 6.

242. *See id.* at 5.

243. *Id.* at 22.

244. *See id.* at 6, 22.

tidiscrimination principle.[245]

Thus the antidiscrimination principle, and presumably the other principles of justice, are manifestations of the society's morality, and not the society's manifested desires at any particular time, nor the society's old social compact.

The antidiscrimination principle would have no validity if it did not represent the moral leanings of a significant segment of the society, yet it is not the result of any actual vote taken in the society or in a meeting of its representatives. Rather, as a moral principle, it is supported by more basic moral principles, for instance, those that describe fairness and moral worth.[246] However, Brest also argues for the principle on consequentialist grounds—on the basis of the injuries which might be avoided if the principle is heeded.[247]

Brest is concerned not only with the constructive task of the new constitutional law commentator—helping to engineer a new type of theory of judicial review—but also with the destructive task of criticizing central features of the traditional commentary. In fact, he concentrates more on this destructive task in his more recent articles, perhaps because of his growing skepticism concerning the possibility of justifying any specific moral principle or moral stance to be maintained by the Court. Brest challenges Ely's representation-reinforcing procedural model for judicial review as being no less dependent on the assertion of fundamental values by the Court than the fundamental rights theories which Ely attacks.[248] Ely's model, which allocates to the Court the role of invalidating legislation tainted by prejudice, is impotent, according to Brest, without some asserted values. Without some choice of values, the Court could not distinguish between, for instance (this example is actually Ely's), laws that disadvantage burglars as a class and laws that disadvantage homosexuals as a class.[249] Brest finds the task of distinguishing which prejudices should be allowed a society and its legisla-

245. *Id.* at 5-6. Brest states in a later article, "The Court has commonly interpreted social morality—or what might be called the 'social text'—in articulating public values." He continues, "How can a court perform the essential constitutional task without interpreting the social as well as the written text? . . . [I]f the social text plays a significant role in fact—and I agree with Professor Fiss that it must—judges would do well to bring it to the surface, to understand how it interacts with the written text, and to confront it directly. Suppressing consciousness of social values, far from constraining the judges' discretion, gives them free reign—unchecked by self-scrutiny and the criticism of others." Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 767-68 (1982).

246. *See* Brest, *supra* note 239, at 8, 48. *See also id.* at 49-50.

247. *See id.* at 8-11.

248. *See* Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981).

249. J. ELY, *supra* note 134, at 154, 162-63.

ture (for instance, prejudice against burglars as opposed to prejudice against homosexuals) to be inherently value-laden.[250] He expresses doubt that a value-free scheme for judicial review could ever be developed.[251]

Brest also challenges the notion, held by many of the traditional commentators, that the Constitution supplies all of the values that may be used in legitimate constitutional adjudication. Brest concludes that both types of "originalism"—"textualism," which makes the language of the Constitution the source of constitutional law, or "intentionalism," which makes the intentions of the Framers the source of constitutional law—create impossible tasks for the person involved in constitutional adjudication.[252]

> The [originalist] interpreter's task as historian can be divided into three stages or categories. First, she must immerse herself in the world of the adopters to try to understand constitutional concepts and values from their perspective. Second, at least the intentionalist must ascertain the adopter's interpretive intent and the intended scope of the provision in question. Third, she must often "translate" the adopters' concepts and intentions into our time and apply them to situations that the adopters did not foresee.[253]

Each of these steps is more difficult than the former, and it is hard to believe that this process can be undertaken with the reliability and determinacy which motivates the desire for originalist analysis in the first place.[254] Given that originalism cannot be the source of legitimacy in constitutional decisionmaking, and given that it is unclear why the historical adoption of the Constitution has any binding force on modern society anyway,[255] Brest proposes that the focus of constitutional adjudication should be the enforcement of (only) those values which are fundamental to our society.[256] Such constitutional adjudication "treats the text and original history as important but not necessarily authorita-

250. *See* Brest, *supra* note 248, at 134-37, 140-41. Brest also claims that many substantive due process claims can be readily translated into representation-reinforcing terms. *Id.* at 138.

251. *See id.* at 142.

252. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 205, 209 (1980).

253. *Id.* at 218.

254. *See id.* at 218-22. The problems of reliably translating the text do not provide the only obstacles to one who wishes to adjudicate in terms of the Constitution alone, according to Brest. An additional problem is posed by the fact that "the principles that can be derived are too vague to help resolve particular cases." Brest, *Accommodation of the Majoritarianism and Rights of Human Dignity*, 53 S. CAL. L. REV. 761, 763 (1980). *See also*, Brest, *supra* note 8, at 1089; Brest, *Interpretation and Interest, supra* note 245, at 769.

255. *See* Brest, *supra* note 252, at 225.

256. *See id.* at 227.

tive."[257] By changing the focus of constitutional adjudication from the Constitution to fundamental values, a more conscious and efficient form of decisionmaking develops. Brest concludes, "To put it bluntly, one can better protect fundamental values and the integrity of democratic processes by protecting them than by guessing how other people meant to govern a different society a hundred or more years ago."[258]

Brest, who in 1976 argued for the existence of a constitutional antidiscrimination principle with roots in the moral order, and who thereby implied a moral justification for antimajoritarian judicial review, had withdrawn somewhat by 1981. Brest concludes in his more recent work that the theories of judicial review proposed by both the proponents of judicial activism *and* the proponents of judicial restraint lack theoretical justification.[259] Such theories can have no justification; they are doomed to incoherence, because the very notions of liberalism and constitutional democracy on which they rely create what has been termed the "Madisonian dilemma." The Madisonian dilemma is said to exist between the liberty granted to the individual to pursue his or her self-interest and the mandate of the state to mediate in conflicts of self-interest, or equivalently, between the rule of the majority and the rights of the individual in the face of majority preferences. Judicial review, the institution that protects the rights of the individual against the majority, is thus inextricably tied to the Madisonian dilemma. Brest maintains that this dilemma is, as such, "not susceptible to resolution in its own terms."[260] Although Brest's new position does not per-

257. *Id.* at 228.

258. *Id.* at 238.

259. *See* Brest, *supra* note 8, at 1063, 1089, 1096. Notice, however, that still in 1982 Brest appears to support the legitimacy of judicial appeal to "social morality." *See supra* note 245.

260. Brest, *supra* note 8, at 1105; *see id.* at 1096-1109. Robert Dahl, whom Brest cites with respect to Madisonian democracy, *id.* at 1096 n.191, says the following: "[T]he logical and empirical deficiencies of Madison's own thought seem to have arisen in large part from his inability to reconcile two different goals. On the one hand, Madison substantially accepted the idea that all the adult citizens of a republic must be assigned equal rights, including the right to determine the general direction of government policy . . . . On the other hand, Madison wished to erect a political system that would guarantee the liberties of certain minorities whose avantages of status, power, and wealth would, he thought, probably not be tolerated indefinitely by a constitutionally untrammeled majority. Hence majorities had to be constitutionally inhibited." R. DAHL, A PREFACE TO DEMOCRATIC THEORY 31 (1956). Judicial review was possibly not part of Madison's own scheme, *see* B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 18 n.24, 23, 26-27 (1967), but in today's America the Court and judicial review provide the most prominent voice to the Constitution. So, if Madisonian democracy is an arrangement in which the people rule but the Constitution also rules, then judicial review is central to the workings of today's Madisonian democracy. Madisonian democracy, then, pits the Court as the voice of the Constitution against Congress as the voice of the people. Resolving the question of when the Court

mit him to argue that there exists a moral justification for the assertion of certain principles by the Court, it does not preclude argument in favor of the application of such principles by the Court, if only as the persuasion of an advocate. For, despite his skepticism, Brest asserts that "if it would be arrogant to think that we could change the world, it would be even more irresponsible to act as if we couldn't."[261]

The theories of Supreme Court decisionmaking presented by Karst and Brest provide a good introduction to the work of the new school of constitutional law commentators. Two features of their theories should be noted in this regard. The first is the use of principles. Certainly, it is not an innovation to argue that the Court should guide its decisionmaking through the use of principles. As discussed earlier, the notion that decisions should not be made on the basis of attraction to a particular result in a particular case, but rather on the basis of principles that can be applied unfailingly to all cases, is a feature of the traditional commentary.[262] But the role of principle in the theories of Karst and Brest is much different. Principles or neutral principles in the traditional view can most properly be seen as means of containing the power and prerogative of Supreme Court Justices. They prevent ad hoc decisions; their use, however, does not insure justification for particular decisions.[263] Therefore, talk of principles has in more traditional commentary generally had a somewhat destructive task. What is innovative in the works of Karst and Brest is a *constructive* use of principles. The authors present specific substantive principles on which they place their trust, and argue for their use by the Supreme Court. Whereas in traditional commentary the plan for correct social order involved constraining judicial prerogative, these two commentators envision a social order in which the Justices must push forward, armed with theoretical weapons, with substantive principles.

Although it may be true that Karst and Brest seem particularly intent on unearthing correct constitutional principles, there is little doubt that the more traditional commentators would also appreciate having correct principles. (Representation-reinforcement comes to

should have the upper hand over Congress (so viewed) is therefore the same as resolving the dilemma introduced by Madisonian democracy.

261. Brest, *supra* note 8, at 1108. Compare the approach of Frank Michelman, who notes the existence of the dilemma, and states: "It is a contradiction that will endure, I suppose, for as long as our civilization endures. But partial resolutions are possible. Indeed, it is possibility of partial resolutions that allows us to experience the contradiction as generative tension rather than as dead end." Michelman, *Property As A Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1110 (1981).

262. *See supra* text accompanying notes 187-91.

263. *See* J. ELY, *supra* note 134, at 54-55.

mind.) The larger gap between the two groups seems to lie in the notion of what would make a principle correct. The traditional commentators are perhaps less interested in the constructive use of principles because their standard for justification of any such principle insures that few "substantive" principles would ever be justified. The notion held by the traditional commentators that "procedural" principles are somehow value-free, and thus that each group of participants can insert its own values, makes procedural principles more easily justified, and, by contrast, makes substantive principles more difficult to justify.[264]

For the traditional commentators, a proposition of law is justified insofar as it has resulted from the democratic process. The law can have virtually any content, as long as it has had a procedurally sound genesis. Since the basic means of justification is "procedural," the basic principles of constitutional law must be "procedural." Therefore, it is more likely that the traditional commentators would settle on seemingly procedural principles, like those inspired by footnote four, rather than on "substantive" principles, like the principle of equal citizenship or the antidiscrimination principle.[265] Procedure, then, and not substance, is the focus of traditional constitutional justification, and procedure lends itself much more easily to criticism of improper decisions than to support of affirmative decisions.

With this in mind, the major point of interest is the source of justification of propositions of constitutional law. The fact that the newer commentators do not pay homage to the theories of judicial deference and majoritarian justification supported by the traditional commentators allows them to develop and argue for substantive principles. It is

264. This type of distinction (between procedure and substance) is still commonly accepted, it seems, and figures significantly in the latest books by Ely and Ackerman, as well as in the economic analyses of rights. *See* J. ELY, *supra* note 134; B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980). Yet the view that there could be a value-free decision process seems internally inconsistent. Is it not the case that a value can be defined as that which directs one to choose between one alternative and another? The distinction between procedure and substance in the context of moral and legal principles is, at best, elusive. Does the representation-reinforcing model provide a procedure for finding which statutes are unconstitutional, or does it provide a definition of which statutes are unacceptable?

265. It might be asked why utilitarianism or footnote four jurisprudence constitute merely procedural systems, whereas Rawls's system or a system dependent on conventional morality does not. As just stated, it is difficult to believe that in the context of moral and legal decisionmaking there is a clear distinction between procedural principles and substantive principles. One may, however, draw a distinction from the fact that the first two are not used to derive specific "substantive" moral or legal principles to be used in later theorizing. On the other hand, Rawls, for instance, uses his perhaps procedural original position to generate substantive principles of justice. Similarly, Brest and others use substantive principles derived from conventional morality in their theories. *See supra*, note 32.

apparent that neither Karst nor Brest holds the view that the majoritarian process, manifested through the text of the Constitution, the will of the legislature, or the curing of democratic dysfunction, is the only justification for a principle of law. Karst seems to find justification for his constitutional principles in underlying consensus of the people, or in theoretical or moral attractiveness. Brest seems to have found justification in conventional morality and in consequentialist concerns.

The change in focus from seemingly procedural principles to substantive principles parallels the trend in modern moral philosophy. For the utilitarians, the source of moral truth is the utilitarian calculus, a means of arriving at that which is proper. However, some modern moral philosophers, notably Rawls and Fried, have criticized utilitarianism because it is merely procedural and therefore contentless and incomplete.[266] Put another way, the procedural nature of utilitarianism is attacked because it distracts the observer from the actual substance imbedded in the theory, which substance is insufficient as a foundation for (a good) morality. The underlying sentiments among such moral philosophers seem to be that there *are* things which are right and wrong, good and bad, that these are the focus of moral philosophy, and that the value of any procedure for discovering what is right or good is dependent on the validity of the results, not vice versa. Allegiance to a system that does not guarantee the maintenance of certain rights and wrongs, but promises only internal consistency, is not prudent.

The philosopher's criticism of moral systems that are intended to be merely procedural may be applied to the commentator's view of constitutional law in two ways. The first is that an analogy can be drawn between the theory of what the Court should do to shape constitutional law and the theory of what an individual or society should do to shape the society. In this way, the procedural theory of the role of the Court stemming from footnote four, for instance, can be likened to the procedural ethical theory in utilitarianism. Thus, one could say that a theory of constitutional law that does not guarantee substantive rights can be criticized in the same way as a moral theory that does not guarantee substantive rights. The second, which does not so directly view the Court as a moral actor, is that procedural theories of the correct judicial role could be viewed with respect to their underlying assumptions and preferences, instead of being viewed with respect to their vacuousness. For instance, footnote four theories are based on certain assumptions: *e.g.*, that there is nothing of value other than that

266. *See supra* text accompanying notes 27-38.

which each individual desires, that individuals' desires can be discovered only through their votes (if monitored correctly), that the desires of one citizen can be nullified by the opposing desires of another, and so on. Philosophers' criticisms of procedural theories like utilitarianism can be used to discredit traditional constitutional law commentaries by attacking the validity of their underlying moral premises, which are typically procedure supporting. It should be clear that neither Karst nor Brest, nor any of the philosophers discussed would accept entirely these underlying moral premises.

B. The Political

Karst and Brest present principles and values which the Court might add to its arsenal to defend against social backwardness. Were the Court to employ such principles openly, the actual or perceived role of the Court might be affected significantly. However, Karst and Brest do not really deal with this fact. Sandalow, Perry, Wellington, and Fiss, on the other hand, support the assertion of values and substantive principles by the Court, and in doing so discuss the consequential role change. In fact, their theories focus more on suggesting a proper role for the Court as a political, policymaking organ, than on suggesting proper principles for use in adjudication.

1. Terrance Sandalow

For Terrance Sandalow, as for Karst and Brest, a search for substantive principles and values is central to Supreme Court adjudication. Sandalow, however, unlike the other commentators viewed here, believes that the present majoritarian process in America is the ultimate source of legitimacy for propositions of law.[267] The determinations of Congress, therefore, are necessarily quite legitimate, especially when these determinations are the product of full deliberation by the body.[268] The decisions of the Court, in contrast, are not automatically legitimate. Whereas Congress is majoritarian by design, the Court is not. If there exists justification for the Court's decisionmaking powers, it must be sought out. To the extent that such justification exists, Sandalow finds it in the validity of substantive principles and values.

In traditional commentary, two types of theories are invoked to justify the assertion of the Court's rule in potentially legislative realms. The first is the view that whatever the Court can derive from the text of

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

268. *See id.* at 1188.

the Constitution can be asserted without frustrating the democratic process because of the original consent. The second is the notion that the maintenance of the democratic process requires that the Court step in on certain occasions. Sandalow refers to these theories in the following way:

> Now a decision can be justified in only two ways, either by demonstrating that it conforms to a controlling standard or that it is the result of a process that is appropriate for making such decisions. Courts traditionally have attempted to justify constitutional decisions in the former way. Justice Stone's emphasis on the deficiencies of the legislative process looks toward the second type of justification: courts can legitimately substitute their judgments for those of legislatures, at least when they are determining the validity of legislation directed against minorities, because the judicial process is more appropriate than the legislative for making the choices that are required in that setting.[269]

Sandalow rejects Justice Stone's footnote four reasoning "in its pure form,"[270] and he rejects use of the Constitution as the controlling standard. He does not, however, rule out the use of other types of standards.

A procedural justification for the Court's assertion of its views is not plausible in Sandalow's eyes,[271] for he finds that footnote four theory lacks content.

> Even with the gloss placed upon it by Professor Ely [that the costs of legislation damaging a minority are not reliably reflected in the legislature because of uneven allocation of the ill effects], Stone's suggestion is less persuasive than might be supposed from its broad acceptance. Neither Stone nor Ely contends that all legislation directed against a "discrete and insular minority" is invalid. But if such legislation is sometimes valid and sometimes invalid, there must be standards by which a determination can be made. Yet, neither Stone nor Ely explicitly addresses the question how courts are to establish the legitimacy of standards they employ to make the determination.[272]

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269. *Id.* at 1177.

270. *Id.*

271. *See id.* at 1179-80.

272. *Id.* at 1175. See also Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446, 466 (1981), where he states, "Democratic theory does not provide an equivalent of the economist's model of perfect competition; except in the most egregious cases, we have no means of ascertaining by an examination of the inner workings of the political system whether all or any of the interests in society are adequately represented. In the absence of a model of perfect democracy, it is difficult to understand how, without appraising results, judgments could be made about whether one or another group has the 'right amount' of political influence, or at least sufficient influence to obviate the need of special judicial solicitude for its interests."

Further, no qualities of the Court's procedure, such as fairness or impartiality, can justify the overriding of legislative decisions when popular participation is the only value to be promoted.[273] Therefore, any legitimacy attaching to the Court's decisions must stem from substantive standards.

Substantive standards, according to Sandalow, cannot come from the text of the Constitution. "In substance, if not in every particular, we have, in Grey's phrase, 'an unwritten constitution.' Its content is not fixed by the limits that the framers imposed upon the power of a majority."[274] There are not pre-existing rules of constitutional law embedded within the Constitution that can be discovered and applied to cases.[275] Therefore, the Court is in an insupportable position when, for instance, invalidating legislation specifically on the basis of constitutional provisions such as the Due Process Clause or the Equal Protection Clause.[276]

> Judgment depends on principles that are necessarily value-laden, principles that are an extension of views concerning the appropriate role of government in society and, ultimately, proper ends of society. No doubt, such premises are necessary whenever the constitution is invoked to limit legislative power. Judicial review has been a persistent source of controversy for precisely that reason. The democratic commitment of our age requires—or at least has seemed to many to require—that important value choices rest with institutions that are more politically responsible than the courts. The judiciary's warrant for curbing legislative power is especially vulnerable when the limits that are imposed depend on giving substantive meaning to the due process or equal protection clauses. The absence of a textual foundation for whatever substantive principles are proposed to be read into those clauses diminshes the likelihood that the necessary value choices are rooted in constitutional tradition and thereby weakens whatever claim the judiciary might have for withdrawing those choices from other institutions of government.[277]

Given this, on what substantive principle is the Court to rely, and when may it do so? Substantive principles may not be extracted from the Constitution. Therefore, constitutional law must be seen as the "expression of evolving societal norms."[278] Thus, it is the "changing cir-

273. *See* Sandalow, *supra* note 267, at 1177.

