ARTICLES

Provisional Review: An Exploratory Essay on an Alternative Form of Judicial Review

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Introduction

The core problem of judicial review under our Constitution is judicial choice: where the Constitution authorizes, but does not compel, a particular choice, how can the decision of an anti-majoritarian Court be final and bind the people and their elected representatives consistent with democratic principles?[1] The current legitimacy debate has not proven helpful in solving this problem.

This Article posits an alternative approach to judicial review that includes five basic elements. First, judicial review would be accepted as a process in which judicial choice often cannot be avoided in interpreting the Constitution. Second, the Court's scope of review would extend to cases involving substantive rights and federalism disputes, as well as to

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1. Some scholars seek to answer this question by appearing to deny it altogether. *See, e.g.*, Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 123-36 (1983). Sedler argues that the Constitution is primarily concerned with placing limits on all governmental power. But when presented with other constitutional functions, such as the establishment of a representative form of government with amendments guaranteeing broad suffrage, Sedler is compelled to address the question. His answer is that the Court's decisions are consistent with the Constitution's democratic character because the people have come to accept (a) the Court as an appropriate institution to protect individual rights and (b) the liberties articulated by the modern Court as the values we hold. *Id. See also* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 67-70, 125-28 (1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 52 (1978); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 226-27 (1980); Fiss, *The Supreme Court 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 38 (1979); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1963).

cases involving process rights and representation reinforcing values.[2] Third, the Court's decisions on all of these issues would bind the States. Fourth, the Court's decisions, however, would not bind Congress except when based on the largely process-oriented and representation reinforcing limits imposed directly on Congress by the Constitution.[3] Fifth, to insure that any congressional action modifying or reversing Court decisions on substantive rights and federalism issues addressed the merits, the Court could use a variety of other techniques[4] to examine the lawmaking process and to remand legislation to Congress for reconsideration when appropriate.

There is a common thread in these elements. The Court's decisions interpreting the Constitution would not purport to be final and binding determinations of substantive rights and federalism issues. They would serve only to initiate a principled dialogue with Congress over the appropriate choices. For example, a decision of the Court invalidating a state act for violating the Fourteenth Amendment on substantive grounds would be subject to reversal or modification by Congress acting pursuant to its enumerated powers. The Court would then review that legislative response only to insure that Congress addressed the merits of the controversy in an open, representative manner, free of we-they defects in the lawmaking process.[5] Upon finding any such failure, the Court could suspend the federal statute and remand to Congress for further consideration, but Congress would retain ultimate authority to make the final substantive policy choice. Throughout this Article, this alternative form of judicial review is therefore referred to as "provisional review."

This alternative approach will be explored in three parts. Part I examines the current legitimacy debate. Part II considers the constitu-

2. "Process rights" refer to procedural limits on governmental decisionmaking primarily imposed by interpretations of the Due Process Clauses and related criminal procedure provisions. "Representation reinforcing values" refer to limits on official decisionmaking, elections, and voting imposed by diverse interpretations of the Constitution that promote representative democracy. In contrast, "substantive rights" refer to interpretations directly protecting personal rights (*e.g.*, privacy and autonomy) no matter how fair the processes that led to the decisions affecting these interests. "Substantive due process" and "fundamental interest equal protection" cases are prime examples of such substantive rights interpretations. *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980). Finally, "federalism disputes" refer to controversies concerning whether governmental decisionmaking power rests with the states or with the federal government under the Constitution. *See generally* J. CHOPER, *supra* note 1.

3. *See, e.g.*, U.S. CONST. art. 1, § 9 and amends. I-VIII (with the Due Process Clause in amend. V understood solely as a procedural limit).

4. Examples of these techniques include statutory construction and suspensive veto.

5. "We-they defects" include, for example, legislation motivated by any racial bias of a white majority in-group against a racial minority out-group. *See* J. ELY, *supra* note 2, at 135-79.

tional sources for judicial review of congressional power and federalism disputes and of individual rights against both the states and the federal government. Part II concludes by summarizing how the text and structure of the Constitution authorize, but do not compel, provisional review. Part III evaluates the extent to which this alternative is consistent with representative democracy and with our major judicial traditions. Part III closes by evaluating the impact of provisional review on some of the Court's major human rights decisions.

This Article is styled as an exploratory essay because my own views are tentative. I am not convinced that provisional review should be adopted by the Court or the people. Nevertheless, it demonstrates that there is a mode of judicial review of substantive rights issues that is consistent with representative democracy. The existence of such an alternative may encourage the Court, commentators, Congress, and the people to expend their energies discussing the merits of policy choices rather than further debating the legitimacy of judicial review.

I. The Legitimacy Debate

Contemporary theories of judicial review fall into three major camps— interpretivist, structural, and noninterpretivist. Despite the exchange of sometimes heated criticism, the three share more in common than their proponents care to admit.

A. Interpretivism

Interpretivists justify judicial review on the ground that the Court finds and applies a superior positive law, ratified into the Constitution by a prior supermajority, to strike down conflicting legislation subsequently passed by a transitory majority. Yet, avowed interpretivists like Grano, Bork, and Van Alstyne also claim that the general phrasing in clauses like "equal protection" and "freedom of speech" authorize—but do not compel—the modern Court's landmark decisions restraining majoritarian legislation and practices concerning forced segregation and abridgment of political speech.[6] Grano, for example, approves of this interpretation of the Equal Protection Clause even if the Framers did not specifically intend to outlaw school segregation. He argues that the general anti-caste value that he finds in "equal protection of the laws" need not be negated even by the Framers' contrary original understanding

6. *See generally* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1 (1981); Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107 (1982).

concerning a specific practice unless the text itself provides for such a specific exception.[7] Under this brand of interpretivism, the general value underlying the constitutional provision prevails over current legislation.