274. *Id.* at 1165. *See* Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1046 (1981).

275. *See* Sandalow, *supra* note 267, at 1168.

276. *See* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 659 (1975).

277. *Id.* at 657.

278. Sandalow, *supra* note 267, at 1185.

cumstances and values of our society"[279] that provide the substance upon which decisions of the Supreme Court should be based.

The legitimacy of decisions made by the Court stems from the Court's ability to monitor and apply the dictates of the society's norms. "The central problem in devising a satisfactory theory of judicial review is, thus, to define and justify the process by which societal norms should be constructed for the purpose of giving content to constitutional law."[280] The Court is well qualified to monitor and apply the dictates of societal norms.

> Deciding whether one or another action is consistent with our values requires reflection. Judicial review, in Justice Stone's familiar phrase, offers the opportunity for a "sober second thought," an occasion for considering whether challenged governmental action is consistent with broadly shared societal values. By subjecting such action to the test of principle—a test of conformity of principles that are themselves subject to being tested by the results that they imply—courts can increase the prospects that governmental action will conform to those values. Of course, courts are not the only institutions of government capable of testing action against principle, but experience suggests that because of their practices and their place in the governmental system they are more likely than others to do so.[281]

However, despite the Court's ability to register social norms, it is not the primary policymaking body. Congress is the body most appropriate for such decisions, and thus the Court should never be able to invalidate any judgment made by Congress, especially after full debate.[282] It would appear that the Court may be allowed the power of invalidation through judicial review only for rules adopted by bodies that are not like legislatures—for instance universities that draw up and adopt

279. Sandalow, *supra* note 276, at 700. *See* Sandalow, *Constitutional Interpretation, supra* note 274, at 1054-55.

280. Sandalow, *supra* note 267, at 1185. It appears that for Sandalow the process involves, inter alia, tallying the results of legislative decisions in the various states. Sandalow agrees with Rehnquist's criticism of the result in *Roe v. Wade* that the fact that the majority of states had restricted abortions showed that the right to abortion in this nation could not be fundamental. *See* Sandalow, *Federalism and Social Change*, 43 LAW & CONTEMP. PROBS. 29, 35, 36 (1980).

281. Sandalow, *supra* note 267, at 1186. But see Sandalow, *The Distrust of Politics, supra* note 272, at 457-60, where he argues that whereas courts are particularly suited for undertaking "the protection of individual and minority rights," they are not suited for "the definition of the rights that individuals and minorities should have." *Id.* at 460.

282. *See* Sandalow, *supra* note 267, at 1186-87. Sandalow sees "legislation recently enacted by most states" as being just as invulnerable as judgments made by Congress. *Id.* at 1187. *But see infra* note 283.

preferential admissions policies.[283]

It is important to acknowledge all that lies beneath these statements. Sandalow states that the substance for constitutional decision-making must come from societal values, and not from the Constitution. It is clear that he believes that statements concerning this body of widely shared values can be determined valid through appeal to coherence theory.[284] This is betrayed by the words from the quote above: "By subjecting such action to the test of principle—a test of conformity of principles that are themselves subject to being tested by the results that they imply—courts can increase the prospects that government action will conform to those values." In another work Sandalow states,

> A constitutional principle that government may not distribute burdens or benefits on racial or ethnic grounds is required neither by the "intentions of the framers" nor by a more general principle of constitutional law. Adoption of the principle would be required therefore only if the principle were necessary to justify one or several more particular decisions that the Court would feel compelled to make.[285]

He ends this statement with a citation to Feinberg's description of coherence theory.[286] Thus Sandalow appears to believe that there exists a body of widely shared values, which at any given time is sufficiently coherent to admit of more or less verifiable ethical propositions as confirmed through coherence theory.

What is puzzling is how, after saying this, Sandalow can claim that a legislature is always a more proper policy-producing organ than the Court. Sandalow states,

> If constitutional law is to be understood as expressing contemporary social norms, it is hard to see how courts can, in the end, set their judgment concerning the content of those norms against a deliberate and broadly based political decision, say, one made by Congress after full debate or embodied in legislation recently en-

283. *See* Sandalow, *supra* note 276, at 698-99. Sandalow remarks that the widespread recognition of nationally held fundamental norms may be responsible for the trend limiting the prerogative of individual states to set the boundaries of personal rights. Thus, in the area of family relationships and reproduction, for instance, the Court has been making decisions for the whole nation, treating state statutes, much like the conclusions of administrative agencies or universities, as being subject to national norms. *See* Sandalow, *supra* note 280, at 33-34.

284. As discussed earlier, coherence theory is characterized by justifying ethical systems through constantly testing the axioms by the validity of the principles which may be derived from them, and through constantly testing the principles by their consistency with the axioms and by their consistency with observed phenomena. *See supra* notes 67-70 and accompanying text.

285. Sandalow, *supra* note 276, at 675.

286. *See supra* notes 67-70.

> acted in most states. Political decisions such as these ought to be considered controlling not because they evidence societal norms—were they only evidence they would, presumably, be subject to refutation by other evidence—but because the process that has led to them is the ultimate source of law's legitimacy in a democratic society. That process confers legitimacy upon the decision not merely because it registers consent in some abstract way, but . . . because "political responsibility is crucial to the democratic ideal that governmental policies ought to respond to the wishes of the citizenry . . . ." A consensus achieved through a broadly representative political process is, thus, as close as we are likely to get to the statement of a norm that can be said to reflect values of the society.[287]

It appears that the society's values are to be the source of proper governmental action. If this is so, how is it that legislative action is something better than evidence of societal norms? It is not societal norm itself. Is there something intrinsic to the legislative process that brings it legitimacy aside from the proximity of legislative enactments to societal norms? This would seem to run contrary to Sandalow's ultimate democratic wish, which he expresses at the close of this paragraph, that the government get "as close as we are likely to get to the statement of a norm that can be said to reflect the values of the society."[288] It appears that Sandalow is torn between two visions of democracy. One is a vision of a polity in which *popular participation* is the primary value. In this version of democracy, legislative decisions would be given precedence, despite their content, because of the perceived connection with popular participation. The other is a vision of a polity in which the *values of the people* guide governmental decisionmaking. In this version of democracy, those decisions which are most faithful to the "values of the society" would be given precedence.[289]

It is difficult, therefore, to know whether Sandalow is better characterized as one who agrees with the traditional constitutional doctrines or not.[290] But to the extent that he believes that there exist societal

287. Sandalow, *supra* note 267, at 1186-87.

288. *Id.*

289. Note the connection between this tension and the "Madisonian dilemma" discussed by Brest. *See supra* text accompanying notes 259-60.

290. The difficulty in finding exactly where Sandalow stands is demonstrated by the contrast between two articles which appeared in 1981. In one he states, "To argue that neither the language of the Constitution nor the intentions of those who employed it controls the meaning that may subsequently be given to the Constitution is not, of course, to argue that they lack relevance to the process by which the meaning is derived. Constitutional law is the means by which we express the values that we hold to be fundamental in the operations of government. Judges, or others who wish to appeal to the Constitution, must demonstrate that the principles upon which they propose to confer constitutional status express values

values that are best monitored by some means other than majoritarian processes or resort to the Constitution, to the extent that he believes that there exist norms that can be isolated, defined, and used coherently and meaningfully in legal or moral argument, and to the extent that he believes that the Court as a governmental organ is equipped to base policy decisions on the proper examination of such values, he is a member of the renegade movement of constitutional law commentators being viewed here.

2. Michael Perry

Michael Perry, unlike Sandalow, supports judicial activism. He seeks a source of content for Supreme Court decisions that legitimates expansive judicial policymaking. Again, important here is a search for content, and a dissatisfaction with the reliance on procedure. Perry, in most of his writings, argues that the Court ought to employ principles or values that are actually held by the citizens, rather than to conduct itself with deference to the results of procedure which may only simulate approval of the citizens.[291] Perry envisions an active role for the Court in the creation of governmental policy. Although he accepts the doctrine that judicial decisions must be supported by principled explanations, Perry rejects as impractical the view that the Supreme Court may only interpret and apply the text of the Constitution—the "textual approach."[292] Further, he rejects the view that the policymaking process that is the most majoritarian is necessarily the best.

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that our society does hold to be fundamental. One way in which that can be done is by showing that those values are rooted in history, that they are not merely the result of the interests or passions of the moment. . . . [A]ll history is relevant for that purpose . . . ." Sandalow, *Constitutional Interpretation, supra* note 274, at 1069.

In another article he states toward the beginning: "The distrust of politics is evident . . . in much recent discussion of constitutional law. During the past quarter century, the answers to an extraordinary variety of questions of public policy have been found in the Constitution. Issues that traditionally were regarded as within the domain of legislature have thus come to be decided by courts. The justifications advanced . . . rest on the notion that there are important areas of public policy in which the political process cannot be trusted . . . ." Sandalow, *Distrust of Politics, supra* note 272, at 446-47.

He concludes the second article by stating, "The distrust of politics, in sum, often reflects merely a disagreement with the results it yields, and the attempt to reduce its influence on governmental policy nothing more than an effort to substitute a process of decision that will advance interests and values that might not prevail in the political process. . . . [W]hen politically made, the decision rests upon the foundation of democratic theory. We have as yet no theory that explains how judges may justify preferring the interests and values of some individuals to those of others." Sandalow, *Distrust of Politics*, *supra* note 272, at 468.

291. *But see infra* text accompanying notes 308-314.

292. *See* Perry, *supra* note 167, at 1202-11; Perry, *supra* note 10, at 284-301.

> If governmental policymaking—of which majoritarian policymaking is one aspect, albeit the principal one—is, on balance, more responsive to society's professed ideals and sensibilities as a result of constitutional policymaking by the Court, then, assuming we do not reject society's professed ideals, why should we reject that Constitutional policymaking?. . .Perhaps for him to whom moral values have no objective integrity, the *process* by which policy is made is more precious than the *content* of whatever policy is made; perhaps he believes it to be the *summum bonum* that the processes of governmental policymaking should be exclusively majoritarian. But surely [any supporter of judicial restraint, in this case Raoul] Berger does not mean to suggest that radical moral skepticism is an obligatory philosophical stance. Certainly it is not the traditional American stance.[293]

Clearly, Perry, like others viewed in this section, wishes to see the Court promote social change in specific ways. Frustrated by deference to contentless (and thus undirected) process, Perry wishes to define an acceptable role for an activist Court.

In Perry's account of the judicial role, two functions belong to the Court. The first is to arbitrate individual disputes. The second is to propound "general, fundamental ethical principles for the moral education and guidance of the political processes." He calls this second the "ethical function of judicial review."[294] As is apparent from the segment quoted above, Perry believes that the government should act in accord with the values of the citizens. As a governmental body, the Court must be sensitive to these societal norms. But, as a policymaker, it must further develop and clarify these norms.

> [I]t oversimplifies the judicial function under expansive judicial review to suggest that the judge's responsibility is merely to discern societal ideals and sensibilities and to apply them to the case at hand. Societal ideals, when we make the heroic effort necessary to articulate them, are quite broad and imprecise. The judicial function will usually be one of working out the implications of broad, imprecise moral ideals or principles. And in applying an ideal or principle as a decisional norm in a particular case, the Court necessarily redefines the ideal with greater precision by specifying the ideal's "content." Thus, the Court does not play a passive role in determining societal morality but an active, even creative one: the Court gives shape to that morality.[295]

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293. Perry, Book Review, 78 COLUM. L. REV. 685, 698 (1978). Perry does not, however, reject the "principle of electorally accountable policymaking," i.e., that governmental policymaking should be subject to the control of electorally accountable officials. *See* Perry, *supra* note 10, at 263.

294. Perry, *supra* note 12, at 716.

295. Perry, *supra* note 167, at 1228. *But see* Perry, *supra* note 11, at 286-87 (by trying to define or refine traditional values the Court is merely fabricating tradition).

The Court, according to Perry, is particularly qualified to further the development of societal norms because it is not likely to be swayed by morally irrelevant factors, such as lobbying and bartering.[296] In addition, the Court can deal with moral issues in a way that a legislature likely would not. Unlike legislatures, the Court has traditionally served as "a forum for the subtle dialectical interplay of complex, principled ethical discourse."[297]

Justification of judicial activism does not require a showing that the Court is better able than a legislature to make policy decisions.[298] One need show only that the Court is competent as a policymaker and that it makes policy in a fashion different from legislatures.[299] Perry envisions a dialectical process involving the two different types of policymakers, which would give rise to better policy as a result of the synthesis than either organ could produce alone.[300]

> [T]he interplay between Court and society is dialectical. Relying in large measure on the preliminary efforts of other courts, the Supreme Court derives various working principles from the totality of the American experience—past and present. The derivation is tentative and incremental. Occasionally, as in *Roe v. Wade*, it is inchoate. But it is not, nor can it be, value-neutral. In turn, society responds to the Court's work, and in responding it will accept or reject, or more often simply moderate, the principles the Court has established. The Court, in turn, will respond by assimilating society's response, and by treating that response as a new facet of the evolutionary American experience that will underlie and inform the Court's future efforts to refine its working principles and to derive new ones. The Supreme Court's role in the dialectical process has been likened to that . . . of a teacher "in a vital national seminar."[301]

296. *See* Perry, *supra* note 12, at 728.

297. *Id.* at 729.

298. *See id*; Perry, *supra* note 167, at 1228.

299. Perry states, "There is no plausible textual or historical justification for constitutional policymaking by the judiciary . . . . The justification for the practice, if there is one, must be functional: if noninterpretive review [i.e., review of constitutionality not based on the value judgements embodied in the text of the Constitution, and associated with judicial policymaking] serves a crucial governmental function that no other practice realistically can be expected to serve, and if it serves that function in a manner that somehow accommodates the principle of electorally accountable policymaking, then that function constitutes the justification for noninterpretive review." Perry, *supra* note 10, at 275.

300. *See* Perry, *supra* note 12, at 718-19. *See also* Perry, *supra* note 11, at 307-10 (explaining the dialectical process).

301. Perry, *supra* note 167, at 1229. Perry states that legislatures are reliable voices for society's interests, and thus one may assume that the interplay between the Court and legislatures constitutes a significant part, if not the major part, of the "interplay between Court and society." *See id.* at 1228.

Perry describes the Court as an unmistakably political entity with an affirmative policymaking role.[302] The Court is to be one of the governmental policymakers.

The one assumption that underlies the entire theory is that society has a body of widely shared values, which provides the means for evaluating governmental policy. Sandalow's theory shares this assumption to a significant extent. A value judgment is, under this assumption, valid if it comports with the dictates of society's norms.

> [M]uch constitutional adjudication involves judicial application of norms—"basic shared national values"—not found in the Constitution, but rather in "conventional morality." By "conventional morality," I mean the basic moral, political, and philosophical principles to which society professes commitment, not specific positions on moral issues taken by a majority in society at a given time. The legitimacy principle [that a law which abridges private interests is invalid unless it furthers legitimate governmental objectives] is the basic doctrine that the judiciary uses to constitutionalize and thereby vindicate conventional morality. The principle requires that every governmental resolution of competing values be legitimate, and the criterion of this legitimacy is conventional morality.[303]

It is important to note why the dictates of conventional morality, as perceived by Perry, are not necessarily the same as the results of a vote or of a vote of representatives. Any particular vote may involve mo-

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302. *See* Perry, *supra* note 12, at 717.

303. Perry, *supra* note 6, at 387-88. Perry notes that similar suggestions as to the role played by conventional morality in constitutional law can be found in Grey, *supra* note 160, at 703, and Wellington, *supra* note 6, at 265-311. *See* Perry, *supra* note 6, at 387. Grey states, "Much of our substantive constitutional doctrine is of this kind. Where it arises "under" some piece of constitutional text, the text is not invoked as the source of the values or principles that rule the cases. Rather the broad textual provisions are seen as sources of legitimacy for judicial development and explication of basic shared national values. These values may be seen as permanent and universal features of human social arrangements—natural law principles—as they typically were in the 18th and 19th centuries. Or they may be seen as relative to our particular civilization, and subject to growth and change, as they typically are today. Our characteristic contemporary metaphor is "the living Constitution"—a constitution with provisions suggesting restraints on government in the name of basic rights, yet sufficiently unspecific to permit the judiciary to elucidate the development and change in the content of those rights over time." Grey, *supra* note 160, at 709. *See generally* Wellington, *supra* note 6, at 243-49.

Professor H.L.A. Hart describes conventional morality as "standards of conduct which are widely shared in a particular society, and are to be contrasted with the moral principles or the moral ideals which may govern an individual's life, but which he does not share with any considerable number of those with whom he lives." H.L.A. HART, THE CONCEPT OF LAW 165 (1961).

tives that the society would deem immoral.[304] Conventional morality, by contrast, involves a society's *professed* ideals, its "underlying moral vision," and is independent of the actual practices or current preferences of the society.[305] Perry perceives a societal disunion between theory and practice. These principles of conventional morality are not eternal, however, but are redefined by each generation.[306]

According to Perry, the dictates of conventional morality are the substance of correct judicial decisions. Conventional morality provides content, leaving deference to the majoritarian processes less necessary. Perry believes that principles of conventional morality can be isolated and employed in legal and moral discussion. For instance, he enunciates three fairness norms, which he believes to be among the principles of conventional morality and thus deserving of implementation in constitutional decisions.

> First, we think it unfair for one person or group to inflict harm on another on the basis of a judgment about relevant facts that no reasonable person could endorse, a factual judgment not even plausibly accurate. Any action, whether public or private, inflicting harm on the basis of a palpably inaccurate factual judgment offends our shared sense of *fairness-as-accuracy*. Second, we think it unfair for one person or group to inflict harm on another on the basis of the latter's possession of a trait that we regard as morally irrelevant. Such action offends our shared sense of *fairness-as-nondiscrimination*. Third, we think it unfair for one person or group to inflict on another a harm incommensurate with whatever good the infliction of the harm might achieve. Such action offends our shared sense of *fairness-as-proportionality*.
>
> The function of the legitimacy principle in equal protection is chiefly the constitutionalization of these three fairness norms.[307]

In a recent article, Perry repudiates that part of his theory describing conventional morality as the source for judicial policymaking, for the reason that "there are no consensual values sufficiently determinate to be of help to the Court," and if there were, "there would probably be little need for the Court to enforce them frequently against electorally

304. *See* Perry, *supra* note 167, at 1226. Recall the discussion of Dworkin's notion of external preferences. *See supra* text accompanying notes 42-44, 83-86.

305. *See* Perry, *supra* note 167, at 1226.

306. *See* Perry, Book Review, *supra* note 293, at 697-99.

307. Perry, *supra* note 6, at 390. How this second principle of fairness underlies equal protection doctrine is further developed in Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979). See also Perry, *The Principle of Equal Protection*, 32 HASTINGS L.J. 1133 (1981), where he discerns the normative content of the equal protection principle in a particularly consequentialist fashion.

accountable officials."[308] Perry sees the Court not as the guardian of the conventional morality, but when involved in making decisions not founded in the text of the Constitution ("noninterpretive review"), as a participant in the "religious" conception of American politics.[309]

> In dealing with ["political-moral"] issues, the Court, when acting at its best, has not relied on established moral conventions. To the contrary, the Court has used such issues as occasions for moral reevaluation of established conventions and for possible moral development, leading . . . to the establishment of morally sounder conventions. . . . Noninterpretive review has served an important, even indispensible function. It has enabled us, as a people, to keep faith with two of the most basic aspects of our collective self-understanding: our "democratic" understanding of ourselves as a people committed to electorally accountable policymaking and our "religious" understanding of ourselves as a people committed to struggle incessantly to see beyond, and then to live beyond, the imperfections of prevailing moral conventions.[310]

Perry feels that the centrality of this religious self understanding implies that neither moral skepticism,[311] nor utilitarianism,[312] is central to American culture. Although Perry does not believe that there exists some single, valid moral theory, he does believe that there may exist right answers to moral questions of human rights. "[A] right answer—*e.g.*, that racial segregation is wrong or that state governments ought not to impose civil disabilities on non-Christians—frequently represents a point at which a variety of philosophical and religious systems of moral thought and belief converge."[313] Such answers "are right or wrong independently of what a majority of Americans happens to believe, either in the short term or in the long term."[314] Because Perry finds moral validity in the convergence of perhaps all or most existing systems of moral thought, the extent to which Perry actually distances himself from reliance on conventional morality is unclear.

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308. Perry, *supra* note 11, at 284.

309. Perry states, "I use the word 'religious' in its etymological sense to refer to a binding vision, a vision that serves as a source of unalienated self-understanding, of 'meaning' in the sense of existential orientation or rootedness. *I do not use the word in any sectarian, theistic, or otherwise metaphysical sense*." *Id.* at 288-89 (emphasis in original).

310. *Id.* at 294-95.

311. *See id.* at 299-301.

312. "The American people still see themselves as a nation standing under transcendent judgment; they understand, even if from time to time some members of the intellectual elite have not, that morality is not arbitrary and that justice cannot be reduced to the sum of the preferences of the collectivity." *Id.* at 291.

313. *Id.* at 304.

314. *Id.* at 307.

3. Harry Wellington

Harry Wellington presents a theoretically refined understanding of the judicial role based on a distinction between "principle" and "policy" akin to that presented by Dworkin.[315] For Wellington, a policy is an instrumental or consequentialist justification for a rule, and a principle is a nonconsequentialist, moral justification for a rule.[316] In his view, a court involved in common law adjudication acts legitimately only when it justifies the rules that underlie its decisions with principle, or with policy that is both widely regarded as socially desirable and relatively neutral.[317] The source of moral guidelines or principles that are to be used by courts is conventional morality, which Wellington defines as "underlying values and attitudes, that translate into 'standards of conduct which are widely shared in a particular society.' "[318] By limiting the source of legitimate judicial decisionmaking to the society's body of social norms and to widely held and neutral preferences of outcome, the courts are denied the opportunity for autocratic behavior and are kept within the bounds of fairness and the dictates of democratic theory.[319] Democratic theory may favor the society's widely held moral norms over the results of any particular vote or legislative compromise, and thus a court may legitimately decide contrary to legisla-

315. Wellington does not attribute this distinction to Dworkin, but does mention that Dworkin too is concerned with the distinction. *See* Wellington, *supra* note 6, at 222 n.1. Bruce Ackerman argues that in fact Wellington and Dworkin mean different things by the principle-policy distinction. According to Ackerman, Wellington's principles need be based only on the society's dominant practices and expectations, while Dworkin's principles must be based on a coherent political theory. B. ACKERMAN, *supra* note 5, at 171-74.

316. *See* Wellington, *supra* note 6, at 222-24.

317. *See id.* at 226-28, 236. By "neutral" Wellington appears to mean that the policy does not impose "disproportionate burdens on a particular group (as contrasted with the population generally) unless there are special reasons that can be adduced for imposing these burdens." *Id.* at 236. One of the problems that Wellington sees with judicial decisions made according to policy in general is that "they may have more finality than is healthy for a constitutional solution based on problematic assumptions." Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 513 (1982) [hereinafter cited as *Judicial Review*]. The finality of constitutional decisions is, for Wellington, an appropriate cause for concern about the institution of judicial review. *See id.* at 519.

318. Wellington, *supra* note 6, at 231 (quoting H.L.A. HART, THE CONCEPT OF LAW 165 (1961)).

319. *See* Wellington, *supra* note 6, at 236-38; H. WELLINGTON, LABOR AND THE LEGAL PROCESS 17-19 (1968). Wellington argues, in fact, that the criticism of judicial review as antimajoritarian is generally overstated, for "[t]he power to act in derogation of the immediate or apparent wishes of the majority is peculiar neither to constitutional adjudication nor, more generally, to the courts." Wellington, *Judicial Review, supra* note 317, at 487. He continues, "It is possible to view these countermajoritarian forces in the Constitution, legislatures, the bureaucracy, and private associations as flaws in our democratic system . . . . But such a view seems mistaken." *Id.* at 490.

tive intent if it can justify the decision on the basis of principle.[320]

The legitimate exercise of power by the Supreme Court in matters of constitutional law is much like the legitimate exercise of power by any other court. Courts are granted the authority to assert legal conclusions that can be justified by principles because the courts as institutions are best equipped for providing principled legal justifications.[321] The Supreme Court functions, therefore, to "translate conventional morality into legal principle," since it is well suited for doing so.[322] The Supreme Court, like other courts, has wide discretion when its decisions can be justified by principle, and restricted discretion when its decisions must be justified primarily by resort to constitutional policy. Additionally, the Court is restricted to the use of principles that may be "related to constitutional text."[323] Yet the text of the Constitution alone rarely provides sufficient guidance in the definition of principles.[324] Judicial review of statutes should be guided by the assumption that policy justifications for the statute are valid, since the legislature is institutionally more competent than the Court in evaluating policy arguments, but the arguments of principle that might be raised with respect to the statute deserve scrutiny.[325] Consequently, the Court may reject a statute because it violates the dictates of conventional morality, but may not reject a statute because it is otherwise unwise or inefficient.[326]

Central to Wellington's theory of adjudication is the ability of judges, including the Justices of the Supreme Court, to understand and apply the dictates of conventional morality.

> [W]hen dealing with legal principles a court must take a moral point of view. Yet I doubt that one would want to say that a court is entitled or required to assert *its* moral point of view. Unlike the moral philosopher, the court is required to assert *ours*. This requirement imposes constraints: Judicial reasoning in concrete cases must proceed from society's set of moral principles

320. *See* Wellington, *supra* note 6, at 264, 286-87, 291. "It is certainly not difficult to imagine that the moral ideals of the community are often less than scrupulously regarded in the give and take of the legislative process with its necessary compromises, trade-offs, and essential goal orientation." Wellington, *Judicial Review, supra* note 317, at 514.

321. *See* Wellington, *supra* note 6, at 280.

322. *Id.* at 267.

323. *Id.*

324. *See* Wellington, *supra* note 10, at 1109-10.

325. *See* Wellington, *supra* note 6, at 284.

326. Wellington faults Ely for equating legislation or majority rule with conventional morality. *See* Wellington, *The Importance of Being Elegant*, 42 OHIO ST. L.J., 427, 428 (1981) [hereinafter cited as *Importance*]. *See also* Wellington, *Judicial Review, supra* note 317, at 514 n.133.

> and ideals, in much the same way that the judicial interpretation of documents (contracts, statutes, constitutions—especially constitutions) must proceed from the document. And that is why we must be concerned with conventional morality, for it is there that society's set of moral principles and ideals are located.[327]

Conventional morality is an evolving set of moral ideals and moral principles that develops organically within a society.[328]

> The American people have a history and tradition which interact with their common problems to fashion attitudes, values, and aspirations that tend toward a dynamic, but nevertheless relatively cohesive, society, and that make it possible to discern a conventional morality. This morality may impose obligations that sometimes are beyond the capacity of some normal adults; therefore, compliance with its obligations may not be "a matter of course." Yet, it is a morality that is at least *knowable* to socialized persons. This is not to imply that individuals would always agree about the implications of a moral duty or the particular behavior that a moral principle requires. It is merely to insist that normal adults know when particular behavior raises serious moral questions.[329]

The way in which a person would discern the strictures of the society's conventional morality would be to "live in it, become sensitive to it, experience widely, read extensively, and ruminate, reflect, and analyze situations that seem to call moral obligations into play. This task may be called the *method of philosophy*."[330] Courts are better equipped than legislatures to reflect upon and analyze issues in isolation from contemporary prejudices, and thus are better equipped to be the voice of conventional morality within the political arena.[331]

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327. Wellington, *supra* note 6, at 244.

328. *See id.* at 245-46.

329. *Id.* at 245 (emphasis in original).

330. *Id.* at 246 (emphasis in original). It is unclear whether "it" in the quote refers to the society or to the conventional morality. It should be noted that Wellington believes legislative decisions provide evidence for, but are not conclusive as to, the features of conventional morality. *Id.* at 287. Wellington states elsewhere that judges act inadequately when they are not sufficiently sensitive to the "political environment [which] is a legitimate aid for the judge in his difficult judicial task of deciding how to count particular values." H. WELLINGTON, *supra* note 319, at 19.

331. *See* Wellington, *supra* note 6, at 246-49. *See also* Wellington, *Judicial Review, supra* note 317, at 493-94. Note that although courts are the best equipped to be the voice of the conventional morality, they need not have the last say. Wellington appears to envision a dialectical relationship between the courts and other voices of the people, similar to that described by Perry. "When the Justices are right about the moral ideals of the community, their decisions become settled and accepted . . . . When the Court is wrong, criticism and analysis help to reveal the mistake—so do the turmoil, the threats, the approval and the resistance, from all the sources that make up our community. Remember, it is the moral ideals of the community and not of the wise philosopher that concern the Court. And it is a

Conventional morality, according to Wellington, evolves slowly, absorbing the best thought of each generation, and adjusting to the new conditions that meet each generation. There is no guarantee that the conventional morality will be as sophisticated as some modern formulations of the hierarchy of moral principles, nor that it will be the "best" morality, because it changes so slowly.[332] Yet, Wellington must feel that this slow absorption of each generation's best produces a sufficiently good morality to be worthy of guiding the politics of the nation. Wellington points out that our conventional morality is not utilitarian in nature.[333] Efficiency alone, although it may provide a basis for policy, is not part of our conventional morality.[334] Therefore, the principle of utility should not be the guideline by which the Court apportions legal rights. Wellington is skeptical as to the potential for success of any critical moral theory, or at least of any "individual rights theory," in explaining or describing the scope of constitutional rights,[335] or the connection between morals and politics.[336]

4. Owen Fiss

The conceptual framework of Owen Fiss may in some ways be likened to that of Perry. Fiss presents both a political scheme for judicial activism, and also some substantive principles to guide decision-making. In Fiss's framework, various aspects of constitutional adjudication involve interpretation of the Constitution through "mediating principles."

> This . . . mode of constitutional interpretation deemphasizes the text. Primary reliance is instead placed on a set of principles—which I call *mediating* because they "stand between" the courts and the Constitution—to give meaning and content to an ideal embodied in the text. These principles are offered as a paraphrase of the particular textual provision, but in truth the relationship is much more fundamental. They give the provision its only meaning as a guide for decision. So much so, that over time one often loses sight of the artificial status of these principles—they are not "part of" the Constitution, but instead only a judicial gloss, open to reevaluation and redefinition in a way that the text

wise court that pays attention to the community—not out of fear, but out of obligation." *Id.* at 516.

332. *See* Wellington, *supra* note 6, at 280.

333. *Id.* at 231.

334. *See id.*

335. *See* Wellington, *supra* note 10, at 1125-26. *See also* Wellington, *Importance, supra* note 326, at 430.

336. *See* Wellington, *supra* note 10, at 1134-35. For a definition of "critical morality" see *infra* text accompanying note 366.

of the Constitution is not.[337]

Fiss finds the Constitution to be virtually vacuous. Only the barest shape of constitutional values is perceivable. To bring about constitutional standards for judicial decisionmaking, substance in the form of principles must be imported into constitutional law. These principles, however, are not sacred, and will change. Given the notion of a vague Constitution and the need for mediating principles, Fiss's affinity with the other members of this group of new commentators is apparent. Not only does he, like the others, embark on a search for content, but he also gives the Court a major political role in providing this content in the form of principles.

> The values that we find in our Constitution—liberty, equality, due process, freedom of speech . . . —are ambiguous. They are capable of a great number of different meanings. They often conflict. There is a need—a constitutional need—to give them specific meaning, to give them operational content, and, where there is conflict, to set priorities. All of us, both as individuals and institutional actors, play a role in this process. In modern society, where the state is all-pervasive, these values determine the quality of our social existence—they truly belong to the public—and as a consequence, the range of voices that give meaning to these values is as broad as the public itself. The legislative and executive branches of government, as well as private institutions, have a voice; so should the courts.[338]

337. Fiss, *Groups and the Equal Protection Clause*, in EQUALITY AND PREFERENTIAL TREATMENT 84-85 (M. Cohen, T. Nagel, & T. Scanlon eds. 1977) (emphasis in original).

338. Fiss, *supra* note 7, at 1-2. In a later article Fiss expands on his notion of constitutional interpretation. He states, "Adjudication is interpretation: Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text." Fiss, *Objectivity, supra* note 159, at 739. With the notion of judge as interpreter, Fiss seeks to combat skepticism as to the legitimacy of judicial policymaking. *Id.* at 740. Objectivity in interpretation can be attained if interpretation is constrained by "disciplining rules" authoritative in the relevant "interpretive community." There is an interpretive community for legal interpretation, of which judges are members. *See id.* at 744-47. Thus the Court may pursue legitimate policymaking through objective interpretation of the Constitution. "The ultimate authority for a judicial decree is the Constitution, for that text embodies public values and establishes the institutions through which those values are to be understood and expressed. When asked to justify why the schools of a community must be desegregated, reference will first be made to some lower court decision, then to a Supreme Court decision, and finally to the Constitution itself, for it is the source of both the value of equality and the authority of the judiciary to interpret that value." *Id.* at 751.

In this view of adjudication as interpretation, the text of the Constitution may be vague, but not wholly devoid of content. "My defense of adjudication as objective interpretation . . . assumes that the Constitution has some meaning—more specifically, that the text embodies the fundamental public values of our society . . . . The idea of adjudication requires that there exist constitutional values to interpret, just as much as it requires that there be

With regard to these mediating principles, Fiss, like his comrades, seeks "substance" and not "procedure." This is apparent from his discussion criticizing the "antidiscrimination principle" and favoring the "group-disadvantaging principle" as a foundation for equal protection rulings. The antidiscrimination principle is a statement that "similar things should be treated similarly."[339] This is intended to be simply a procedure, something that may be seen as value-neutral, and thus something that can be applied by a court without injection of preference.[340] However, just as modern moral philosophers have complained that the utilitarian calculus, as a procedure, at best does not lead to correct solutions, and at worst is a camouflage for improper value judgments leading to incorrect solutions, so argues Fiss regarding constitutional principles. Fiss complains that the antidiscrimination principle is not value-neutral, and that the values it does represent are invalid.[341] He argues that the group-disadvantaging principle, which states that there should be no laws or practices that hurt disadvantaged groups, should underlie equal protection decisions instead.[342]

Fiss appears at first glance to justify his principles and value judgments with consequentialist arguments.[343] The dominant mode of justification, however, does not lie in consequentialism, but rather lies in an appeal to something like conventional morality. It is this type of justification that provides the bedrock for his consequentialist arguments. The fact that Fiss employs such nonconsequentialist "analytic tools" as "nonallowable interest" and "compelling benefit" demonstrates that he is not a consequentialist (and therefore not a utilitarian). That is, when attempting to justify his group-disadvantaging principle, Fiss claims that certain interests should not be given any weight no matter how much attention to them would increase total welfare. An example of such a nonallowable interest is "the interest of whites to keep blacks in a subordinate position."[344] Similarly, an ordinary benefit to the society will not justify (a slightly less than) equivalent harm to a disadvantaged group; only a compelling benefit could justify such harm.[345]

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constraints on the interpretive process. Lacking such a belief, adjudication is not possible, only power." *Id.* at 762-63.

339. Fiss, *supra* note 337, at 85.

340. *See id.* at 97.

341. *See id.* at 99-123.

342. *See id.* at 134.

343. *See, e.g.*, Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 258-61 (1971); Fiss, *supra* note 337, at 128.

344. Fiss, *supra* note 337, at 142.

345. *See id.* at 143.

Although Fiss is somewhat unclear on this topic, he appears to rely on a notion of conventional morality as the foundation for his legal and moral principles. In a discussion as to whether the antidiscrimination principle or the group-disadvantaging principle should be preferred when adjudicating under the Equal Protection Clause, he states,

> [S]ome might argue that the antidiscrimination principle should be given priority . . . because equal treatment is a more widely accepted goal of personal and social action (or more in accord with traditional American values, such as individualism). But the argument seems wrong, even if the informal Gallup Poll came out as imagined. It is not the job of the oracle to tell people—whether it be persons on the street or critical moralists—what they already believe.
>
> For one thing, the public morality may be only an echo: the concept of equal treatment may be the more widely accepted subgoal of the ideal of equality because it more nearly accords with the concept of equality previously propounded by the Supreme Court and because it is the one embodied by the law. . . . Of course, the relationship between law (viewed as pronouncement rather than directive) and popular morality does not deny the existence of the latter; an echo is still a sound. But it does mean that the group-disadvantaging principle may also be widely accepted once it too is propounded to be the chosen strategy of the Supreme Court. . . .[346]

Fiss does not appear in this quote to put too much stock in the "public morality" because it seems too susceptible to influence. In later work, however, he does argue that the Court must involve itself with "constitutional values" or "public values." Perhaps the distinction between the public morality of the earlier article and the public values of the later article is the distinction between present community sentiments and the "underlying values and attitudes" or "underlying moral vision" of Wellington and Perry. This distinction surfaces in the following quote:

> The judge is not to speak for the minority or otherwise amplify its voice. The task of the judge is to give meaning to constitutional values, and he does that by working with the constitutional text, history, and social ideals. He searches for what is true, right, or just [citing Dworkin]. He does not become a participant in interest group politics.[347]

346. *Id.* at 150-51.

347. Fiss, *supra* note 7, at 9. Fiss here cites to Dworkin, *No Right Answer? reprinted in* 53 N.Y.U. L. REV. 1 (1978), where one finds the following: "[A] proposition of law is sound if it figures in the best justification that can be provided for the body of legal propositions taken to be settled. I argue that there are two dimensions along which it must be judged whether a theory provides the best justification of available legal materials: the dimension of fit and

These constitutional values need not be "embodied in textually-specific prohibitions." The Equal Protection Clause and the Free Speech Clause, for example, are not very specific. Rather, such clauses "simply contain public values that must be given concrete meaning and harmonized with the general structure of the Constitution."[348]

In Fiss's theory, as in the theories of Sandalow, Perry and Wellington, the text of the Constitution does not, without supplement, provide sufficient guidance to the Court in its decisionmaking. As a result, each of these commentators sees a need to define a role for the Court that is consistent with what is seen to be the actual source of principles used in constitutional adjudication. Fiss's concept of the proper role for the Court is based on two potentially conflicting notions. The first is that the Court is one of several political policymakers, and is left to assert its influence in any way that it can. The second is that the Court is only structurally well suited to make certain kinds of value-forming decisions.[349] "Judges have no monopoly on the task of giving meaning to

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the dimension of political morality. The dimension of fit supposes that one political theory is *pro tanto* a better justification than another if, roughly speaking someone who held that theory would, in its service, enact more of what is settled than would someone who held the other . . . . The second dimension—the dimension of political morality—supposes that, if two justifications provide an equally good fit with the legal materials, one nevertheless provides a better justification than the other if it is superior as a matter of political or moral theory; if, that is, it comes closer to capturing the rights that people in fact have." *Id.* at 30 [footnote omitted]. Fiss's reliance on Dworkin is interesting because Dworkin appeals to conventional morality but does not rest on it. Both Fiss and Dworkin seem to be ambivalent concerning reliance on conventional morality. *See supra* text accompanying notes 98-105.