Yet the Court, acting as a final arbiter in interpreting this general value, does more than just "find" what the Framers enacted into positive law. The Court makes a choice in defining the value protected by the constitutional text and in measuring that protection against specific legislation or custom. While only one right answer may exist in every case for a judge with the wisdom of Dworkin's Hercules,[8] a comparison of *Plessy v. Ferguson* and *Brown v. Board of Education* demonstrates that the answer is not always dictated by the text or the Framers' intent.[9] As a result, the interpretivist premise is seriously undermined. Where the

7. Grano, *supra* note 6, at 67-73. Raoul Berger claims that the Court's authority to exercise its power of judicial review is limited to those situations where the specific intent of the Framers and, presumably, of the ratifiers unequivocally indicates that a particular type of practice was specifically outlawed by adoption of a particular constitutional provision. *See generally* R. BERGER, GOVERNMENT BY JUDICIARY (1977). This approach is arguably consistent with the democratic notion that the Court may override ordinary legislation only if a supermajority has previously enacted a higher positive law into the Constitution. Yet this approach leads to a curiously undemocratic understanding of the Constitution: the dead hand of the past limits the ability of the people's representatives to deal with the problems of today and the needs of tomorrow through ordinary legislation.

To determine what the Framers intended to outlaw and what current practices are counterparts to such prohibited practices, we look through a lens that is focused by subsequent history and often ask questions that history cannot answer. *See, e.g.*, Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1036, 1039, 1064-68 (1981). The text of the Constitution and the Framers' intent do not always provide the specific answers that Berger purports to find. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH (1961); J. ELY, *supra* note 2, at 11-43 (1980); Bork, *supra* note 6, at 13-15; Brest, *supra* note 1, at 214-17, 220-21, 230-31; Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462 (1982); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Sandalow, *supra*. Given these interpretive dilemmas, two basic choices for judicial review emerge: either the Court can limit its power to overturn decisions of representative institutions to those instances where the text and Framers' intent clearly compel a specific answer, *see, e.g.*, R. BERGER, *supra*, or the Court can interpret more controversial, general and open-ended constitutional provisions in reviewing majoritarian decisions. *See, e.g.*, Sandalow, *supra*, and Wellington, Book Review, 97 HARV. L. REV. 326 (1983). If the Court chooses the first course, the general phrasing of many constitutional provisions will be deprived of any judicially cognizable meaning. The Framers' purpose in adopting general provisions rather than specific proscriptions will be ignored, and the Court will be limited to posing unanswerable questions concerning the original understanding of the provisions. *See, e.g.*, A. BICKEL, *supra*; Dimond, *supra*; Sandalow, *supra*. If the Court chooses the second course, then the dilemma of an anti-majoritarian Court choosing to overturn majoritarian decisions cannot be avoided. *See, e.g.*, J. ELY, *supra* note 2, at 4-5, 41, 71. *See generally* A. BICKEL, *supra*; C. BLACK, DECISIONS ACCORDING TO LAW (1981); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).

8. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 105-30 (1978).

9. *Compare* the majority opinion in Plessy v. Ferguson, 163 U.S. 537 (1896) *with* Justice Harlan's dissent, 163 U.S. at 557-60 (Harlan, J., dissenting) *and* Brown v. Board of Educ., 347

constitutional text and Framers' intent are open-ended, the Court cannot decide the merits of today's disputes solely by claiming to find an answer from the past.

B. Structuralism

Faced with the necessity of judicial choice in interpreting the Constitution, Ely has suggested a supplementary, structural approach based on the premise that majoritarian legislative decisions should generally prevail over an anti-majoritarian Court in any democracy. Ely argues that the Court should interpret only those constitutional values that reinforce the ability of legislative and executive institutions to represent fairly the majority will.[10] Under this interpretation, the Court acts as a final arbiter of key constitutional provisions concerning due process, universal suffrage, fair apportionment, and prohibition of we-they defects in the legislative process to insure that representative institutions work. Yet, this restriction on the Court's power to render decisions ignores many other substantive provisions of the Constitution[11] and apparently prohibits the Court from making society confront any issue concerning substantive rights.[12]

Choper takes a different structural approach. He urges the Court to limit its final and binding interpretations to individual rights and to leave federalism disputes for final resolution by Congress—the institution that represents the interests of the people, the states, and the nation.[13] While there may be a strong case for the Court to defer to congressional determination of federalism issues, Choper fails to demonstrate why the Court

U.S. 483 (1954). *See also* Dimond, *supra* note 7, at 507-11; Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 748 (1982).

10. J. ELY, *supra* note 2, at 73-180.

11. *See, e.g.*, Laycock, Book Review, 59 TEX. L. REV. 343 (1981). Whether or not one agrees with each of Laycock's suggestions for interpreting diverse substantive rights provisions of the Constitution, it is manifest that Ely's representation reinforcing approach chooses to eschew final and binding judicial interpretation of such substantive rights because it is inconsistent with his attempt to reconcile judicial review with representative democracy. *See* J. ELY, *supra* note 2, at 41, 98.

12. *See, e.g.*, Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). I say "apparently" because Ely does suggest, for example, that the Privileges or Immunities Clause of the Fourteenth Amendment may well offer an open-ended substantive rights provision. J. ELY, *supra* note 2, at 28-30. Yet he does not see how judicial review of substance under such an open-ended rights clause can be consistent with the democratic character of the Constitution. *Id.* at 41, 98. Therefore, Ely chooses to limit judicial interpretation to articulation and enforcement of representation reinforcing values. The alternative approach explored here seeks to meet Ely's objection by explaining how provisional review of substantive rights issues is consistent with the tenets of representative democracy.