As is apparent from his 1981 symposium, *supra* note 11, Perry too is ambivalent in this regard. He rejects resort to conventional morality by the Court, yet he seemingly rests moral validity on the convergence of existing systems of moral thought. *See supra* text accompanying notes 310-14. In that article, Perry states that the theory Fiss provides in his *Foreword* is "largely harmonious" with Perry's own. *See* Perry, *supra* note 11, at 323.

On the other hand, instead of explaining Fiss's appeal to values in terms of Perry's theory, one may attempt to explain it in terms of Fiss's theory of objective interpretation of the Constitution. *See supra* note 338. That is, perhaps for Fiss the source of values to be used by the Court is not the conventional morality per se, but rather the society's "public values," which are embedded in the Constitution. "Interpretation does not require agreement or consensus, nor does the objective character of legal interpretation arise from agreement. What is being interpreted is the text, not what individual people believe to be the good or right. An individual is . . . morally free to dispute the claim of the public morality embodied in the Constitution and its interpretation . . . but that possibility does not deny the existence or validity of either that morality or its interpretation." Fiss, *Objectivity, supra* note 159, at 751-52. *See also id.* at 753. But, as with Perry's new theory, it is unclear how Fiss's public morality differs from conventional morality.

348. Fiss, *supra* note 7, at 11.

349. Fiss states that his observations concerning the role of the Court "imply a view of judicial function that is not easily cabined . . . . They suggest that courts be seen as a coordinate source of government power with their own sphere of influence, one that is defined in terms that unify both the *occasion* and *function* of the exercise of power. The judi-

the public values of the Constitution, but neither is there reason for them to be silent. They too can make a contribution to the public debate and inquiry."[350] Judges are just one group of political actors who attempt to give definition to public values.

One area in which such value-defining adjudication has taken meaningful steps in the past, and in which it should be allowed to venture in the future, according to Fiss, is the area of "structural reform." Structural reform involves adjudicating guidelines for the operation of large-scale, generally state-controlled, organizations, primarily through the use of injunctions. The Court's actions in *Brown v. Board of Education*[351] provide the paradigm for this type of adjudication.[352] In such cases, as in all cases, the existence of determinate public values provides legitimacy for the Court's active role. To the extent that there is no moral or political truth aside from the result of any particular vote tally, the Court has no coherent role.

> We have lost our confidence in the existence of the values that underlie the litigation of the 1960's, or, for that matter, in the existence of any public values. All is preference. That seems to be the crucial issue, not the issue of relative institutional competence. Only once we reassert our belief in the existence of public values, that values such as equality, liberty, due process, no cruel and unusual punishment, security of the person, or free speech can have a true and important meaning, that must be articulated and implemented—yes, discovered—will the role of the courts in our political system become meaningful, or for that matter even intelligible.[353]

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cial role is limited by the existence of constitutional values . . . ." *Id.* (emphasis in original).

350. Fiss, *supra* note 7, at 2. Like Perry, Fiss envisions a "pluralistic or dialectical relationship" among the various governmental branches. *Id.* at 15.

351. 347 U.S. 483 (1954), 349 U.S. 294 (1955).

352. *See* Fiss, *supra* note 7, at 2-8. *See also* O. FISS, THE CIVIL RIGHTS INJUNCTION 1-12 (1978). "Structural reform" is a form of adjudication that is contrasted with the "dispute resolution" model of adjudication. Whereas the dispute resolution model assumes two individuals in disagreement seeking out an umpire, structural reform allows the participation of various groups, which may themselves be internally divided on the issues. More important, the dispute resolution model seeks to accommodate the private desires of the individuals, whereas structural reform litigation vindicates the values that form the "core of a public morality," which are identified by the Constitution. Fiss, *The Social and Political Foundation of Adjudication*, 6 LAW & HUM. BEHAV. 121, 122-24 (1982) [hereinafter cited as *Foundation of Adjudication*]. Fiss states, "Just as the dispute resolution model shares the assumptions of social contract theory and the night watchman state [*e.g.*, that 'ends are private, power is legitimated through individualized consent,' *id.* at 127], structural reform and the modern activist state share a common political theory . . . . Both are grounded on the belief in the existence and importance of public values and a recognition of the need to translate those values into social reality . . . ." *Id.* at 128.

353. Fiss, *supra* note 7, at 16-17. *See also* Fiss, *Objectivity, supra* note 159, at 762-63.

The question that might be raised here is why the Court should have much of a role here at all in the implementation of public values. Should not a policymaking monopoly be granted to legislatures, except perhaps for those cases involving "legislative failure?" Fiss avoids these questions, for he rejects the very premise that forms the foundation of constitutional law doctrine based on legislative failure, which is that the only legitimate source of values employed in policymaking is people's preferences.

> [F]ootnote four and the theory of legislative failure that it announces is radically incomplete. . . . First, the footnote gives no account of the judicial function even in the acknowledged cases of legislative failure. It never explains why legislative failure is to be corrected by judicial action. Second, the footnote never justifies its major normative premise, the one positing the supremacy of the majoritarian branches even when constitutional values are at stake. At the root of both failings is, I believe, a denial of the special character of our constitutional values.[354]

There is no reason, then, to grant a monopoly to the legislature. Majoritarian influence is only one type of legitimate input into governmental policymaking. Another source of legitimate input is constitutional, or public, values. Courts properly provide an influence in any area in which such values exist. "The judicial role is limited by the existence of constitutional values, and the function of courts is to give meaning to those values."[355]

Due to structural features, courts are better suited to provide such input than are other governmental organs. Unlike legislators, judges are guided by social and institutional expectations to ignore their own preferences, or the preferences of others, and to decide justly or truthfully.[356] In addition, judges, by the nature of adjudication, must give principled justifications for their decisions, and must come to decisions only after participating in "a dialogue about the meaning of the public values."[357] It is a bit ironic, perhaps, that it is actually judicial process that lends legitimacy to the Court's role as a decisionmaker.[358] Thus, at least to some extent, it is process and not substance that becomes the

354. Fiss, *supra* note 7, at 8-9.

355. *Id.* at 11.

356. *See id.* at 12-13. Yet a court may lose its independence, and its ability to engage in dialogue, as it becomes involved in the restructuring of institutions under the remedial aspect of structural reform litigation. Fiss, *Foundation of Adjudication*, *supra* note 352, at 126-27.

357. Fiss, *supra* note 7, at 13. Also, courts possess a special competence for textual interpretation. *See* Fiss, *Objectivity, supra* note 159, at 755.

358. *See* Fiss, *supra* note 7, at 16. The courts' "expertise is derived from the special quality of the judicial process—dialogue and independence." *Id.* at 34. *See also* Fiss, *Ob-*

focus of this constitutional doctrine as well.[359]

5. Summary

Karst and Brest argue that there exist specific moral and legal principles that are in some sense valid, and thus should be applied by judges. From this it may be inferred that there exists some body of valid principles, some content of morality, but this is inference only. Sandalow, Perry, Wellington and Fiss proceed one step further by allowing the content of morality as a whole to serve as an integral part of their theories. Whereas knowledge of individual moral principles would direct the courts in individual areas of the law, knowledge of the source of morality as a whole compels a certain type of role for the courts. A more complete moral theory allows a more complete constitutional doctrine.

It is important to appreciate how changes in moral philosophy away from utilitarianism might have helped these constitutional law commentators to construct their theories. Certainly utilitarians as well as nonutilitarians believe that at any given time a correct moral stance exists. Within the utilitarian framework, one might say that there is a best policy in light of the morality defined by utilitarianism. The way in which the best policy can be found is through the use of the utilitarian calculus. No one is terribly adept at performing the required calculations, but perhaps a vote is the best way to approximate the hypothetical correct results of the calculations. Therefore, policymaking should be left to the majoritarian organs of government.

Modern moral philosophy, by offering alternative theories for the correct means of identifying moral truths, can provide constitutional law commentators with at least two types of alternative constitutional doctrines. For instance, philosophers like Dworkin and Scanlon present modified utilitarian approaches to the discernment of moral imperatives.[360] Such theories may be used to support the notion that, while the preferences of the members of the society may be morally relevant,[361] there are problems with simply monitoring those preferences at

jectivity, supra note 159, at 754-55; Fiss, *Foundation of Adjudication, supra* note 352, at 125-26.

359. Of course, Fiss can say that what makes a judicial decision correct is substance—that is, faithfulness to the public morals. The traditional commentator cannot make such a claim, and will find a judicial decision to be correct if it is properly deferential to majoritarian procedure, and if it is proper with respect to logical exposition.

360. *See supra* text accompanying notes 42-45, 71-92, 118-20.

361. Scanlon's theory is of aid here only in spirit, since in his view of utilitarianism, preferences do not provide the input for the utilitarian calculus, but rather "benefits and burdens" do. *See* Scanlon, *supra* note 15, at 95. For this reason, his utilitarian theory would

a given time and aggregating them. It might be the case that simple polling would take into account irrelevant preferences, or would not take sufficient account of certain underlying moral values.[362] So, to the extent that the basic moral values of a society are not expressed faithfully in the preferences monitored in the polling place, a modified utilitarian theory could support the validity of the popular morality without supporting the validity of the results of majoritarian processes. In this way, modified utilitarian theories may provide the constitutional commentators with the basis for a theory of the judicial role grounded in conventional morality, where "conventional morality" refers to the body of moral rules accepted as such by a society, without forcing the commentator to accept notions of legislative deference. Also, Dworkin's theory of adjudication, which calls for constraint of judges by the "community morality," which is defined as a *theory* that best explains relevant community events and institutions, provides another model for the commentators who base their theories on conventional morality.[363]

Philosophers like Rawls, Nozick and Fried have presented theories that cannot be tied so closely to consensus, but which attempt more theoretical justifications, such as resort to coherence theory.[364] As a matter of design, such theories, historically based on appeals to reason or on the preferences of some social elite,[365] will not automatically support the validity of popular values, but rather will provide a means for evaluating them. Such theories can provide constitutional commentators with the basis for a theory of the judicial role grounded in critical morality,[366] where "critical morality" refers to a body of moral rules

not support prima facie moral validity of voting or legislative decision in the first place, and his revision of utilitarian theory would not support the underlying conventional morality.

362. *See* R. DWORKIN, *supra* note 42, at 276-77; Scanlon, *supra* note 15, at 98-101.

363. *See supra* text accompanying notes 98-105.

364. Consensus of some form arguably will enter into all such theories at some level. Perhaps even our notions concerning which statements follow logically from others is based on consensus. Certainly, Rawls's theory involves the theoretical consensus of those in the original position. The distinction between those theories which are or are not closely tied to consensus involves the extent to which consensus is relied upon, or the proximity of the discernment of moral truth to some sort of popular manifestations of approbation.

365. That moral truth might be identified by observation of some sort of elite is found in D. HUME, *Of the Standard of Taste* in OF THE STANDARD OF TASTE AND OTHER ESSAYS 4-5, 17-19 (J. Lenz ed. 1965); PLATO, *Crito* 46c-48d in THE COLLECTED DIALOGUES OF PLATO 31-33 (E. Hamilton & H. Cairns eds. 1961).

366. This is not meant to imply that the theories of Dworkin and Scanlon, or even utilitarian theories, are not examples of theories of critical morality. The focus of this discussion is the extent to which such theories support heavy reliance on some sort of consensus. Conventional morality is certainly more consensus-bound than critical morality and less so at any particular time than vote-based (approximated utilitarian) morality. This latter point is

that is the consequence of a theory that is used to criticize or support rules of conventional morality.[367]

For the commentators who have been labeled "the political," the first of the above two types of theories would be extremely useful. These four commentators seek to find a means of justifying appeals to the basic values shared by members of the community, that is, to conventional morality, that will not bind them absolutely to espouse deference to legislative decisions. The modified utilitarian theories of Dworkin and Scanlon could be used in the formulation of such theories. As long as there exist public values that can be discerned, but which are not necessarily discerned through majoritarian processes, there is no reason to believe that determinations by the Court are necessarily less valid than determinations made by legislatures. Yet, at the same time, there is no need to place trust in the arcane arguments of professional philosophers, for the people themselves are the source of true values. In this way, the modified utilitarian theories can provide these commentators with just what they are looking for: an argument for the existence of democratic values, values derived from the people, that does not call for excessive deference to be paid to legislatures. Specific values may be designated as popular values, if sufficiently argued for, despite the fact that votes and legislative decisions inhibit the expression of those values. For instance, Dworkin in his modified utilitarian theory places great value on racial and other equality, thereby eliminating the possibility of a utilitarian justification of, for example, any form of racial discrimination,[368] and Scanlon introduces the values of "fairness" and "equality" into his modified utilitarian framework.[369]

Dworkin, unlike the other philosophers, has devised a theory of the role of the Supreme Court built upon his own moral theory. For Dworkin, the Supreme Court Justice, like any other judge, is granted the task of adjudicating on the basis of principles.[370] "Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right," as opposed to arguments of policy which "justify a political decision by showing that the

correct because any particular vote may not be consistent with time-worn social norms. It might even be the case that a society would have norms to which a majority of the members would not at any given time profess allegiance.

367. *See* H.L.A. HART, LAW, LIBERTY AND MORALITY 82 (1963); S. HAMPSHIRE, TWO THEORIES OF MORALITY 67-70 (1977). *See also* B. ACKERMAN, *supra* note 5, at 10-15; D. LYONS, FORMS AND LIMITS OF UTILITARIANISM 145-50 (1965).

368. *See* R. DWORKIN, *supra* note 42, at 234-38.

369. *See* Scanlon, *supra* note 15, at 98-101.

370. *See* R. DWORKIN, *supra* note 42, at 148.

decision advances or protects some collective goal of the community as a whole."[371] Dworkin argues that judicial decisionmaking should be based largely on principle, and to the extent that it is, it does not run afoul of democratic political theory.[372] The reason that such judicial decisionmaking is democratic, is that Dworkin's moral theory calls for the existence of community rights that function to protect citizens in specific ways from the tyranny of public interest or majority rule, as discussed earlier.[373] Therefore, when a judge makes a decision based on arguments of principle, and thus on features of existing community morality, the judge is neither assuming power by inventing new "rights," nor usurping power from the majority in a way inconsistent with the community morality. The function of the judge is not undemocratic in any democracy that recognizes rights that do not change with every new vote.

The Constitution, according to Dworkin, is an institution for setting out a body of such rights.[374] For him, the Constitution is the primary source, but not the sole source of rights for Supreme Court adjudication, since independently existing rights must be respected also.[375] Dworkin's willingness to depend significantly on the text of the Constitution derives from his view that the vague standards set out in the text were chosen intentionally to establish "concepts" of moral standards, rather than "conceptions."[376] This distinction[377] allows one to argue that the Constitution binds the Court only to the general notion, or concept, of, for instance, cruelty, and does not bind the Court to a specific formulation, or conception, of cruelty. The Court is left to formulate its own modern conception of cruelty, for cruelty as a concept is understood merely by virtue of speaking the common language,[378] and is not restricted to what the Framers would have considered to be cruel.

Given this set of assumptions, there seems to be little difficulty in justifying an activist judiciary. The Court acts legitimately when it makes decisions founded on arguments of principle, arguments concerning the already existing rights of the parties before it. These rights derive from the Constitution and the community morality. For at least

371. *Id.* at 82.
372. *See id.* at 85.
373. *See supra* text accompanying notes 71-92.
374. *See* R. DWORKIN, *supra* note 42, at 106, 133.
375. *See id.* at 234-39.
376. *See id.* at 133-35.
377. *See supra* note 105.
378. *See* R. DWORKIN, *supra* note 42, at 127.

two reasons, the Court is a no less proper body than a legislature for discerning rights. First, the role of rights is to protect people from the majority. A legislature is a voice of the majority, and it is unfair to have the majority judge its own cause.[379] Second, rights are features of political theories, and the discernment of rights involves the formulation of such theories. The Court is no worse, and in fact probably better, adapted to the formulation and testing of such theories than is a legislature. There is a risk that the Court will make the wrong decision, but such decisions will be eroded in time if they are sufficiently unpopular.[380]

C. The Philosophical

As should be clear by now, one of the central features of some of these new constitutional theories is a theory of morality. Yet, there are two ways in which "morality" might be used in this context, and thus two types of theories that might qualify as a "theory of morality." The differences between the theories employed by Sandalow, Perry, Wellington and Fiss and those employed by Tribe and Michelman are illustrative of this dichotomy.

One use of "morality" is as a label for a body of society-specific norms. Within a society, various manifestations of coherence and cohesiveness among the members evolve. Two such significant manifestations are law and morality. From this perspective, a theory of morality is a theory that discerns norms from the fact of acceptance or allegiance of the members of the society as a whole. Accordingly, moral validity is a matter of testing whether certain rules are accepted by the society as part of its body of moral rules. Theories based on this concept of morality are theories of conventional morality. Sandalow, Perry, Wellington and Fiss employ such theories of morality.

Another use of "morality" refers to the body of rules dictating acts or goals that are "correct" in an ultimate, not society-specific way (although the rules themselves may be society-specific). When one speaks of "moral truth," "the morality of war," or "a society's immoral legal system," one may not be speaking of conformance with that society's norms, but rather may be making evaluations of a more universal or general character.[381] Moral validity from this perspective would lie in the correctness of the norm rather than allegiance to the norm. Many do not believe that such ultimately correct moral norms exist, yet we

379. *Id.* at 85, 142-43.
380. *See id.* at 148.
381. *See* H.L.A. HART, *supra* note 367, at 17-24.

refer to such norms in everyday speech. One can ask, without sounding peculiar, "Well, I agree that this law reflects our society's view of punishment, but is it moral?" Similarly, one might ask of someone holding a theory of morality based on conventional morality, "The Supreme Court decision reflects the people's view of punishment, but is it correct?" For a person who believes that some correct critical morality exists, attempts to justify Supreme Court decisions through reliance on conventional morality will not be considered responsive to the request for justification. The fact that society assents is not relevant for such people, since society may be wrong (look at Nazi Germany, for example).[382] They must seek some other type of justification. Tribe and Michelman appear to fit into this category of people concerned with the *justification* of moral and legal assertions.