13. *See* J. CHOPER, *supra* note 1.

should decline review of these issues altogether.[14] Nor does he explain how allowing the Court to be the final arbiter in all individual rights cases is consistent with the democratic character of the Constitution.

Finally, Charles Black argues that, when interpreting the text and structure of the Constitution, the Court has an important role in defining and enforcing a wide range of substantive national rights.[15] To square this daunting power with the tenets of representative democracy, however, Black argues that the Court's decisions are not final or binding because Congress may act under Article III to deprive the Court of jurisdiction to hear any particular case.[16] But this argument ignores the limits imposed on *all* congressional powers by the Bill of Rights: is the Court compelled to remain silent if Congress, for example, passes a law barring the Court from reviewing free speech cases when the First Amendment provides that "Congress shall make no law . . . abridging freedom of speech"?

C. Noninterpretivism

The self-styled noninterpretivists argue that the Framers did not specifically intend to enact into positive law many of the modern Court's major human rights decisions.[17] As a result, some have argued that the Court's "mission" to protect human rights must be justified on functional rather than textual grounds.[18] Under this view, the Court is the deliberative forum of principle in which issues can be decided on the merits in a

14. The Court has demonstrated its capacity to defer to Congress for resolution of these issues without finding them nonjusticiable under Article III. *See, e.g., infra* text accompanying notes 33-53. As a result, there is no need for the Court to give a restrictive reading to its jurisdiction under Article III when federalism disputes arise in an actual case or controversy. Moreover, the Court's decisions on the merits of disputes between states and Congress, even if misdirected, are not as likely to drain any limited "judicial capital" as are the Court's restrictions on state discretion in its substantive rights and anti-discrimination rulings. Although part II will not address Court decisions refereeing separation of power disputes between Congress and the President, these rulings probably have built rather than drained public support, respect, and capital for the Court. *See, e.g.,* A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 3-30 (1976); M. PERRY, *supra* note 7, at 50-60. In addition, such decisions usually do not establish substantive policies binding on all branches of government in the future, but instead operate to remand the substantive policy choice for consideration by some other branch or combination of branches. Modes of proceeding, not the merits of policy, are thus dictated by judicial refereeing of separation of power disputes. *See also infra* note 88.

15. *See generally* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); C. BLACK, *supra* note 7.

16. C. BLACK, *supra* note 7, at 18-19.

17. *See, e.g.,* M. PERRY, *supra* note 7, at 65-72.

18. *Id.* at 93-96.

search for "right" answers.[19]

While some who engage in this search for fundamental values argue that the Court's decisions are final and binding,[20] Perry argues that Congress retains plenary power to restrict the Court's jurisdiction over human rights cases. Yet, in Perry's view, this legislative power to constrain the Court's human rights decisions does not permit positive legislation that directly conflicts with the substance of the Court's decisions. Ironically, Perry's "functional" argument posits moral dialogue as the basis for judicial review but then deprives the people's representatives of all opportunity and obligation to address directly the moral issues raised by the Court's judgments. For Perry, moreover, unfettered congressional power to gerrymander the Court's jurisdiction is but a grudging concession to majority rule; he hopes that a variety of institutional constraints will prevent Congress from ever exercising this plenary power to silence the Court.[21]

Perry never argues that his functional human rights approach to judicial review runs contrary to the text of the Constitution. In his most recent reconsideration of this issue, he even drops the argument that the major human rights decisions of the modern Court are "extra-constitutional." Instead, he substitutes an argument that sounds familiar to many interpretivists. He admits that the Court does interpret the text of the Constitution when engaging in judicial review, but, as in the case of the critic encountering a literary classic, this search for meaning is not limited to investigating the author's original intent.[22]

Van Alstyne's interpretivist criticism[23] of Perry's earlier rhetoric as inventing a new constitution in his personal image clouds the common problem shared by interpretivist and noninterpretivist alike: open-ended

19. *Id.* at 101-27. At the very least, the Court initiates some sort of principled dialogue over the substance of rights. *Id.* at 93, 98, 112; L. TRIBE, *supra* note 1, at 13-14, 892.

20. L. TRIBE, *supra* note 1, at 896; Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

21. *See* M. PERRY, *supra* note 7, at 128-37.

22. *See* Perry, A Theory of Constitutional Interpretation (forthcoming article). Perry amplifies his claim that constitutional interpretation partakes of a religious encounter with a sacred document. Perry's latest labels, nevertheless, continue his attempt to place all interpretivists into Berger's isolated camp by limiting them exclusively to a search for "authorial meaning" or "originalist interpretation"—*i.e.*, the specific intent of the Framers or ratifiers. In defining that meaning, Perry continues to find that almost nothing was originally intended, and he ascribes only the narrowest plausible conception to generally phrased provisions of the Constitution that might otherwise limit governmental power. Most self-styled defenders of interpretivism, however, have rejected this gambit and refuse to be placed in such a narrow corner. *See supra* notes 6, 7 and accompanying text.