1. Laurence Tribe

For Laurence Tribe, as for the four scholars just viewed, the Supreme Court is a political organ, a governmental policymaker. The Justices cannot be seen simply as facilitating procedure. Any decision as to whether a certain piece of legislation is worthy of deference is itself a substantive governmental policy decision.[383] The Court as a policymaker has legitimacy distinct from, and not dependent on, the legitimacy attaching to the majoritarian organs of government.[384] Accordingly, citizens have two distinct types of legitimate governmental expectations, one satisfied by the courts and one by legislatures: citizens have a right to participate as litigants and the right to participate as voters.[385] Thus, as noted by Perry and Fiss, there is a duality to governmental decisionmaking, which creates policy through a dialectical

382. Rather than say that Nazi Germany's citizens acted morally, the conventional moral theorist might say that the people there were immoral for they did not act in accord with their own ideals. This might possibly be true for that society, but it is unlikely that it is true for every "bad" society. For the conventional moral theorist there must be *some* empirically observed link between the people and their moral standard. If no "bad" society is ever moral, for the conventional moral theorist, the connection between a society and its moral standard must be attenuated indeed. In such a case the conventional moralist would appear to be a critical moralist.

383. *See* L. TRIBE, *supra* note 10, at 453; Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1085-87 (1977) [hereinafter cited as *New Federalism*].

384. *See* Tribe, *Seven Pluralist Fallacies: In Defense of the Adversary Process—A Reply to Justice Rehnquist*, 33 U. MIAMI L. REV. 43, 46 (1978) [hereinafter cited as *Fallacies*]. *But see* Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 131-32 (1981).

385. *See* Tribe, *supra* note 9, at 1068.

process.[386]

Tribe challenges the traditional view of the role of the Court in several ways. First, he questions the connection between the text of the Constitution and the policy decisions of the Court. Tribe takes a moderate view of the use of the Constitution by the Court.

> [T]o say that a principle, however durable and appealing, must not be imposed by the Supreme Court "if it lacks connection with any value the Constitution marks as special" [quote from Ely] is to say nothing false—but it reveals very little of what is true. . . . And to say, at the other extreme, that judicial protection of human rights "would be better justified by explication of contemporary moral and political ideals not drawn from the contitutional text" [quote from Gray] adds little in this context, for in the end it is the *text* that invites a collaborative inquiry, involving both the Court and the country, into the contemporary contents and demands of freedom, fairness, and fraternity. The text does so through majestic generalities that plainly summon judges and lawmakers alike to a task which simply cannot be understood as deciphering of an ancient scroll, however much the image of passive interpreter might suit an enterprise whose legitimacy is sometimes doubted.[387]

It appears, then, that although Tribe does want the Court to remain somewhat faithful to the text of the Constitution, perhaps as a device for setting the agenda for inquiry, he does not feel that the Constitution can serve as the sole source of content in the decisionmaking process. This view itself is not terribly informative. On the one hand, he speaks of the Constitution's prescription for certain types of policy formation.[388] On the other hand, he speaks of the "Constitution as a mandate for a process that seeks to incorporate evolving visions of law and society into constitutional principle,"[389] a notion that perhaps betrays a view of an open-ended or indeterminate text which provides only "delphic" messages.[390] It appears that, at the very least, Tribe joins the other commentators viewed in rejecting an interpretivist or textualist theory of the judicial function.

The second way in which Tribe challenges the traditional view is by criticizing the idea that the majoritarian process is the "sole touch-

386. *See* Tribe, *Fallacies, supra* note 384, at 54.

387. L. TRIBE, *supra* note 10, at 566.

388. *See* Tribe, *supra* note 12, at 291. Tribe states: "[T]he Constitution constrains and shapes the choice among alternative processes of policy-formation and decision no less than it controls either the content of the specific policies formed or their accurate application to particular cases." *Id.* at 291 n.63.

389. *Id.* at 293.

390. *See* Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 14 (1973).

stone of legitimacy." On one level, he argues that the process is not wholly successful in monitoring consensus.[391] Even assuming that legislators are capable of monitoring consensus accurately, it is unlikely that the substance of this consensus will always survive legislative compromise.[392] On a more fundamental level, the majoritarian process cannot be the sole source of legitimacy because it does not necessarily lead to the use of valid substantive values in policymaking.

> [I]t is significant that the Court never wholly abandoned the position that legislatures, at least in their regulatory capacity, must always act in furtherance of public goals transcending the shifting summation of private interests through political process. The pluralist thesis that there *exists* no public interest beyond that summation never became judicial dogma in economic life any more than in other sectors of human concern. Thus, even when deferring to legislative actions, the Court continually pointed to reasons that could justify such actions in terms of the general public interest.[393]

In short, Tribe rejects intuitionism, and does not find validity in policy decisions simply because they result from democratic process. "Decisions are legitimate . . . because they are right."[394] Thus, questions of which values are fundamental are "logically and morally prior" to questions of who will prevail in pluralistic political struggles.[395]

Tribe, like others viewed in this article, does not believe that majoritarian procedure can necessarily be the source of "right" decisions, since it is only a "contentless" procedure and thus lacking in conscious direction. Tribe addresses himself to the constitutional doctrine inspired by footnote four—namely, the traditional view that the Court may step into the world of policymaking by asserting itself (when there is no clear constitutional mandate) only in order to aid the majoritarian process when there has been some legislative failure.

> [I]t is not difficult to show that the constitutional theme of perfecting processes of governmental decision is radically indeterminate and fundamentally incomplete. The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of sub-

391. *See* L. TRIBE, *supra* note 10, at 51.

392. *See id.* at 1091. *See generally* Tribe, *Fallacies, supra* note 384, at 43.

393. L. TRIBE, *supra* note 10, at 451 (emphasis in original). Although this statement is merely descriptive, it is clear that Tribe makes it with approval. Further on in the same discussion Tribe states that as opposed to the "pluralist approach," he supports "a substantive acceptance of certain regulatory laws as supportive of human freedom, rightly understood, and therefore not violative of due process." *Id.* at 452.

394. *Id.* at 52.

395. *See* Tribe, *Fallacies, supra* note 384, at 44-45.

> stantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.[396]

As an example, Tribe discusses the notion of discrete and insular minorities and how values must be employed in order to distinguish those minorities from other losers in majoritarian political struggles.[397] Decisionmaking, then, is inextricably bound up with values. A constitutional doctrine that forces the Court into a minor role out of deference to process is faulty, for the adoption of such a doctrine would constitute the triumph of unarticulated, and thus unexamined, values. Another problem with a doctrine that appeals to "contentless" process as the source of legitimacy is that the Constitution itself does not teach deference to process, but rather contains many substantive commitments.[398] The basic question Tribe asks of the process-perfecting theorists, as all of the commentators viewed in this article might ask, is

> Why *should* politics be open to equal participation by all? Doesn't that norm itself presuppose some substantive vision of human rights? Why wouldn't a vision rich enough to support a reasonably complete theory of political openness also suffice to generate a theory of which substantive claims individuals may make against the majority?[399]

The assertion that processes which provide policy answers all have distinct substantive commitments serves Tribe well in attacking areas other than majoritarianism. Like Fried, Tribe attacks economic analyses of rights for having unexpressed assumptions as to the nature of distributive rights and other rights. Whereas Tribe criticizes majoritarianism qua contentless procedure as not being committed to proper values, he criticizes economic analyses of rights qua contentless procedure for being committed to hidden, improper values. The problem, as he sees it, with economic analyses of rights stems from their focusing on the end results of processes, like the functioning of the market, rather than on the value of the processes themselves.[400] With respect to such processes, it is important to focus not only "on *where one ends up* but on *how one gets there*."[401] Tribe is led by such reasoning to an attack on utilitarianism itself also.

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396. Tribe, *supra* note 9, at 1064.

397. *See id.* at 1073-77.

398. *See id.* at 1065-67. This might be a little unfair, since the legislative failure doctrine arose partially out of notions of the emptiness of the Constitution, which Tribe himself might share. Ely's legislative failure theory is a good illustration of that development. *See* J. ELY, *supra* note 134, chs. 1-4.

399. Tribe, *supra* note 9, at 1077-78 (emphasis in original).

400. *See* Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 628-33 (1973).

401. *Id.* at 631 (emphasis in original).

> From many perspectives, the *procedures* that shape individual and social activity have significance independent of the final products they generate. Yet the traditional approach of both moral philosophy and welfare economics has been to focus exclusively on the end results of social and institutional processes in assessing their value. Thus classical utilitarianism, for example, has asked simply whether a particular process or distribution produces the greatest net balance of satisfaction.[402]

Utilitarianism and economic analyses of rights betray (incorrect) assumptions about the nature of rights not only because they are concerned solely with results, but also because they are concerned solely with preferences. The utilitarian calculation—a procedure that focuses only on the satisfaction of human wants—has a value orientation by virtue of this fact. Yet this orientation is improper because it is simply not the case that all values that we hold can be expressed in terms of human preference.[403]

> Treating all values as based on personal preferences results in a major shift in focus: Attention is no longer directed to the ostensible content of the value but rather to the fact that it is a more or less abstracted indicium of self-interest. Even if one ultimately chooses the same action under such a shift of focus, one may well end with the feeling that one has chosen them not out of obligation or for their own sake, but because their opportunity cost in terms of one's range of personal interests was low enough, thereby distorting the meaning of the choice and of the actions chosen.[404]

The emphasis on valuing procedure for its substance, for what it is and can be, has led Tribe to a view of how courts should operate, which he calls "structural due process." Tribe recognizes the irony here, that those traditional commentators who seek to base constitutional doctrine on process do not pay sufficient attention to the process itself, while those like Tribe who are interested in substantive directions for constitutional law must concern themselves with process as something which is valuable in itself.[405] Fiss's theory, it may be remembered, led to a similar irony.[406] In Tribe's formulation, "If process is constitutionally valued . . . it must be valued not only as a means to some independent end, but for its intrinsic characteristics: being heard is part of what it means to be a person. Process itself, therefore, becomes

402. Tribe, *supra* note 11, at 79 (emphasis in original).

403. *See* Tribe, *supra* note 6, at 1329.

404. *Id.* at 1329-30.

405. *See* Tribe, *supra* note 9, at 1071.

406. *See supra* text accompanying notes 357-59. This can be seen to some extent in Rawls also. *See supra* note 32.

substantive."[407]

The goal of structural due process is to have a system of adjudication which, by virtue of procedure, will adapt to changing values and changing law.[408] A constitutionally dictated process, perhaps more so than constitutionally dictated protection of substance, would be well equipped to reflect such substantive changes. Such a process would cause each generation to confront the legitimacy of its laws. Over time, the evolution of values, rather than the stagnation of laws, should result. The role of the judiciary in this procedural system would be to promote such evolution through facilitating dialogue concerning the issues at hand.[409] In such dialogue,

> [a] citizen whose basic liberty is subject to control is always entitled to some answer (as a matter of minimum rationality—substantive due process) when she asks *why the control is being enforced at all*, just as she is entitled to be told (as a matter of procedural due process) *why the control applies to her*. In accounting for this demand, structural due process adds only a twist: the citizen inquiring about why a control has continued in force is entitled to a responsive answer from the state, not a hypothetical answer from a reviewing court. From the dialogue-centered perspective of structural due process, the proposition that "a law serves no purposes its defenders are now willing to articulate" (the ground for invalidation under the articulated rationale approach) is thus equivalent to the proposition that "a law serves no imaginable purpose" (the usually accepted "neutral" ground for substantive due process invalidation).[410]

A dialogue that would lend legitimacy to governmental control could not be cut short by pre-ordained deference to a rule provided in the past by a governmental body. If a court is allowed to decide a controversy merely by invoking some rule of thumb, it need never confront the "norms or factual assumptions that are widely shared" at that particular time.[411]

> [T]he commitment to real dialogue which this Article locates at the heart of an adequate notion of legitimacy represents in part "an agreement to limit liberty only by reference to a common knowledge and understanding of the world," an agreement that avoids creating "a privileged place for the view of some over others."[412]

407. Tribe, *supra* note 9, at 1070-71.

408. *See* Tribe, *supra* note 12, at 293.

409. *See id.* at 300-02.

410. *Id.* at 302 (emphasis added).

411. *Id.* at 304.

412. *Id.* at 305-06 (quoting J. RAWLS, *supra* note 24, at 213).

The scenario for adjudication under structural due process would be as follows. If a controversy involving some fundamental rights comes before a judge, and there is "widely perceived moral flux affecting [those] rights (whether of property or liberty) widely agreed to be fundamental,"[413] then the judge would be constrained not to rely on pre-formed rules concerning the now questioned rights. Rather, the judge would confront the controversy anew, and settle it in a way that seems just in that particular situation, after engaging in a dialogue with the parties.[414] A coherent explanation for the decision would be expected of the judge. The process would recur until a new consensus is attained.[415] The goal of the process would not be to reject the use of preconceived ways of dealing with controversies, but rather to insure that whatever approach is used is tailored to the controversy, taking into account such factors as context, time, and place.[416]

The role of consensus in this program merits attention. The failure of consensus notifies the judiciary that more individualized treatment of certain issues is called for. The judiciary does not, however, resort to consensus in order to be informed as to how the cases should be decided.[417] By hypothesis, there is no overwhelming consensus to direct the court in the general case. Yet, rather than trying to approximate actual consensus in some way, even by resorting to evidence of underlying conventional morality, the court is encouraged to confront the case on an individual level. By arguing for the removal of any generalizable feature from such adjudication, Tribe appears to suggest that the court should act in these cases on the basis of reason, and little else.

Tribe is clearly concerned with the existence of determinate substantive values, and their application in the lawmaking process. It is this concern which leads him to be so interested in the unmentioned foundations of procedures, and which leads him to the notion that policy decisions can be "right." Values, according to Tribe, are not immutable; they change along with changes in society.[418] In addition, values cannot all be reduced to some basic value substratum, quantifiable and

413. Tribe, *Childhood, Suspect Classifications and Conclusive Presumptions: Three Linked Riddles*, 39 LAW & CONTEMP. PROBS. 8, 27 (1975).

414. *See id.* at 25. *Cf.* H. WELLINGTON, LABOR AND THE LEGAL PROCESS 21-23 (1968) (courts ought not upset the status quo when there are no relevant pre-existing standards).

415. *See* Tribe, *supra* note 413, at 25.

416. *See* L. TRIBE, *supra* note 10, at 1137-39.

417. This assumes that the statements in Tribe, *supra* note 12, at 301-02, are a description of Witherspoon v. Illinois, 391 U.S. 510 (1968), and not an assertion that public consensus indicates what is right or legitimate. *See also* L. TRIBE, *supra* note 10, at 304 n.108, 314-15.

418. *See* L. TRIBE, *supra* note 10, at 892.

measurable, so that a little is good and a little more is that much better. The value of some things is not equivalent to the sum value of any possible list of attributes in isolation; various values are not commensurable with the satisfaction of preferences, and thus any moral theory must take into account the existence of "discontinuities."[419] Tribe's view that values are not "continuous" is incompatible with utilitarian theories, which rely on a measurable common basis for all values—namely pleasure or the satisfaction of preferences. Despite the complexity that Tribe attributes to the structure of values, he believes, and this must be seen as one of the foundations of this theory overall, that reason may lead one (correctly) to choose one set of values over another.[420] Tribe states that "both the relations within a set of values and the internal structure of a particular value are amenable to much the same sort of disciplined insight and rational inquiry that can characterize discussions of factual questions."[421] Not only, then, is Tribe not a participant in intuitionism, but he seems to be a critical morality theorist.

Tribe does not always speak of values as a critical morality theorist would. He speaks of the Constitution as being a vehicle for directing policymaking by virtue of its being a reflection of the "deep beliefs" of the society.[422] More important is the fact that he supports the application of general rules by courts only when the rules reflect "an underlying set of widely shared values."[423]

> [I]t is *only* the existence of communally shared values expressed as rights and rules that can hope to reconcile the tension between formal and fraternal conceptions of justice. When substantive rules cease to represent faithful expressions of communally shared ideals, they come to enforce—and to be perceived as enforcing—the interests and ends of others, and thereby to destroy even the most temporary and tentative harmony between the rule of law and the spirit of community—a harmony one can hope to sustain only in the presence of shared values and ends.[424]

It appears, however, that this consensus is related to, but secondary to, a more basic source of values. The idea of such a relationship, which puts consensus into context in Tribe's framework, is expressed in the following quote:

419. *See* Tribe, *supra* note 11, at 94-97. *Compare* Taylor, *The Diversity of Goods* in UTILITARIANISM AND BEYOND 135 (A. Sen & B. Williams eds. 1982).

420. *See* Tribe, *supra* note 400, at 640.

421. Tribe, *supra* note 11, at 99.

422. *See* L. TRIBE, *supra* note 10, at 10.

423. Tribe, *supra* note 12, at 312.

424. Tribe, *supra* note 413, at 28 (emphasis in original).

> [I]n the end the analytic approach [i.e., the application of "policy-analytic and microeconomic techniques to the legal problem of how to assign basic rights and liabilities," p. 628] proves to be self-defeating and indeed wrongheaded even if it assigns rights in accord with those underlying feelings["as to what rights should exist," p. 629], for being "assigned" a right on *efficiency grounds* fails to satisfy the particular needs that can be met only by *a shared social and legal understanding that the right belongs to the individual because the capacity and opportunity it embodies is organically and historically a part of the person* that he is and *not* for any purely contingent and essentially managerial reason.[425]

This is not a strong point, and certainly Tribe is not forceful in asserting the existence of some underlying source of value. In fact, he is virtually silent in this area, probably in awe of the problems attaching to policy analysis, which he criticizes on several occasions. This silence betrays a breach in his theoretical framework, and is the source of legitimate confusion as to what holds his theory together. But the assertion that Tribe assumes an underlying source of values, distinct from any form of consensus, is given further credence by two related stances that he takes. The first is his rejection of conventional morality theories.

> [A]ttempts to ground constitutional rights of privacy or personhood in conventional morality [citing to Wellington], or in broadly if not yet universally shared ideas of public welfare [citing to Perry], are helpful but have inherently limited power. For we are talking, necessarily, about rights of individuals or groups *against* the larger community, and against the majority—even an overwhelming majority—of the society as a whole. Subject to all of the perils of antimajoritarian judgment, courts—and all who take seriously their constitutional oaths—must ultimately define and defend rights against government in terms independent of consensus or majority will.[426]

The second stance, as discussed earlier,[427] is his allegiance to reason as the key to the discovery of authentic values.

> Now of course the initial definition of values and rights may be arrived at through a kind of plebiscite. After all, the initial legitimacy of our Bill of Rights depends in part on the fact that it received a degree of popular sanction and was not simply dictated autonomously from on high. But if one looks closely at the groups who were denied any voice in approving even this basic charter, it becomes clear that the legitimacy of such a catalog of rights cannot turn simply on the fact that more people favored than opposed the values it expressed. And this is as it must be.

425. Tribe, *supra* note 400, at 629-30 (emphasis added in part).

426. L. TRIBE, *supra* note 10, at 896.

427. *See supra* text accompanying notes 418-21.

> For the legitimacy of any starting point of basic values or basic rights must rest in the persuasiveness of the reasons that can be adduced for them.[428]

Although Tribe is not specific as to the foundation of values, he believes that correct values will be discovered, or more and more correct values will be distilled, as the result of an "evolving process of interaction and change."[429] The constitutional-legal framework presumably exemplified by the workings of the Court, makes such evolution possible.[430]

2. *Frank Michelman*

Frank Michelman is concerned primarily with understanding our laws and legal system in light of the means available for evaluating fundamental features of our society. Michelman explores the vantages that economics and moral philosophy provide for a critical view of judicial decisionmaking. He examines not only what economic and philosophic perspectives reveal about law, but also what limits may be inherent in those perspectives. Michelman argues that courts in general do not sufficiently uphold welfare rights advocated by moral philosophers,[431] and that courts do not and should not enforce the dictates of economic efficiency alone.