23. Van Alstyne, *Interpreting this Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983).

constitutional provisions *authorize* a range of choices but do not *compel* any particular choice. The Court must often do more than find a particular positive law specifically enacted by a previous supermajority. But how can this discretionary role of the Court square with majority rule in our representative democracy? It is no answer for interpretivists to ridicule Perry's early rhetoric when they share the same problem.[24]

D. Nonfinal Judicial Review

In response to this dilemma of judicial choice, Wellington and Sandalow counsel that we have not paid enough attention to the possibility that the Court's constitutional interpretations need not be final or binding. After all, constitutional amendments have overruled certain Court decisions,[25] while others have been substantially eroded or undercut by subsequent judicial decisions and congressional legislation.[26] From this perspective, the Court's decisions interpreting the Constitution may be viewed as provisional judgments ultimately subject to reversal through an ongoing process akin to common law adjudication without

24. Thus, Van Alstyne argues that the history of the Equal Protection and Free Speech Clauses authorize but do not compel the Court's decisions concerning reapportionment and free speech. *See generally* Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33; Van Alstyne, *supra* note 6. In both instances, Van Alstyne recognizes that the Court exercises choice in making a judgment rather than being given a single answer by the Framers; he also recognizes the difficulties that this stubborn reality of constitutional interpretation presents to conscientious judges, as well as the dilemma that it poses for judicial review in a constitutional democracy. Once Perry's rhetoric is pierced, Van Alstyne and Perry face the same practical and theoretical problems with judicial interpretation of the Constitution. *See generally* Sandalow, *supra* note 7. In the process of elaborating provisional review, this Article may contribute to moving beyond the contentious labels and obfuscating terms clouding the current legitimacy debate.

Tribe offers another way to minimize the central problem of the legitimacy debate. He notes the majoritarian constraints on the Court, the less than ideally democratic operations of our representative institutions in practice, and the dialogue between the various constitutional actors over the correct interpretation of an indeterminate constitutional text. *See* L. TRIBE, *supra* note 1, at 9-14, 49-52. Although such observations are bracing, they do not often help in making choices among plausible interpretations of the Constitution. Part II, *infra*, therefore examines the issues of judicial review by turning to interpretation of the Constitution itself.

25. *See, e.g.*, U.S. CONST. amend. XI (overruling Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)); U.S. CONST. amend. XIV, § 1 (overruling Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)); U.S. CONST. amend. XVI (overruling Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895)); U.S. CONST. amend. XXVI (overruling Oregon v. Mitchell, 400 U.S. 112 (1970)).

26. *Compare, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) *with* Plessy v. Ferguson, 163 U.S. 537 (1896); *compare* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) *and* United States v. Darby, 312 U.S. 100 (1941) *with* Hammer v. Dagenhart, 247 U.S. 251 (1918).

stare decisis[27] or by simple statute if Congress can ever muster the necessary majority.[28] This vision of the Court as initiator of a dialogue about the meaning of the Constitution certainly makes judicial review more consistent with the traditional theory of democracy.

There remains the disturbing prospect that a blanket rejection of the binding nature of judicial interpretation of any constitutional provision conflicts with specific provisions of the text. For example, judicial interpretation of Article I, section 9 and of the Bill of Rights may limit congressional power by imposing constraints on majority rule. Part II, therefore, analyzes several types of constitutional cases to determine whether an alternative form of judicial review better fits the text and structure of the Constitution. Part II also offers a principled basis for determining what types of cases should be subject to congressional reversal and what types of cases should be subject to reversal only by constitutional amendment or subsequent judicial decision.

II. Forms of Judicial Interpretation

Part II examines judicial interpretations of the meaning of the Constitution with respect to (a) the limits of congressional power and resolution of federalism disputes, (b) individual rights against the states, and (c) individual rights against the national government. Part II does not contend that the Court has been compelled to adopt or to apply particular interpretations of the Constitution. Nor does it explain instances where the Court, in choosing among alternative interpretations, made right or wrong choices. Rather, the objective is to determine whether the Court's prior decisions offer any options for an alternative form of judicial review that better fits the democratic character of the Constitution.

A. Congressional Power and Federalism Disputes

Chief Justice John Marshall's opinions for the Court in *McCulloch*

27. Wellington, *supra* note 7; Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

28. *See, e.g.*, Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977). In his published articles, Dean Sandalow has only sketched his support for the view that the Court's constitutional decisions ultimately should be subject to direct reversal by the Congress through ordinary statutes. In comparison, provisional review would allow the Supreme Court to shift final decision on most fundamental values, as well as disputes arising from the Union's federal structure, from the states to Congress. This shift reflects Sandalow's early suggestion that state court review could limit the otherwise broad initiative powers of local government by shifting final decisions on such critical issues to the state legislature. *See* Sandalow, *supra*, at 1187-90; Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 700-09 (1964).

v. Maryland[29] and *Gibbons v. Ogden*[30] established a basic framework for judicial review of congressional power. Congress acts within its power if (1) the goal of the law is related to one or more of the enumerated powers and the implied powers arising therefrom; (2) appropriate means are chosen to achieve that legitimate end; and (3) neither the means nor the ends of the law are prohibited by other provisions of the Constitution.[31] The first two constraints can be understood as "internal limits" inferred from the enumerated grants of power to Congress. The last can be understood as external limits imposed, for example, by the provisions of Article 1, section 9 or of the Bill of Rights on all enumerated congressional powers.[32]

In practice, the modern Court has deferred to the legislative branch and imposed virtually no internal limits upon Congress.[33] Both *McCul-*

29. 17 U.S. (4 Wheat.) 316 (1819).

30. 22 U.S. (9 Wheat.) 1 (1824).

31. In *McCulloch*, Chief Justice Marshall described this test variously as follows:

—"The [federal] government which has a right to do an act [under the Constitution] . . . must, according to the dictates of reason, be allowed to select the means . . . ." 17 U.S. at 409-10.

—"[L]eave it in the power of Congress to adopt any [means] which might be appropriate, and which were conducive to the end [enumerated in the Constitution]." *Id.* at 415.

—Congress may "employ those [means] which, in its judgment, would most advantageously effect the object [enumerated in the Constitution] to be accomplished . . . any means adapted to the end." *Id.* at 419.

—"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *Id.* at 421.

—"[W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake [in the Court] to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *Id.* at 423.

32. See L. TRIBE, *supra* note 1, at 224-27, for a detailed elaboration of the distinction between internal and external limits.