In his *Foreword* to the 1968 Term, Michelman seeks to explain the "judicial 'equality' explosion of recent times"[432] not as a quest for equality (a somewhat "procedural" notion), but rather as an assertion of the value of minimum welfare.[433] Michelman confronts this explanatory task by showing what kind of moral theory could potentially underlie the "explosion." He describes his project as follows:

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428. Tribe, *Fallacies, supra* note 384, at 45. Reason can be used to discern conventional morality too. Yet for the conventional moralist it must be the fact of acceptance on some level, and not the evaluation as reasonable, that is the starting point for rights and values. This assumes, of course, that there is some aspect of reasonableness that is not determined by that society's peculiar inclinations.

429. Tribe, *supra* note 6, at 1338.

430. *See id.*

431. Michelman is not alone in this search for judicially created and enforced welfare rights. Tribe also has argued for such entitlements. *See* Tribe, *New Federalism, supra* note 383, *passim*; L. TRIBE, *supra* note 10, at 918-21.

432. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969).

433. Michelman's argument for "minimum protection" as opposed to equal protection in wealth discrimination cases is quite similar to Fiss's arguments in favor of the group-disadvantaging principle as opposed to the antidiscrimination principle. Michelman points out that his minimum protection concerns would require no more of the courts in terms of substantive "value-sculpting" than would the supposedly more procedural equal protection concerns. *See id.* at 45.

> Perhaps the best description of what ties these paragraphs together is provisional adoption, as inchoate legal doctrine, of a theory of social justice which prima facie seems capable of rationalizing an important group of equal protection decisions without positing equality or evenhandedness as the guiding value (or discrimination as the target evil).[434]

The theory that assists him in this task, and which assists him in several articles, is John Rawls's theory of justice.[435] The theory leads Michelman to the conclusion that certain needs can be identified as "just wants," meaning that it is unjust for society to allow those needs to be involuntarily unfulfilled. The workings of the marketplace cannot be marshalled by those who would argue in favor of the nonfulfillment of those needs, for the marketplace is not per se just.[436] The role that the Court has adopted when raising the banner of equality in some cases is in fact to protect citizens from unjust workings of the marketplace.

> We do better by the Court to regard it, not as nine (or seven, or five) Canutes railing against the tides of economic inequality which they have no apparent means of stemming, but as a body commendably busy with the critically important task of charting some islands of haven from economic disaster in the ocean of (what continues to be known as) free enterprise.[437]

Not only the idealistic late Sixties but also the cynical late Seventies find Michelman arguing for the existence of constitutional rights to minimum entitlements based on moral rights, and revealed in Supreme Court decisions.[438] Michelman admits that he cannot prove his "welfare-rights thesis" (that there is a constitutional right to basic entitlements) empirically, since there are judicial statements to the contrary,[439] yet it is important for him to keep the moral foot in the constitutional door.

> Many or all of the ostensibly contradictory decisions can be explained away, and the alternative grounds cited by the Court for many or all of its decisions that do, in fact, vindicate welfare claims can be shown to be unsatisfactory. These explanations and showings are too laborious to support a claim that the cases

434. *Id.* at 10.

435. It is interesting that Rawls's landmark, A THEORY OF JUSTICE, had not yet been published at the time that the *Foreword* was written. Michelman cites various early articles by Rawls in the *Foreword. See, e.g., id.* at 15 n.20.

436. *See id.* at 30-31.

437. *Id.* at 33.

438. *See* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, *passim* (1977) [hereinafter cited as *Permutations*]; Michelman, *supra* note 12, *passim*.

439. *See* Michelman, *supra* note 12, at 663.

> themselves fully make out the existence of any constitutional welfare rights. . . . The "tension" among their "rhetoric, reasoning, and results," as Professor Tribe puts it, does "reflect an unarticulated perception that there exist constitutional norms establishing minimal entitlements to certain services." . . . [T]he cases alone do not establish the welfare-rights thesis, but they do go far to answer the first two objections against it—that it is purely fanciful and that it thrusts inappropriate tasks on the courts.[440]

Indeed, Michelman has argued that in several areas of the law the existence of specific legal rights reveals a distinctly moral attitude on the part of the Court, and thus an underlying morality embedded within the law. This is the case with respect to the right of access to litigation (despite inability to pay fees),[441] the right to certain state provided services,[442] and the right to adequate housing.[443]

Michelman's ultimate goal in showing that certain moral attitudes underlie certain types of cases, and that certain theories might rationalize these attitudes, is most likely not merely descriptive.[444] One may assume from the tenor of his writings that his descriptive point—that a possibly coherent body of moral values is to some extent vented in judicial opinions—is meant to provide a basis for his normative point that the courts should realize more fully these particular moral values.[445] It is unclear as to whether Michelman does actually assert the existence of, for instance, constitutional welfare rights. He does, however, make theoretical preparations for such an assertion. Michelman documents, for example, utterances by the Supreme Court in favor of minimum

440. *Id.* at 664 (footnotes omitted) (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1074 (1978)).

441. *See* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J., 1153, 1194-97.

442. *See* Michelman, *Permutations, supra* note 438, at 1187-91.

443. *See* Michelman, *Formal and Associational Aims in Procedural Due Process*, 18 NOMOS 126, 144-45 (1977).

444. It is important to note that this article imputes a position to Michelman which is not acknowledged specifically in his articles. Some of the articles on the basis of which such inferences are drawn were written before most of the other writings highlighted in this article. It may be somewhat unfair to attribute to Michelman a definite position based on writings that appeared possibly before thought on value-asserting constitutional commentary crystallized. Therefore, the inferences drawn from his writings in order to describe an overall approach should be considered with this historical caveat.

445. *See* Michelman, *supra* note 443, at 144-45; Michelman, *supra* note 12, at 660-63. Note that Michelman does not intend that the courts could realize such moral values unassisted. *See* Michelman, *supra* note 443, at 144; Michelman, *supra* note 12, at 663, 684-85. For evidence that Michelman is cognizant of the Humean warning against inferring "ought" from "is," see Michelman, *supra* note 9, at 1043.

entitlements.[446] He searches for a theory, a moral theory, that can lend some coherence to this body of diverse data, keeping in mind that some data will not conform and may have to be explained away.

The theory is of great importance because it allows inference as to what is consistent with the relevant decisions and what is not. Courts are expected to produce decisions that are theoretically consistent.[447] Therefore, it is consistency which can provide Michelman with the grounds for normative assertions. Michelman describes judicial consistency, or "neutrality of principle in constitutional adjudication," in light of Rawls's work as follows:

> One tries to understand various legal claims and entitlements in a certain way—that is, as reflecting "natural rights" which in turn are suggested by principles of justice in a coherent theory of justice. Then neither rights nor principles can stand in isolation from any other rights or principles contained in or suggested by the same theory.[448]

Accordingly, Michelman may applaud decisions that do, or criticize those that do not, conform with his principle of justice anchored in precedent.[449] In addition, derivation of the principle allows extrapolation and examination of whether the projected, hypothetical applications of the principle meet the dictates of common sense.[450] If they do, this renders the original decisions and the theory even more acceptable.[451]

In order for Michelman to be able to show that courts or the Court have certain moral assumptions or commitments that should lead them to preserve certain rights, he must counter arguments that the law is committed to one value only—economic efficiency, the flip side of utilitarian pleasure maximization.[452] Michelman adopts the position that

446. *See, e.g.*, Michelman, *supra* note 432, at 24-27, 40-46; Michelman, *supra* note 12, at 686-93.

447. *See* Michelman, *supra* note 6, at 1003, 1015.

448. *Id.* at 1015. Michelman cites to works by Bickel and Wechsler as illustrations of the expectations of "neutrality of principle" in adjudication. *See id.* at 1015 n.156.

449. *See* Michelman, *supra* note 432, at 9, 47-59.

450. *See id.* at 37-39.

451. If, indeed, the foregoing description is true to Michelman's strategy, then it is further evidence of the influence of Rawls on Michelman. Applying a theory based on a primary set of cases to new cases and at the same time testing the primary cases and the theory, in terms of the appropriateness of the new cases, is reminiscent of coherence theory.

452. For evidence that Michelman perceives a link between utilitarianism, or at least theories positing the existence of subjective values only, and economic theories of law and rights, see Michelman, *supra* note 145, at 496-97; Michelman, *supra* note 11, at 153-54. That Michelman finds it important to characterize actual or desired legal results as the product of (other) moral stances and not economic reasoning can be seen in Michelman, *supra* note 6, at 1015.

while a concern for efficiency may enter into judicial decisionmaking, it is not the basis for all judicial decisions. He argues, at least in the context of local government public law, for "the co-existence in the judicial mentality of two different, and contradictory, models of local government legitimacy . . . —an economic or 'public choice' model and a noneconomic 'public interest' or 'community self-determination' model."[453]

> In the economic or public choice model, all substantive values or ends are regarded as strictly private and subjective. The legislature is conceived as a market-like arena in which votes instead of money are the medium of exchange. The rule of majority rule arises strictly in the guise of a technical device for prudently controlling the transaction costs of individualistic exchanges . . . there is no right answer, there are only struck bargains . . . .
>
> The opposed, public-interest model depends at bottom on a belief in the reality—or at least the possibility—of public or objective values and ends for human action. In this public-interest model the legislature is regarded as a forum for identifying or defining, and acting towards those ends. The process is one of mutual search through joint deliberations, relying on the use of reason supposed to have persuasive force.[454]

These two models, intended to be overly simple, represent the ways in which judges may view the political system as a whole, and thus how they may view the legitimacy of their own decisionmaking.

Michelman chips away at a descriptive economic theory of law by uncovering distinct areas of the law that are not well described by such a theory. He finds that the economic or public choice model does a poor job by itself of explaining the public purpose and delegation doctrines found in public law, as well as current local zoning law.[455] Similarly, he finds that economic efficiency will not be useful in explaining the strict liability of landlords for injuries resulting from hazardous conditions in leased dwellings.[456] Specific facets of community morality, he suggests, provide a better explanatory tool.

Further, Michelman argues that we would not really be happy with a Court that sees its function as consisting solely of facilitating

453. Michelman, *supra* note 11, at 148 (footnote omitted).

454. *Id.* at 148-49 (footnote omitted).

455. *See id.* at 164-77, 182-206. Some economic theories of law claim that common law adjudication, as distinct from public law adjudication, is governed by a judicial desire to facilitate economic efficiency. In response, Michelman argues that public law adjudication is in no important way different from common law adjudication, thus casting doubt on the theories' explanatory power. Michelman, *supra* note 151.

456. *See* Michelman, *supra* note 9, at 1016-28. *See also* Michelman, *supra* note 441, at 1185-89.

wealth maximization. There are many types of laws that many of us would want the courts to uphold, such as those protecting endangered species or family values, which probably are not wealth maximizing.[457] Economic theorists recognize that there may be values that are not easily quantifiable—"moralisms"—but cannot incorporate them into their theories. A pure notion of efficiency will not explain these moralisms within the law, but theories of law that abandon pure efficiency, according to Michelman, lose their explanatory and predictive power.[458] Although economic theories of law might pave the way for simple or reductionist descriptions of the law, simplicity per se is not that attractive a quality.[459] (In fact, the descriptive theory of law that attracts Michelman is rather Byzantine in nature. That is the theory propounded by Ronald Dworkin.)[460] Finally, Michelman protests the assumption of acceptability which usually is granted economic efficiency. The idea that efficiency is the ultimate moral principle assumes that "all values are arbitrarily private,"[461] a moral principle to which Michelman will not assent.

If courts or the Court are not best described as governmental organs bent on facilitating economic efficiency, and if they do operate from some (other) moral inclinations or values, then the next inquiry should be, what would be a good and plausible moral framework for the Court to adopt that would meet the requirements of judicial consis-

457. *See* Michelman, *supra* note 145, at 507-10.

458. *See* Michelman, *supra* note 9, at 1035-37; Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV., 307, 310-11 (1979); Michelman, *supra* note 151, at 445. In addition, Michelman finds fault with the wealth-maximization criterion itself which, "may seem a contradictory and unfathomable amalgam of individualistic methodology and collectivist morality: 'value' taken to be nothing but private exchange value, measured by *individual* willingness to pay, but the optimal social state taken to be that in which the sum of the private exchange values ('wealth') *across society* is as high as it can be, never mind what is the case respecting any individual." Michelman, *supra* note 151, at 435 (emphasis in original).

459. Michelman, *supra* note 9, at 1046. Michelman might also argue that this simplicity is misleading, since efficiency alone is insufficient to justify or criticize the foundations of our legal system, the starting point from which reallocation begins. Therefore, economic theories of law may be simple because they are incomplete. *See* Michelman, *supra* note 151, at 445-46, 448 n.54. *See also* C. FRIED, *supra* note 15, at 93-94; *supra* text accompanying note 35.

460. *See* Michelman, *supra* note 9, at 1044.

461. *See id.* at 1042. *See also* Michelman, *supra* note 151, at 432, 435. The economic theorist's values are arbitrarily private since the assumption is that the only test for value is whether and to what extent an individual would be willing to purchase such an item or privilege. This is quite similar to the classical utilitarian's assumption that the only test for value is whether and to what extent an individual will derive "pleasure" from an item or privilege.

tency and impartiality?[462] Michelman's assault on this issue takes him again to the philosophy of John Rawls,[463] whose work has greatly influenced Michelman's work. This is especially true of the articles written by Michelman in the first part of the last decade. In an article written in 1973 about Rawls's book, Michelman introduces himself as a student of the book.

> Some sort of focused interrogative strategy may help one come to grips with Professor Rawls' monumental utterance. I have chosen to seek understanding through this not-so-philosophical question: How does the book bear upon the work of legal investigators concerned or curious about recognition, through legal processes, of claimed affirmative rights (let us call them "welfare rights") to education, shelter, subsistence, health care and the like, or to the money these things cost?[464]

Michelman employs Rawls's theory in order to examine whether a plausible moral theory could provide the Court with a reasoned basis for opinions that would establish constitutional welfare rights.

Michelman looks first to Rawls's "difference principle," found in the second principle of justice,[465] in order to find a justification for the existence of "insurance rights."[466] He finds that while the difference principle would lead to the right to a minimum level of income, it would not lead to more easily justiciable and more attractive insurance rights.[467] However, the lexically prior part of the second principle (as ordered by the Second Priority Rule), which Michelman dubs the "opportunity principle,"[468] does bring the desired results. The opportunity principle states in effect that social or economic inequalities may be considered just only if each citizen has a fair equal opportunity for attaining a position of social or economic advantage. This principle should create a constitutional right to a certain level of education, and

462. In an earlier article Michelman expresses doubt that the courts are equipped to act as the guardians of constitutional morality in some cases. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1171 (1967).

463. A plausible moral framework like Rawls's, if nothing else, provides a judge seeking a consistent theoretical basis for a decision with "a principled way of organizing and directing the search for an answer." Michelman, *supra* note 6, at 1016.

464. *Id.* at 962 (footnote omitted). *See also* the revision of this article in READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE 319, 321 (N. Daniels ed. 1974).

465. *See supra* text accompanying notes 50-70. For a full delineation of the two principles of justice see *supra* note 52. The "difference principle" is (a) of the second principle.

466. An insurance right, also called a "specific welfare guaranty" is defined by Michelman as a right "to provision for a certain need—on the order of shelter, education, medical care—as and when it accrues." Michelman, *supra* note 6, at 966.

467. *See id.* at 981.

468. *Id.* at 971.

perhaps to certain levels of subsistence, health, and housing.[469] Similarly, the lexically prior first principle of justice, which Michelman calls the "liberty principle,"[470] conveying the right to basic liberties, carries along with it certain biological entailments or prerequisites. Basic wants must be met before basic liberties can meaningfully be granted,[471] just as certain educational requirements must be met before there can be equal opportunity. Similarly, the highest good in Rawls's system, self respect, would carry along with it a panoply of biological entailments.[472]

According to Michelman, the fact that a widely acclaimed theory such as this would call for some constitutional welfare rights, if adopted by the Court, is cause for some hope. He argues that such a theory could be used by the Court since it might qualify as a source of "neutral principles."[473] Furthermore, Rawls's theory may be sufficiently successful to call into question the popular belief that no moral theory could be adequately coherent or comprehensive to provide a theoretical base for the Court. Whether the Court should actually adopt the theory, however, depends on exactly how valid the theory is. This is an issue that, understandably, Michelman does not take on. However, the thesis that such a theory would be able to guide the Court, is not insignificant.

> At the very least, the thesis may counsel skepticism toward any insistence that the legal and moral orders are, logically and intrinsically, worlds apart, separated if not by a void then by an ether through which (at most) only occasional and inarticulate influences can pass. . . . It suggests that the difficulty we experience is not with the logical possibility of interlacing moral speculation and law, but with the state and condition of moral theory itself—a state characterized by complexity causing inaccessibility and irresolvable controversy. Who dares predict that this state can never be transcended?. . . I will confess that Professor Rawls persuades me to keep my mind open.[474]

Later in the decade, perhaps as confidence in Rawls's theory waned, Michelman argued that even Ely's somewhat traditional theory of judicial review[475] might lead one logically to accept that insurance rights should be granted constitutional status. Ely's notion of "repre-

469. *See id.* at 988-89.
470. *Id.* at 973.
471. *See id.* at 989-90.
472. *See id.* at 990-91.
473. *Id.* at 1015-17. *See also supra* text accompanying notes 187-90.
474. Michelman, *supra* note 6, at 1018-19.
475. *See supra* text accompanying notes 200-06.

sentation-reinforcing rights"—that the Court may enforce rights that insure or facilitate broad political participation, despite the fact that such rights may not be found in the text of the Constitution—suits Michelman's purpose well. If one's basic needs are not met, or if one is not sufficiently educated, it is unlikely that that one will be able to participate effectively in a "democratic" or "representative" government.[476] Similarly, being part of a disadvantaged group—"the poor"—may bring a stigma, like a racial stigma, which in itself may be politically debilitating.[477] Therefore, welfare rights should be considered constitutional rights under Ely's label of representation-reinforcing rights. It is interesting to note that in this discussion of the logical ramifications of Ely's theory, Michelman leans on the rights theories of Dworkin and Fried, in addition to that of Rawls.[478]

Michelman is a noninterpretivist; he believes that the Court should assert values not specified within the text of the Constitution.[479] According to Michelman, the provisions of the Constitution, as they stand, are indeterminate and thereby incapable of presenting the Court with all that it needs for the fulfillment of its function.[480] Therefore, the Court is left in search of values that can guide it in a principled disposition of the claims before it. Whereas Ely, a noninterpretivist cited often by Michelman,[481] settles on "process writ large," embodied in the value of representation-reinforcement, Michelman sees nothing magi-

476. *See* Michelman, *supra* note 12, at 674-77. *See also* Michelman, *supra* note 261, at 1109, 1112 (arguing for the existence of constitutional rights to property to the extent that they affect the capacity for political participation); Michelman, *Process and Property in Constitutional Theory*, 30 CLEV. ST. L. REV. 577, 584-89 (1982) [hereinafter cited as *Process and Property*]. Note the connection between this type of analysis and Rawls's use of "primary goods." *See* J. RAWLS, *supra* note 24, at 92-93; Rawls, *Social Unity and Primary Goods* in UTILITARIANISM AND BEYOND 169-73 (A. Sen & B. Williams eds. 1982).

477. *See* Michelman, *supra* note 12, at 678-79.

478. *See id.* at 670, 681-84.

479. *See* Michelman, *supra* note 145, at 489; Michelman, *supra* note 5, at 1003; *see supra* note 160.

480. *See* Michelman, *supra* note 145, at 505. For instance, with regard to "property," as in the "taking clause" of the Fifth Amendment, Michelman states, "What kinds of interests or relations, respecting what kinds of valued objects, fall within the category of protected interests or relations that the Constitution knows as 'property'? The constitutional text itself does not begin to answer the question. Judges adjudicating claims under the property clauses of the Constitution can answer it—as answer they must—only by attributing to the Constitution some political theory, some principle or principles of political morality, that it does not itself enunciate." Michelman, *supra* note 261, at 1099. *See also* Michelman, *Constancy to an Ideal Object*, 56 N.Y.U. L. REV. 406, 408-10 (1981) [hereinafter cited as *Constancy*].

481. *See, e.g.*, Michelman, *supra* note 145, at 489-90, Michelman, *supra* note 12, at 666-76. Note that Michelman cites Dworkin, Tribe and Grey as noninterpretivists whom he views favorably. *See* Michelman, *supra* note 145, at 489 n.9.

cal in that sole value.[482] Consequently, Michelman is willing to set the Court loose on a more widescale search for values. He envisions the Court as a body that will not only search, but also distill. One must see the task of the Court as involving "value-sculpting."[483] The reason that the Court must have a creative role, and the reason that the Court should not be overly constrained by legislative deference, is that politics is not solely a matter of monitoring personal preferences. The Court, as we know it, in at least some of its dealings, operates from the assumption that

> values are an intended *outcome* of politics: they are public as well as private in origin, originating in political engagement and dialogue as well as in private experience that supposedly preexists political activity and enters into it as a given. . . .[In this view] majoritarian politics cannot be only the individualistically self-serving activity "realistically" portrayed by economics-minded [or, perhaps, representation-minded] political scientists and theorists. Politics must also be a joint and mutual search for good or right answers to the question of directions for our evolving selves.[484]

If the goal is not the monitoring of preferences, but rather the correct statement and enforcement of values, then policy interplay between the Court and legislatures will be more useful than deference by the Court to legislative bodies.[485]

Michelman assumes that one of the values to be guarded by the government is that of political participation. Therefore, this dialectic arrangement of legislatures and the Court may be seen as facilitating a balance between participatory values (legislatures) and other political

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482. In fact, unlike Ely, Michelman finds nothing magical in process *per se*. "I agree completely with Ely's critics such as Laurence Tribe and Paul Brest, when they suggest that the need for substantive, political value judgements is in no way avoided or lessened by casting constitutional issues in terms of process rather than result." Michelman, *Process and Property, supra* note 476, at 589. However, according to Michelman, there is a point to discussing constitutional rights as "process" rights, for "there seems to be a pragmatic virtue in process talk: a virtue of sometimes making worthwhile conversation possible, of feeling right and persuasive when talk about preferred results would feel weak and arbitrary, or futile and hopeless, in the face of disagreement." *Id.* at 590.

483. *See* Michelman, *supra* note 432, at 45. *See also* Michelman, *supra* note 11, at 198-99.

484. Michelman, *supra* note 145, at 509.

485. *See* Michelman, *supra* note 6, at 1013-15. See also Michelman, *supra* note 441, at 1214, for his statement that the goal is interplay, not subjugation of the Court, or of Congress. Congress' input into political values is important since it may be advantaged in monitoring changing moral sentiments. Recall the dialectical relationship between the Court and legislators suggested by Perry, Fiss and Tribe.

or moral values such as justice (the Court).[486] To the extent that there is an emerging legitimate moral theory for the society, the court would be well equipped to help promote the moral values embodied therein.[487] The moral theory would presumably be an evolving but coherent body of doctrine, much like Dworkin's view of the law.[488] The Court, which is accustomed to presenting neutral explanations for why specific acts do not conform with the evolving law, could make neutral explanations for why acts do not conform with, for instance, the principles of justice.[489] The extent to which the Court legitimately could act in this way might depend on the integrity of the moral theory used, a subject with which Michelman does not deal fully. Yet, significantly, the Court's legitimacy as an organ involved with distilling morality depends on its potential for rendering adequate theoretical justifications, and not wholly on the hidden meaning of the Constitution, nor on the sanctity of the legislature, nor on the sanctity of economic efficiency. Michelman does not doubt that the Court will not be able to come up with a moral theory that reads like a statutory code. However, the fact that background moral rights remain somewhat nonjusticiable does not void the Court's moral purpose.

> Judicial responses to [*e.g.*,] due process claims in the housing and other welfare contexts . . . do suggest the workings of a legally inchoate entitlement to be adequately housed or whatever—an entitlement rooted in moral consciousness or in systematic moral theory which may serve as an ideal backdrop against which the legal order is viewed and comprehended but which is imperfectly represented in the actual legal order. Though courts as such are incapable of full and direct recognition and enforcement of the right (they can not bring about the provision of ideally required housing which the political order fails to provide), they are quite able to recognize and act on the entitlement once embodied even

486. *See* Michelman, *supra* note 6, at 1009-10. Michelman states, "Chief among the traits that distinguish adjudication from other modes of decision is the judge's duty to render the decision that is normatively right—the one that best comports with, and is in that sense compelled by, a body of normative material that is publicly identifiable as authoritative for the judge in virtue of pedigree or some other objective mark. That conception of the judicial role is all that separates the rule of law from judicial dictatorship in the liberal legal theory attributed to the Constitution by each recurrent episode of judicial review." Michelman, *Constancy, supra* note 480, at 412. *See also* Michelman, *supra* note 261, at 1101.

487. But see Michelman, *supra* note 462, at 1171, 1257, where Michelman suggests that rules appropriate for judicial decision are too rigid to bring an ethically satisfying solution to just compensation cases.

488. *See* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 527, 528; Michelman, *supra* note 11, at 151-52 n.30; Michelman, *supra* note 443, at 151; Michelman, *Constancy, supra* note 480, at 412, 414-15.

489. *See* Michelman, *supra* note 6, at 1008-10.

imperfectly in legislative action.[490]

The fact that Michelman sees one of the functions of government as being to develop values rather than monitor them indicates that he might more readily fall into the camp of critical moralists than conventional moralists. When arguing for the establishment of constitutional welfare rights, he does not assert that the people truly believe that such rights should exist, nor that welfare rights are implied by traditional moral principles. Rather he states that moral intuitions have led the Court part of the way,[491] and that theoretical consistency, or perhaps an adopted moral theory, might lead the Court the rest of the way *correctly* to establish constitutional welfare rights.[492] This is not to say that Michelman's view of values is wholly divorced from the notion of popularly held values. In fact, one of the conditions for the existence of a "preinstitutional" or "background" right in Michelman's view seems to be that it conform with "widely held intuitions of inherent personal rights."[493] Intuitions, however, are not quite commitments. It is unlikely that the perfected poll would do Michelman's theories much good. Michelman speaks of "*latent* consensual notions of justice" which are accepted by the society "only intuitively and abstractly."[494] The role of the judge, then, might be one of "catalyzing, evoking, and formulating the community's conscious recognition of values and rights which the community is forever, if inexplicitly, engaged in collectively evolving."[495] Further, the fact that the public might potentially hold certain moral views does not mean that the public will have access to the theoretical apparatus that would allow them to crystallize their moral intuitions into coherent moral stances.[496] Therefore, the Court might be in a position, assuming that it has found a moral theory that is coherent and which expresses the latent, consensual, evolving notions, to discern the moral intuitions of the society in a way that society itself could not.

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490. Michelman, *supra* note 443, at 144.

491. *See* Michelman, *Permutations, supra* note 438, at 1186-88; Michelman, *supra* note 6, at 1005-06.

492. *See* Michelman, *supra* note 6, at 1010-15.

493. Michelman, *supra* note 12, at 681. In an earlier article Michelman rejects the "notion of rights-as-shared-values." Perhaps Michelman's more recent articles can be seen as more under the influence of Dworkin (than Rawls), and thus more receptive to the notion of community morality. *See* Michelman, *supra* note 488, at 529.

494. Michelman, *supra* note 6, at 964 (emphasis added).

495. Michelman, *supra* note 443, at 151. *See also* Michelman, *supra* note 261, at 1106; Michelman, *Process and Property, supra* note 476, at 592.

496. *See* Michelman, *supra* note 6, at 1009.

Like Tribe, Michelman is a bit hazy as to the theory of rights and values that underlies his theory. One cannot fault Tribe and Michelman too much for not having well developed value theories that will support particular stances by, or a particular role for, the Court. After all, this is a Herculean task. Michelman does not even express total confidence in Rawls's attempt at it. Nevertheless, the importance of Tribe's and Michelman's theories does not evaporate because the theories are ultimately incomplete. The theories are worth viewing simply (among other reasons) because they integrate notions of critical morality into theories of constitutional law, even if they have not perfected those notions.

D. Summary

As discussed earlier, "conventional morality" describes the moral code of a society.[497] This moral code presumably is rooted in traditional moral doctrine, and presumably would be revealed by an examination of the beliefs of the members of the society. "Critical morality" describes the consequences of a moral theory used to challenge (or support) the validity of the content of conventional morality.[498] Utilitarianism can be a source of critical morality. If some of the moral rules of a society do not appear to further the maximization of utilitarian pleasure, critical morality based on the utilitarian calculus would reject those conventional moral rules. As assumed throughout this article, however, utilitarian theory can also be used to support the moral validity of "decisions" made by the voting public, by a legislature, or by the marketplace. To this extent, utilitarian theory may be used to support results that are arguably expressions of the conventional morality.[499] Therefore, the fact that Tribe and Michelman are critical morality theorists is important to the theme of this article because, first, they reject the utilitarian arguments that are commonly marshalled to support these expressions of conventional morality, and, second, because they reject intuitionism, or at least the quasi-intuitionism supported by utilitarianism.[500]

497. *See supra* text accompanying note 381.

498. *See supra* text accompanying note 367.

499. Of course, Sandalow, Perry, Wellington, and Fiss would dispute the extent to which these various polling devices actually do reveal the nature of the society's conventional morality at any given time.

500. The "quasi-intuitionism" referred to is the stance that values are inescapably personal—that there are no valid public values, but only the particular tabulations of the preferences of individuals.

Adopting a potential theory of critical morality is not the only consistent way of rejecting the utilitarian-backed results of institutions such as the vote, the legislatures, and the marketplace. Instead, one could argue that these institutions do not approximate the strictures of the conventional morality well because the institutions themselves are flawed. One might argue, for instance, that because fewer than fifty percent of adults vote in elections, or because legislators attend more to their prospects for reelection than to the needs of their constituents, or because externalities or transaction costs isolate the preferences of economic actors from economic results, these institutions are not to be granted the assumption of legitimacy. Alternatively, one could argue along with Perry and Wellington, as supported perhaps by Dworkin and Scanlon, that the poll itself, whether it is political or economic, will not be a good means of discovering the conventional morality because the conventional morality simply is not wholly revealed through voting or spending behavior. For Perry and Wellington, conventional morality is more closely identified with the traditional values of a society, and there is no guarantee that people will vote in accord with those traditional values. The voters may be swayed by certain morally irrelevant desires.[501] Therefore, although discerning conventional morality is the goal, there is no special reason for acting in deference to the vote, legislatures, or the marketplace.

The critical moralist, however, may reject the decisions of these institutions because the conventional morality itself, however expressed, may be open to criticism. And, if in addition one rejects utilitarianism, even the institutions that seem to approximate the utilitarian calculus are suspect. So, one may join Rawls, Fried, Dworkin and Scanlon in rejecting the decisions of those hallowed majoritarian or free market institutions, on either ground, at least insofar as they are to be afforded the *presumption* of moral validity, and search for substantive moral truths. This is the path taken by Tribe and Michelman.

For Tribe and Michelman, as for the other commentators viewed, there is a need to reject the status quo. Each finds major political trends that are immoral, and which might be rectified by a more moral Court. They are therefore led to reject outcomes of the "representative" governmental organs. It would be mistaken, however, to assume that they reject democracy. Both speak in favor of the value of popular participation. Yet they reject the notion that valuing participation implies that popular or representative decisions are per se correct. Neither argues for a government run only by, or mostly by, the judici-

501. *See supra* text accompanying notes 303-07, 327-32.

ary. They do, however, argue for a rethinking of the present balance of authority. They question the theoretical underpinnings of stances of judicial restraint, and suggest ways in which the Court could assert legitimately a more comprehensive authority.

That they do not reject democracy and the importance of consensus can be seen in at least two features of their theories. First, Michelman and Tribe, like Perry and Fiss, see a dialectic process involving the Court and Congress, or courts and legislatures, as the best means of developing policy. For neither Tribe nor Michelman does the Court have the corner on the policy market. Second, both Tribe and Michelman suggest that consensus must be viewed when discerning public values. Both view the development of values as a society-specific, evolutionary process that must, among other things, monitor the moral intuitions of the public. Both, to some extent, find legitimacy in widely held popular values, although where the notions of "widely shared values" or "widely held intuitions of inherent personal rights" fall on the spectrum that stretches from actually held values to potentially held values, is not always clear. For Tribe, proper adjudication through structural due process involves monitoring community sentiments in order to discern when an issue is in popular moral flux.

Tribe and Michelman, more than the other commentators, present theories that typify constitutional law commentary influenced by modern anti-utilitarian moral philosophy. Both explicitly attack utilitarianism or utilitarian-based theories such as economic theories of rights or of law. They discuss the shortcomings of such theories in basing moral decisions on supposedly contentless procedures, rather than on substantive principles. They also attack such theories as having hidden and invalid moral premises under the guise of objectivity or parsimony, such as the premise that all values are inescapably personal. Tribe and Michelman discuss the writings of anti-utilitarian philosophers, most notably Rawls, Dworkin and Fried. They seem to see themselves as participating in the enterprise of these philosophers, certainly as critics if not as theorists. There can be little doubt that these two commentators perceive a link between moral philosophy and constitutional law, and have made use of the anti-utilitarian philosophies in shaping their assaults on traditional constitutional doctrine.

Conclusion

In the dispute between the traditional commentators and those suggesting new theories of the Supreme Court's role, one question is central: Where do we find the values to be applied by this third branch

of the government? The Court finds itself in a position where it must resolve disputes brought before it. The question must arise, therefore: What justification exists for deciding one way instead of another? If we may assume that "because I felt like it" is not a sufficient justification for a Supreme Court Justice to present for his or her position,[502] then to what may the Justices refer in support of their decisions? Which values may properly lead a Supreme Court Justice to choose one alternative over others?

Those who advocate judicial deference to legislatures prefer that the Court uphold the value of political participation and also the values expressed at any particular moment by the people's vote and therefore by the people's choice of representatives. Those who advocate judicial activism prefer that the Court uphold other values in addition. The dispute between the traditional commentators, who are for the most part advocates of judicial restraint, and the new commentators, who are for the most part advocates of judicial activism, concerns, therefore, the choice of one set of values (or approach towards values) over the other as being the most deserving of attention by the Court.

Let us not question, for the moment, the value of political participation, since all involved seem to agree that it must be upheld, and let us focus instead on the other values to be upheld or respected by the Court. The traditional commentators state, in essence, that the preferences of the people as manifested by the election of representatives, and

502. This assumption cannot be made if one believes that there are no legitimate sources of values for judicial decisionmaking. As noted earlier, Brest is exploring this path of despair. *See supra* text accompanying notes 257-59. Even if some acceptable notion of moral validity could be developed, Brest doubts that the resulting general moral principles could be applied by the judiciary without manipulation and the introduction of spurious values. *See* Brest, *supra* note 8, at 1089. According to Brest, the Court and the nation are caught in an irresolvable dilemma inherent to the liberal state—a dilemma between respect for the individual (individual rights) and respect for others (majority rule). This tension motivates an endless search for values that will protect the individual, and a futile search for legitimacy or validity which will placate the people. *See id.* at 1101-09. Brest is not alone in his despair; other academic lawyers have evidenced similar feelings. Arthur Leff argues that without God, or perhaps without proof of the existence of God, there can be no moral validity. Accordingly, unless the Constitution (however conceived) is God, it cannot be the ultimate source of legal or moral values. Consequently, arguments concerning the existence of constitutional rights cannot be valid. They must be accepted, if at all, as a matter of convention. Like Brest, Leff finds the notion of the liberal state or of constitutional democracy to be inherently contradictory. *See* Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229. Bruce Ackerman appears to agree with Leff that there can be no objective good or legitimate value without God, although he does believe that there is a preferred way to view society. *See* B. ACKERMAN, *supra* note 264, at 355-58, 364-69 (1980); Ackerman, *Agon*, 91 YALE L.J. 219 (1981); *Cf.* Barry, *supra* note 5, at 645 (concern with moral status or moral integrity without connection to God and soul becomes a form of narcissism).

therefore by the decisions of those representatives, are of greater merit in decisionmaking than are other values. For the Court, as for other governmental bodies, the only extra-constitutional values that may properly be used in decisionmaking are those that emanate from the voting behavior of the people, channeled through their representatives. The foundational value to be employed in all governmental policymaking, and therefore in judicial decisions as well, is the value of acting in accordance with that for which most of the voters have expressed their approval. This traditional ideal of legislative supremacy in the field of policymaking has much in common with utilitarian thought. Utilitarian thought provides that the best way to make policy is to monitor the people in order to find which policy alternative will satisfy the greatest number of individual preferences. The sole value that leads the utilitarian decisionmaker to choose one alternative over others is the value of satisfying (the most) individual preferences.

Recently, some moral philosophers have attacked the soundness of utilitarian thought. They have argued, in part, that utilitarianism, because it merely aggregates the pleasures or preferences of individuals in a society, does not take sufficient account of the individual as a moral entity. The moral worth and personal integrity of the individual get lost in the aggregation. Further, utilitarianism does not grant the individual basic minimal rights, and thus, in providing for the interests of the many, may cause some to lead subhuman lives. Since the utilitarian calculus is merely a "procedure," it does not really guarantee any particular results, and this is viewed as a shortcoming in a moral system. Also, because utilitarianism is merely a "procedure" it must accept as given some state of affairs on which it may act, and may not choose which initial state of affairs is best. For this reason, it is argued to be incomplete as a moral system. Utilitarianism has also been attacked because it is consequentialist and therefore does not allow for the possibility that certain acts might be just plain right or just plain wrong. Instead, utilitarianism evaluates all acts by their effects on aggregate personal preferences or pleasure.

As an alternative to utilitarianism these moral philosophers have proposed theories based on specific moral principles that are valid irrespective of their immediate effect on the aggregate of pleasure. Further, they have suggested theoretical means for the justification of these principles, such as resort to the original position and coherence theory. Resort to "community morality" as a means for justifying moral principles, has been suggested as has a turn to traditional Western morality. Some have suggested that consequentialist arguments, somewhat like

utilitarian arguments, may lead to the acceptance of specific nonutilitarian rights or moral principles.