33. *See generally* L. TRIBE, *supra* note 1, at 224, 236-42, 250, 273. Thus, for example, in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), the Court articulated the test as follows:

—"whether the activity sought to be regulated is 'commerce which concerns more than one state' [citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1]." 379 U.S. at 254.

—"whether Congress had a rational basis for finding that [activities sought to be regulated] affected commerce." *Id.* at 258.

—"if [Congress] had such a basis, whether the means it selected to eliminate that [perceived] evil are reasonable and appropriate [including, for example, total prohibition.]" *Id.*

In Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964), the Court added, "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation [of any internal limits on the exercise of enumerated powers] is at an end."

Occasionally, however, the Court has remanded to Congress for a "clear statement" that Congress does intend to exercise its resulting plenary power in full. *See* L. TRIBE, *supra* note 1, at 243-44; Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 17 (1981); Fitzpat-

loch and *Gibbons* recognized that such an approach trusts Congress to resolve the issue of which governmental power should be exercised by the national government, the state governments, or both. The structure of the Constitution, in which Congress represents the interests of both the people and the states in maintaining a federal system, may be interpreted as giving Congress the institutional capacity and the primary responsibility to resolve federalism issues.[34]

By the same token, *McCulloch* and subsequent cases recognized that the Constitution did not provide the same institutional basis for trusting a state when it acted against federal instrumentalities and nonresidents, or when it imposed burdens on interstate commerce or the national economy.[35] Whether the Court initially treats such state actions as constitu-

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rick v. Bitzer, 427 U.S. 445, 451-52 (1976); Edelman v. Jordan, 415 U.S. 651, 672, 674 (1974); Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 285 (1973).

34. *See, e.g.*, Helvering v. Gerhardt, 304 U.S. 405, 412 (1938); McCulloch v. Maryland, 17 U.S. at 430-32; J. CHOPER, *supra* note 1, at 176-92; Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1961). My point is not that the Constitution compels this reading. There are plausible alternative interpretations to read the Necessary and Proper Clause as a sharp restriction on any implied powers emanating from the enumerated powers. McCulloch v. Maryland, 17 U.S. at 412-14; L. TRIBE, *supra* note 1, at 228. Even within his rulings, Marshall left open the possibility that the Constitution might impose federalism limits on congressional power based "on a fair construction of the whole instrument." McCulloch v. Maryland, 17 U.S. at 406. In Gibbons v. Ogden, 22 U.S. at 195, Marshall noted:

> The genius and character of the whole [federal] government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necesssary to interfere, for the purpose of executing some of the general powers of the [federal] government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

Nevertheless, Marshall made the choice that the Court should generally defer to Congress on such issues of federal versus state authority because "[i]n the legislature of the Union alone, are [the people of the States] all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused." McCulloch v. Maryland, 17 U.S. at 431. Marshall added, "[t]he people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise [the enumerated federal] power" to regulate the States themselves or their constituents. *Id.* at 433.

35. Thus, in McCulloch v. Maryland, 17 U.S. at 435-36, Marshall struck down Maryland's tax on the National Bank because the interests of the federal government were not represented in the legislature of the state. *See also* Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Crandall v. Nevada, 73 U.S. 35 (1868); C. BLACK, *supra* note 15, at 22-32 (discussing decisions striking down state imposition of burdens on federal officers and state interference with federal rights). Beginning in 1871 with Collector v. Day, 78 U.S. 113, the Court chose to distort Marshall's structural understanding of the relation between the federal and state governments by adopting a concept of "dual sovereignty" to immunize the salaries of state officials from nondiscriminatory federal taxes applicable to the wages of others. This perverse view of state sovereignty to limit the federal taxing power was pursued with vengeance in Hammer v. Dagenhart, 247 U.S. 251 (1918), to limit the power of Congress to

tional violations of personal rights and national prerogatives or merely as common law federalism disputes,[36] the Court's subsequent review of congressional acts reversing, modifying, or altering its initial resolution should proceed pursuant to the deferential standard appropriate for determining whether the act exceeds the scope of congressional power.[37]

For example, in *McCulloch*, the Court hinted that Congress would have the power to authorize Maryland to tax the national bank—even on a discriminatory basis.[38] Subsequent decisions recognized that Congress may authorize the states to burden interstate commerce even after the Court has held that a state may not do so on its own.[39] As long as the congressional act authorizing state discrimination does not run afoul of any external limit imposed on congressional powers by other provisions of the Constitution, the Court need not choose to impose its own artificial internal limits by restrictively interpreting Congress' enumerated powers. With respect to internal limits, the Court uses deferential standards for reviewing any act of Congress passed pursuant to an enumerated power.[40] That fact should come as no surprise: the structure of the Constitution places primary responsibility for ultimate resolution of these federalism tensions with Congress, the representative institution that can respond to the will of the people concerning the respective roles of the states and the national government.[41]

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regulate commerce. *See infra* note 51. Such judicially imposed limits on the enumerated powers of Congress in the name of "state sovereignty" finally fell in Graves *ex rel.* O'Keefe, 306 U.S. 466 (1939) (no state immunity from federal tax) and United States v. Darby, 312 U.S. 100 (1941) (no state sovereignty limit on congressional exercise of enumerated power). *See also infra* note 46 and accompanying text.

36. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Southern Pac. Co. v. Arizona, 325 U.S. 761, 768-80 (1945); C. BLACK, *supra* note 15; J. CHOPER, *supra* note 1, at 205-09; L. TRIBE, *supra* note 1, at 319-408; Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940); Monaghan, *The Supreme Court 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Sedler, *The Negative Commerce Clause as a Limit on State Regulation*, 32 WAYNE L. REV. (forthcoming article 1985).