In much the same way that modern philosophers have criticized utilitarianism, a group of constitutional law commentators has found fault with the prevailing traditional commentary. This new group of commentators has also constructed alternative theories of the judicial role built on foundations that resemble the newly formulated theories of the modern moral philosophers. Three types of theories have issued from this new group of constitutional law commentators within the past ten years, each with a particular stance concerning which values may be used in judicial decisionmaking.

The first of these three types of theories, presented by commentators who, for the purposes of this article are called "the principled," is prompted by frustration with the weakness of constitutional "rights" within the traditional scheme. "The principled" contend that decisions in constitutional law should be made on the basis of what might be called "substantive" moral and legal principles, not necessarily found within the text of the Constitution, which will compel the Court to find certain governmental acts simply unallowable. These theories recommending "substantive" principles—principles that provide for specific types of results in judicial decisionmaking—are presented in contrast to the traditional constitutional law commentary, which shies away from the notion of judicially created "substantive" policy, and which favors procedural solutions. The assertion of specific principles by "the principled," and their implied criticism of the traditional view's avoidance of extra-constitutional guarantees, parallels the work of the anti-utilitarian philosophers. The anti-utilitarians present moral principles that are not conditioned on their effects upon aggregate pleasure, and criticize utilitarianism because it is merely "procedural" and as such does not guarantee basic rights. If we were to ask of "the principled" which values the Court should apply in its decisionmaking, they would reply that the Court ought to apply "substantive" moral and legal principles and values such as the ones presented in their own writings.

The theories of "the political" seem to be prompted by frustration with the subservience of the Court to legislatures, and the subservience of intellectually derived policy to popularly chosen policy. "The political," like "the principled," assume that there exist "substantive," extra-constitutional moral and legal principles which the Court may apply in the controversies before it. However, starting with this assumption, "the political" proceed to devise theories that define the proper role for the Court as an actor in governmental policymaking. The fact that the

Court, by virtue of the reasoned nature of adjudication, has access to such "substantive" moral principles lends the Court legitimacy as a governmental policymaker, much like legislatures. Legislatures have their peculiar source of policy and the Court has its peculiar source of policy. National policy is to result from the political exchange between these two types of policymakers. "The political" are characterized by their reliance upon conventional morality as the source for their moral principles. Conventional morality provides "the political" with a comprehensive source of moral principles that is distinct from the source of value employed by the traditional commentators—popular vote, and derivatively, legislative decision. Therefore "the political" need not honor the arguments of the traditional commentators favoring majoritarian policymaking. Yet reliance on conventional morality allows "the political" to maintain the prominence of the people as the source of values to be used in political decisionmaking, for conventional morality is the expression of the underlying values held by the society.

The view held by "the political"—that the Court might be able to arrive upon good policy as the result of reasoned discourse about law or morality—is shared by the new moral philosophers who construct ethical theories or theories of adjudication based on, for instance, coherence theory. Also, the choice of conventional morality as the source of values is similar to the resort to "community morality" as the basis for moral principles suggested by at least one of the modern moral philosophers, and the reliance on conventional morality is supported by the modified utilitarian theories proposed by some of the philosophers. To the question of which values should be applied by the Court, "the political" would answer that the Court should make its decisions on the basis of "substantive" values derived from the conventional morality.

The theories of "the philosophical" appear to be motivated by the view that an unsophisticated and invalid moral perspective seems to dominate governmental policymaking. "The philosophical," like "the political," argue that the Court has a legitimate role in governmental policymaking by virtue of its ability to discern and distill values in a way that a legislature cannot. According to "the philosophical," the values sought by our society and thus by our political organs need not be reflections of eternal principles, but neither need they be inaccessible to reason. In fact, "the philosophical" claim that part of the function of our government is to facilitate the pursuit of rationally defensible public values. The Court is primarily qualified for assisting in this task because of the reasoned and dialogical way in which cases are

presented before the bench, and because of the fact that judges engage in characteristically theoretical inquiry when resolving the disputes before them.

"The philosophical" differ from "the political" in that "the philosophical" do not find that a value is necessarily valid simply because that value is part of the underlying values and attitudes held by the society. As might be anticipated, "the philosophical" seem to prefer more philosophical approaches to moral validity. The search by "the philosophical" for a way to apply reason to the choice of values in Supreme Court adjudication is quite consistent with a primary goal of modern moral philosophers, which is to apply reason to the discernment of determinate moral principles. "The philosophical" refer to the philosophical literature extensively, and attack either utilitarianism or the economic analysis of rights by name. Especially bothersome to "the philosophical" is the premise in utilitarian thought that values are inescapably personal and subjective, and that all values can be quantified in terms of some one basic, continuous measure, like pleasure. Both of these criticisms are akin to the philosophers' complaints that utilitarianism does not take into account the moral worth and integrity of the individual. For instance, respect for the individual as a moral entity may dictate the fulfillment of basic needs or the protection of basic rights, no matter how much others may disapprove at any given time. To the question of which values should be employed by the Court in adjudication, "the philosophical" would reply that the Court must enforce those values which are theoretically the most valid, or which fit into the most comprehensive moral theory, or which best facilitate societal moral progress, given the perspective of the society at that stage in its moral evolution.

Each of the three groups of new constitutional law commentators, "the principled," "the political," and "the philosophical," opposes the "merely procedural" nature of the role assigned to the Court by the traditional commentators. That role severely limits the types of values that legitimately may be enforced by the Court. Except to the extent that the text of the Constitution is believed to be sufficiently specific to guide Supreme Court adjudication and dictate an outcome, the role assigned to the Court by the traditional commentary is largely procedural. The Court is allowed to assert itself only when there is, for instance, manifest irrationality (in the attainment of a given goal) or (procedural) unfairness, or a malfunction of the majoritarian processes. Further, the Court is to be limited for the most part to the scrutiny of procedural faults in statutes, and is to limit its own decisions to those

which can pass the procedural test of "neutral principles." In another way, the traditional view of the Court's role is procedural because it relies on a procedural moral concept—that the best governmental policy will be revealed by popular vote, popular representation, or the workings of the marketplace. "Balancing of interests" is the notion, a procedural notion, which forms the center of the traditional commentators' view of policymaking.

The new constitutional law commentators would appear to object to this procedural orientation for two basic reasons. The first is that nothing is guaranteed by a well working procedure except for the functioning of the procedure itself. Thus a procedural moral system, or a procedural role for the Court, as such, will not *guarantee* basic rights or basic freedoms. The new constitutional law commentators argue that basic rights should form the core of our constitutional protections, rather than be treated as accidental products of our constitutional system. The second objection to this procedural orientation is that no procedure that can lead to the choice of one alternative over another, can be "merely" or "purely" procedural without substantive foundations. It is the supposedly neutral or unbiased nature of these procedures which commends them to those concerned with democracy. Yet these "procedural" means of decisionmaking are in fact no more neutral than any others. Therefore the values that actually underlie these procedures should be exposed and examined. We should support or criticize these "procedural" means of decisionmaking on the basis of the underlying values, and on the basis of what they can in fact guarantee. All three groups of the new commentators would like to focus the debate over the role of the Supreme Court in terms of "substantive" value choices.

Lawyers, however, have never been able to deny their fascination with procedure. Some of the new constitutional law commentators, notably Fiss and Tribe, while rejecting the "contentless" procedures of the traditional commentators for the reasons just stated, propose different kinds of decisionmaking procedures as being more morally responsible, more sensitive to the dictates of morality. These procedures are formulated with the courtroom in mind. They capitalize on courtroom dialogue, either between two parties or between the judge and a party.[503]

503. Bruce Ackerman has proposed a procedure involving dialogue, constrained in certain ways, as the proper model for decisionmaking in the liberal state. According to Ackerman, the moral (or liberal) approach to the exercise of power by one over another or to the distribution of scarce resources to one instead of another, involves engaging the contestants in dialogue about the legitimacy of such an act. Rights emerge from such dialogue. *See* B. ACKERMAN, *supra* note 264, at 3-6. Like courtroom dialogue, liberal dialogue is to consist of

They demonstrate, even among those value-oriented, new constitutional law commentators, the lawyer-like preference for decisionmaking over settling upon specific decisions.

Placing primary importance on the process of problem solving and only secondary importance on the results of the process is reminiscent of the philosophy of John Dewey. Dewey saw his task as philosopher as providing aid to people in their problem solving rather than providing people with the correct solutions to moral problems. People and societies encounter obstacles in their pursuit of things valuable to them in their everyday lives. They do not need philosophy to explore what is valuable, but rather to explore how intelligence can be exploited in overcoming the obstacles.[504] Problems that must be overcome change from situation to situation. The process of gaining increasing facility with the various resources and opportunities at hand in order to deal more reasonably with various problems—the very process itself—is the most general good.[505] Each situation presents both a unique opportunity for the attainment of desired results and a unique obstacle to their attainment. Anything valuable deriving from a situation is a function of the interaction of the person or society with the situation, and thus includes not only the results of the situation but also the activity leading to the results. Ends and means cannot meaningfully be distinguished with respect to the good or valuable.[506] In Dewey's writings one finds the following:

> Moral goods and ends exist only when something has to be done. The fact that something has to be done proves that there are deficiencies, evils in the existent situation. This ill is just the specific ill that it is. It never is an exact duplicate of anything else. Consequently the good of the situation has to be discovered, projected and attained on the basis of the exact defect and trouble to be rectified. . . . Morals is not a catalogue of acts nor a set of rules to be applied like drugstore prescriptions or cook-book recipes. The need in morals is for specific methods of inquiry and of contrivance: Methods of inquiry to locate difficulties and evils;

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the presentation of reasons for one's position, and is grounded in prima facie equality of the parties. *Id.* at 34-45. Additional constraints are presented by Ackerman in order to define the talk that qualifies as liberal dialogue. As defined, liberal dialogue is not a means for arriving at moral truth, but rather is the end in itself. Liberalism, the ultimate goal, is not the adoption of a set of values, but is rather "a way of talking about power, a form of political culture." *Id.* at 6 (emphasis deleted).

504. *See* J. GOUINLOCK, THE MORAL WRITINGS OF JOHN DEWEY xix (1976); J. GOUINLOCK, JOHN DEWEY'S PHILOSOPHY OF VALUE 162 (1972).

505. *See* J. GOUINLOCK, MORAL WRITINGS, *supra* note 504, at xxxix-xl; J. GOUINLOCK, PHILOSOPHY OF VALUE, *supra* note 504, at 237.

506. *See* J. GOUINLOCK, PHILOSOPHY OF VALUE, *supra* note 504, at 233-35.

> methods of contrivance to form plans to be used as working hypotheses in dealing with them.
>
> No individual or group will be judged by whether they come up to or fall short of some fixed result, but by the direction in which they are moving. The bad man is the man who no matter how good he *has* been is beginning to deteriorate, to grow less good. The good man is the man who no matter how morally unworthy he *has* been is moving to become better. . . . [T]he process of growth, of improvement and progress, rather than the static outcome and result, becomes the significant thing. . . . The end is no longer a terminus or limit to be reached. It is the active process of transforming the existent situation. Not perfection as a final goal, but the ever-enduring process of perfecting, maturing, refining is the aim in living. . . . Growth itself is the only moral "end."[507]

Dewey's contempt for the formulation of "fixed results" or determinate values applicable to all situations is certainly not shared by Fiss or Tribe. Each believes that there are some things other than process that can be valued *generally*. Yet, Dewey's writings are still quite relevant to the task of each of the commentators highlighted in this article. Although most of the commentators appear to believe in determinate moral principles such as those presented by Rawls,[508] they are also quite aware of the fact that the Court makes decisions in the here and now. And without presenting complete moral theories, these commentators (for the most part) want to see an increased role for the Court in confronting policy questions. One might think that one who believes in determinate moral principles would advise restraint until an acceptable statement of those principles, probably in the form of a moral theory, arose. The fact that these commentators advise activism instead of restraint in the absence of a moral theory[509] may suggest that they find value in the mere *intellectual* confrontation of policy questions, an approach to policy that can be provided by the Court but which cannot be provided by Congress.[510] Perhaps these commentators believe, along with Dewey, that intellectual confrontation of moral problems is the morally responsible path for a society to take, and that other ways of

507. J. DEWEY, RECONSTRUCTION IN PHILOSOPHY 169-70, 176-77 (enlarged ed. 1948).

508. Gouinlock presents Dewey and Rawls as philosophers of diametrically opposed moral views. *See* J. GOUINLOCK, MORAL WRITINGS, *supra* note 504, at li-liii.

509. It might be thought that the constitutional commentators appealing to conventional morality would have no need for a coherent moral theory. But at least we might ask of the conventional morality theorists some explanation of how underlying moral views are to be distilled by an everyday Justice, and why these views (or distillations) are to be presumed free of the morally irrelevant influences plaguing voting and spending behavior. This explanation would look much like a moral theory.

510. See Brest, *supra* note 8, at 1105-07, for a different interpretation.

confronting moral issues are not as desirable morally.[511]

The parallels drawn in this article between the theories of the role of the Court proposed by the new constitutional law commentators and the ethical theories proposed by the selected moral philosophers might be important in at least three ways. First, in terms of intellectual history, the fact that movements within two distinct fields concurrently resist basing decisions on subjective, personal preferences and instead tend towards basing them on objective, public rights and values is indicative of a change in the intellectual climate. Perhaps this signals the rebirth of a natural law perspective, in which both the marketplace and the individual prerogative are to be more tightly reined by a stronger moral order. Second, in terms of legal theory, it is informative to view instances in which the development of legal concepts is dependent on the development of ethical theories. How useful such abstract moral theory might be to legal theorists is a question addressed by some of the commentators viewed here, and is a question which should be important to those who see the development of law as an important policymaking function of a government, or as an important moral function of a society. Third, the parallels shown might be important in developing theories of judicial review and of the proper function of the Supreme Court. It is this third possible significance which demands further consideration.

As discussed throughout this article, there are many ways in which the theories supporting judicial restraint in the face of legislative decision or the workings of the marketplace can be linked to utilitarian ideas. The views that the Court can have at best only a tenuous hold on what is correct in terms of policy—that polling the citizens or their representatives is the best way of solving policy questions, that the workings of the marketplace are prima facie proper—all carry certain assumptions. Among these assumptions is the premise that good policy or morality is a function not of substantive, definite values, but only of personal, subjective preferences aggregated through the use of one procedure or another. It is for this reason that outcomes of a vote, a legislative act, or the marketplace are assumed to be better policy or more morally valid than any possible nonmajoritarian decision by the Supreme Court Justices. Votes, legislative decisions, and economic results all involve accepted procedures for monitoring and aggregating

511. Dewey, of course, was a fervent supporter of democracy and the democratic process. He valued democracy for providing an environment conducive to the joint resolution of social problems by the individuals within the society, and rejected the imposition of one person's solutions on others. *See* J. GOUINLOCK, MORAL WRITINGS, *supra* note 504, at xlv.

the personal preferences of the individuals involved. Determinations by the Court are not made in accord with any such aggregating procedure, and thus, in a moral ontology that includes only subjective, personal values, such determinations do not originate from a prima facie legitimate means of arriving upon good policy or the dictates of morality. It is not difficult to see that utilitarianism carries along with it the same assumption—that morality is a function only of personal pleasure or the fulfillment of personal preferences, and that this pleasure can be monitored by simple aggregation. To the extent that all moral theories based on the simple aggregation of pleasure or preference fulfillment can be labelled utilitarian, it seems, therefore, that the traditional doctrine of the role of the Supreme Court assumes a utilitarian theory.

How would one seek to justify or support one of the versions of the traditional theory of judicial function? Could this be done without appealing to utilitarian values?[512] I believe that the answer is a qualified "no." In order to justify a theory of the judicial role that calls for deference to the vote or the legislature, except perhaps in the face of one form of representational process failure or another, one must argue that the vote or the legislature has some connection with the best policy or the best moral answer under the circumstances. Of course, one could support representational values only; that is, one could argue that no decision is better than any other, and that the representative organs are to be favored because, for instance, political participation is the good. This assertion need not rely on utilitarian assumptions (although perhaps it could), but note what a strange assertion it is. If no decision is really better than any other, then any "decision" might be reached by the government as long as it is the result of voting, or perhaps legislation. There would be absolutely no grounds for overturning a vote or statute, no need for a constitution or constitutional court. There would certainly be no need for a theory of legislative failure. If legislatures are tolerated at all, it cannot be because they are bound to say what the people would have said. The people could say that themselves. (Efficiency, remember, is not a value in this system.) It must be instead because electing legislators is itself a form of "political participation." If this is the case, once the legislators are elected, it is irrelevant what kinds of decisions the legislature makes, by hypothesis.

512. It would not be of much use to say in defense of traditional Court doctrine that there are no moral values. How could such a position lead to a defense of the doctrine? Even secondary effects arguments—for instance, that there is no best policy but that it is nice to have citizens participate—must rely ultimately on some theory of the good. Why is it good to allow people to participate? The question must be faced at some point.

Although this approach could provide a justification for judicial restraint, I do not believe that this justification would appeal to many of the advocates of judicial restraint.[513] It is more likely that the advocates of judicial restraint would have in mind a more democratic justification—that preferences expressed by a vote, by the citizens' representatives, or by the citizens' investments, provide the government with the best approximation of good policy or morality. "Good policy" here may mean only that it is the best guess for satisfying the most people in the near future; that is sufficient. As long as this type of justification is proposed for judicial restraint, with the assumption that no means other than an aggregating procedure could possibly provide an equally good guess, it is clear that the justification would rely on utilitarian values. The assertion that a preference-monitoring procedure no matter how flawed (except in cases in which it is arguably not monitoring preferences at all)—is a better source of policy than *any* theoretical investigation into policy—no matter how perfect—is a restatement of the principle that all values are subjective and that good policy or moral truth is derived ultimately from aggregating personal preferences. This is the basis of utilitarianism.

If it is true that the traditional theories of the judicial role are intimately bound up with utilitarian theory, and that justifications for the traditional theories are necessarily tied to justifications for utilitarianism, then the parallels between anti-utilitarian philosophy and the new theories of the judicial role are important. To put it simply, it may be that to the extent that modern philosophers are correct in attacking utilitarianism, these commentators are correct in their attacks on the traditional theories.

The power of a United States Supreme Court Justice to change American society has inspired much scholarly debate. The sheer potential of the Court to do justice not only renders the Court a fitting object for the scrutiny of the student of policy, but also inspires interest among those who still believe that there may exist a moral right and wrong. The Supreme Court is unique in having both the opportunity to affect society greatly, and the widely appreciated duty to make intel-

513. One could imagine other possible justifications for judicial deference that are likewise not dependent on a notion of good decisions. One could, of course, assert that judicial deference is the good. A perhaps more palatable assertion would be that the government ought to act in a manner consistent with its historical foundations. Perhaps this value could be combined with the value of political participation. The problem with this approach is the same as the problem with the adoption of political participation as the sole value. Any view of historical consistency that is strong enough to be of use is likely to disqualify the traditional commentary as well as the rival commentary.

lectually defensible decisions. The question of how the Court should ultimately go about deciding cases is, therefore, tantamount to the question of how practical we can make our notions of moral validity within a society. For this reason it is natural to investigate the potential, if not the actual, connections between the decisionmaking of the Court and theories of the nature of morality.