37. *See, e.g., supra* note 36; Southern Pac. Co. v. Arizona, 325 U.S. at 769; Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981). *Compare* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518 (1852) *with* Pennsylvania v. Wheeling & Belmont Bridge Co, 59 U.S. 421 (1855); *compare* Leisy v. Hardin, 135 U.S. 100 (1890) *with In re* Rahrer, 140 U.S. 545 (1891).

38. McCulloch v. Maryland, 17 U.S. at 420-22.

39. *See supra* notes 36, 37.

40. *See supra* note 33.

41. Under this analysis, if the right to travel is viewed solely as an incident to the federal structure of the Constitution necessary to prevent any state from discriminating against nonresidents, Congress would have the power to reach different results than the Court by enacting legislation under its commerce, spending, or civil rights enforcement powers, as long as the act did not run afoul of the external limits imposed on all congressional power. *Cf.* Oregon v. Mitchell, 400 U.S. 112, 150 (1970) (opinion of Douglas, J.) (plenary congressional power to

From this perspective, a decision like *National League of Cities v. Usery*,[42] which makes the Court's judgment on the appropriate division of responsibility between federal and state governments final and binding on subsequent congressional resolutions, is unjustified. Nevertheless, some argue that in such cases the Court appropriately engages in the stronger, "final arbiter" mode of judicial review by measuring the congressional act against an "external limit" inferred from the structure of the Constitution. In *National League of Cities*, this external limit was the "guts of state sovereignty under our federalism."[43] Yet this *external* limit is also the same *internal* limit which *McCulloch* counseled is better decided by Congress on a continuing basis than by the Court once and

enforce right to travel); Shapiro v. Thompson, 394 U.S. 630-31 (1969); United States v. Guest, 383 U.S. 745, 758 (1966). On the other hand, if the right to travel is viewed as a personal right essential as a safety valve to permit escape from hostile local majorities, *see* J. ELY, *supra* note 2, at 177-79, congressional power to reverse or to modify judicial interpretations of that right may well turn on whether the right is viewed as an external limit inferred from the structure of the Constitution as a whole and binding on Congress or a privilege or immunity under section 1 of the Fourteenth Amendment binding only on the states. *See infra* part IIB and IIC.

42. 426 U.S. 833 (1976), *overruled*, Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985). [Editor's note: While this Article was at the printer, the Court directly overruled *National League of Cities*. *Garcia* adopts a rationale that trusts congressional resolution of federalism disputes. Although Professor Dimond proposes a slightly different elaboration, his proposal is consistent with traditional deferential approaches to judicial review of congressional power in cases of federal-state tension.].

43. *See, e.g.*, L. TRIBE, *supra* note 1, at 301-02. Tribe does not support Justice Rehnquist's wooden argument that minimum wage and maximum hour provisions for public employees impermissibly intrude on state sovereignty. *Id.* at 309-12. Instead, he argues that the result is justified by concern for individual rights against the states. *Id.* at 313-18. But Justice Rehnquist's plurality opinion is concerned with state discretion to do as it pleases rather than state duties to provide services to persons. Thus, Tribe's alternative rationale to support the decision seems only wishful thinking. If the real concern is individual substantive rights and state duties, section 1 of the Fourteenth Amendment provides more relevant interpretive choices than "our federalism" and "the guts of State sovereignty."

Justice Rehnquist's choice to impose an external federalism limit on congressional commerce power is not, however, foreclosed by the Constitution. Even McCulloch v. Maryland, 17 U.S. at 404-07, recognized that such an interpretation was plausible. But neither is that choice compelled. For the reasons articulated by Chief Justice Marshall in *McCulloch*, *see supra* notes 34-41 and accompanying text, and reiterated by Justice Brennan in his dissent in *National League of Cities*, 426 U.S. at 857-62, and by Justice Stevens in his concurrence in EEOC v. Wyoming, 460 U.S. 226, 248-49 (1983), deference to Congress on federalism issues is the better choice, unless Congress acts to destroy some or all states.

Even in that unlikely event, the choice for the Court will not be compelled. When Congress acted in 1867 to substitute United States military districts for civilian government in the rebel states, extraordinary circumstances supported the suspension of state sovereignty, and with an assist from Congress, the Court found a way to avoid reviewing the constitutionality of the Military Reconstruction Act. *See Ex parte* McCardle, 74 U.S. 506 (1868). Given the system of congressional representation now provided in the Constitution, however, it is difficult to imagine that Congress would actually act to abolish or suspend any states absent another War between the States.

for all. Indeed, the Court often cited that limit to justify its imposition of definitional restrictions on congressional commerce power during the era of *Hammer v. Dagenhart*.[44] *NLRB v. Jones & Laughlin Steel Corp.*[45] signalled the Court's practical rejection of this approach, and in *United States v. Darby*[46] the Court explicitly returned to the traditional doctrine of *McCulloch*, by embracing the proposition that the structure of the Constitution gives Congress continuing power to resolve federalism disputes by legislation.

The Court's decisions after *National League of Cities—Hodel*,[47] *Long Island Railroad*,[48] *FERC*,[49] and *EEOC v. Wyoming*[50]—all upheld congressional power in the face of state claims of interference with state sovereignty. These decisions form an analogy to the Court's earlier decisions starting with *Jones & Laughlin Steel Corp.*[51] Once again the Court

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44. 247 U.S. 251, 273-75 (1918). The Court wrote:

> The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture. . . . [T]he Nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved.

Id. at 273-74. To this statement Holmes retorted in dissent:

> I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other [enumerated congressional] powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State. . . . Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of activities of the States.

Id. at 281 (Holmes, J., dissenting).

45. 301 U.S. 1 (1937). *See also infra* note 51.

46. 312 U.S. 100, 115, 123 (1941). The Court directly overruled *Hammer v. Dagenhart* and held: "[R]egulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. . . . Our conclusion is unaffected by the Tenth Amendment [which] . . . states but a truism that all is retained which has not been surrendered." *Cf.* Wickard v. Filburn, 317 U.S. 111 (1942); Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946); Stern, *The Scope of the Phrase Interstate Commerce*, 41 A.B.A. J. 823 (1955) ("cumulative effect" standard leading to same result as deferential review under *McCulloch* and *Gibbons*).

47. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) (holding that federal regulation of private mining operations did not violate state sovereignty under the Tenth Amendment).

48. Union Transp. Union v. Long Island R.R., 455 U.S. 678 (1982) (upholding federal regulation of a state owned and operated railroad).

49. Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) (upholding federal mandate compelling state utility agencies to consider federal proposals for rate designs and other regulations).

50. 460 U.S. 226 (1983) (holding that the Age Discrimination in Employment Act extends to state employees).

51. This decision represented a turning point in the Court's analysis of congressional power under the Commerce Clause. Before *Jones & Laughlin Steel*, the Court had ruled that industrial labor practices were too indirectly related to interstate commerce to justify congres-

can be seen as working out of another aberrational bout with final judicial resolution of federalism disputes. Although the course set by these decisions may still appear definitional at this point,[52] the path back to Chief Justice Marshall's basic interpretation of the Constitution is now in sight.

It is not a big step from *EEOC v. Wyoming* to a standard of judicial review that treats the "external limit" of "our Federalism" much the same as the "internal limit" of "state sovereignty." Did Congress, acting pursuant to its enumerated powers, have a rational basis for deciding that the national interest outweighs the state interest? If so, did Congress choose an appropriate means to implement its judgment? If the Court believes something more is required to insure that Congress actually considers state interests, it can demand a clear statement from Congress that the legislature directly addressed these two questions in its decisionmaking process.[53]

B. Individual Rights Against the States

Several provisions in the Constitution directly protect individual rights against state infringement,[54] and inferences from the structure of

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sional regulation pursuant to the Commerce Clause. Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down federal statute regulating the wages and hours of mine workers because labor relations were said to have only an indirect effect on interstate commerce); Hammer v. Dagenhart, 247 U.S. at 251 (striking down federal act that excluded products of child labor from interstate commerce because the law invaded local police powers).

In *Jones & Laughlin Steel*, the Court upheld a decision of the NLRB to reinstate an employee who had been discharged for union activity. The Court emphasized the "far-flung" activities of the steel industry and the substantial effect labor strife would have on interstate commerce. *Jones & Laughlin Steel*, 301 U.S. at 41. The Court made no effort to distinguish *Carter* even though the link between labor relations and interstate commerce was far more attenuated in *Jones & Laughlin Steel* than it was in *Carter*. *See* Stern, *The Commerce Clause and the National Economy, 1933-1946*, *supra* note 46, at 681-82.

52. For example, either the particular act does not impinge on traditional attributes of state sovereignty, or it uses means designed to insure cooperative federalism rather than destroying state sovereignty.

53. Even the Burger Court's most active defenders of judicial intervention to protect state discretion and state immunity from federal regulation recognize that Congress generally possesses the ultimate power to resolve other federalism tensions. *See, e.g.*, Quern v. Jordan, 440 U.S. 332 (1979); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Whether the Court should impose a "clear statement rule" in such cases to insure that Congress has weighed the state interests is debatable. After all, the Court's claim of protecting state sovereignty in *Hammer v. Dagenhart* coincided with its decision in Lochner v. New York, 198 U.S. 45 (1905), which also deprived states of the discretion to regulate the economy, albeit in the guise of securing personal liberty interests. Perhaps Rehnquist's federalism opinions have a similar substantive policy motivation. *See, e.g.*, Shapiro, *Mr. Justice Rehnquist*, 90 HARV. L. REV. 293 (1976); Fiss & Krauthammer, *The Rehnquist Court*, NEW REPUBLIC, Mar. 10, 1982, at 14.

54. *See, e.g.*, U.S. CONST. art. I, § 10, and amends.XIV, XV, XIX, XXIV, and XXVI.

the Constitution may provide additional sources of protection.[55] For purposes of this inquiry, however, only section 1 of the Fourteenth Amendment will be considered. The amendment imposes three duties directly on the states: "No State shall" (1) "make or enforce any law" abridging the "privileges or immunities of citizens of the United States"; (2) "deprive any person of life, liberty, or property, without due process of law"; nor (3) "deny to any person within its jurisdiction the equal protection of the laws."[56]

On their face, the three clauses can be read as providing respectively for (l) individual substantive rights, (2) procedural fairness in any action by the state depriving persons of life, liberty, or property, and (3) some kind of anti-caste or anti-discrimination protection in official decision-making processes. The text, however, does not define "privileges or immunities." Thus, that clause can be read as a general protection of unenumerated substantive rights.[57]

If this reading of section 1 is correct, it does not foreclose many choices for the Court when interpreting individual rights against the states or reciprocal state duties. Among the few choices foreclosed, however, is that of substituting the Due Process Clause for the Privileges or Immunities Clause as the primary substantive rights provision. Nevertheless, "due process of law" may have had some substantive connotation at the time the Fourteenth Amendment was adopted.[58] The Framers also conversed with sufficient generality to permit such a substantive reading of due process.[59] Given the clear availability of the Privileges or Immunities Clause as the primary source of substantive rights, the Due Process Clause can nevertheless be read as a procedural protection in the context of all three clauses.[60]

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55. *See, e.g.*, J. ELY, *supra* note 2; C. BLACK, *supra* note 15.

56. U.S. CONST., amend. XIV, § 1.

57. My own review of the congressional debates concerning the framing and enforcement of the Fourteenth Amendment confirms that this reading of section 1 is plausible and is certainly a better alternative than finding that the Framers unequivocally agreed on a specific meaning contrary to the text of section 1 itself. *See* Dimond, *supra* note 7. *See also*, J. ELY, *supra* note 2, at 22-32, 192-202. *See generally* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908).

58. *See, e.g.*, Wynehamer v. People, 13 N.Y. 378 (1856); W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 425-27 (1981).

59. *See, e.g.*, J. TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951) (republished as EQUAL UNDER THE LAW (1965)); Dimond, *supra* note 7, at 483-92; Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment, I Genesis, 1833-1835*, 1950 WIS. L. REV. 479; Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment, II Systemization, 1835-1837*, 1950 WIS. L. REV. 610.

60. *Cf.* Dimond, *supra* note 7, at 465-72 (clauses in section 1 should not be read as code words having precise meanings for the Framers different from the text and structure). Limit-

Unlike the other two clauses, the Due Process Clause is limited to state deprivation of "life, liberty, or property." Although that distinction may not compel much restriction on the scope of the procedural guarantee, it does provide a textual basis for imposing some limits. In contrast, the text does not limit the scope of "privileges or immunities" or "equal protection of the laws."[61] Thus, the restrictive reading of the Privileges or Immunities Clause announced in the *Slaughter-House Cases*[62] was not dictated by the text. Limited to its facts, that holding stands for nothing more than a judicial choice to deny that carrying on a trade constituted a fundamental personal right in 1873.[63] The *Slaughter-House Cases* should not foreclose judicial intepretation of fundamental personal rights under the Privileges or Immunities Clause. Instead, it should be viewed as one decision on one issue at one time.

The Court's subsequent choice in *Lochner* to give a different substantive reading to the Due Process Clause should not obscure the fact that the Court in both cases defined what it deemed to be fundamental personal rights. As a result, all subsequent substantive due process decisions could have been decided by defining what did or did not constitute

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ing due process protection to procedure does not imply that any particular form or timing of procedure is dictated when the Court determines that a state has deprived any person of "life, liberty, or property." *See e.g.*, L. TRIBE, *supra* note 1, at 532-63. Nor does it mean that purely procedural protections never operate to serve substantive ends. *See generally* C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974); Dimond, *The Constitutional Right to Education*, 24 HASTINGS L.J. 1087 (1973). The Due Process Clause can also include a strong procedural component in reviewing the process of lawmaking. *See infra* notes 68-78, 98-101 and accompanying text.

61. *See* Dimond, *supra* note 7, at 467. By its terms, the Privileges or Immunities Clause provides for rights "of citizens of the United States." Ely nevertheless argues that the phrasing can also describe a category of national rights that the states may not abridge, whether the victim is a citizen or an alien. *See* J. ELY, *supra* note 2, at 25. An alternative approach, which may be responsive to the real differences between citizens and aliens, interprets the clause as applying only to citizens, but uses two other sources to protect aliens. First, the Court examines the process by which a state distinguishes between citizens and aliens under the Equal Protection Clause to determine if naked prejudice—rather than relevant differences between citizens and aliens—influenced the decision. *See infra* text at notes 69-78, 98-101. Second, if the Court finds prejudice, it suspends the state's classification against aliens until Congress acts pursuant to Article I, section 8, clause 4, to impose the same condition, authorize the states to pass such a regulation, or establish other conditions for aliens. *See supra* notes 33-37 and accompanying text.

62. 83 U.S. 36 (1873) (upholding a Louisiana statute that granted one company a monopoly to operate stock yards and slaughterhouses in New Orleans despite claims that the statute violated the Thirteenth and Fourteenth Amendments).

63. That choice resembles the one made by the modern Court when it rejected *Lochner's* contrary holding, under the rubric of "due process." *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941) (discussed *supra* note 46); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding state regulation of women's wages); Nebbia v. New York, 291 U.S. 502 (1934) (upholding minimum price for milk set by state milk control board).

national privileges or immunities.[64]

Whether pursued under the Privileges or Immunities Clause or substantive due process, judicial review of substantive rights searches for ideals rooted in the nation's evolving conscience—ideals necessary to resolve basic moral questions about the rights of individuals against states.[65] Such judicial interpretation also initiates an ongoing dialogue with the people, their representatives, and the courts.[66] Over time, the Court may modify or reject its previous answers in response to the demands of the people, changed circumstances, or new understanding.[67]

Interpretation of substantive rights under the Privileges or Immunities Clause rather than the Due Process Clause supports the framework for provisional review. Under this approach, judicial interpretation of the Privileges or Immunities Clause binds the states, but it does not restrict congressional power. In the exercise of its enumerated powers, Congress can respond directly to Court interpretations of privileges or immunities by ordinary legislation unless such action is barred by an external limit on congressional power. There is, however, no Privileges or Immunities Clause in the Constitution that operates as such an external limit on congressional power.[68]

This interpretation of section 1 limits the primary function of equal protection to a procedural inquiry into state failure to afford protection from caste discrimination or other invidious preferences in official decisionmaking.[69] Undoubtedly such an interpretation involves important

64. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); United States v. Carolene Prods. Co., 304 U.S. 144 (1938); *Nebbia*, 291 U.S. at 502; Pierce v. Society of Sisters, 268 U.S. 510 (1925); and *Lochner*, 198 U.S. at 45.

65. In each case, the Court would ask whether the claimed right is a national privilege or immunity. If the answer is no, the Court would merely elaborate its substantive reasoning. If the answer is yes, the Court would have to articulate its reasons for declaring such a right and then weigh the state's interests in abridging that right against the personal interest in enjoyment of that right. The merits of each determination would be the crucial factor under such a review, whether undertaken in the guise of the Due Process Clause or the Privileges or Immunities Clause. This adjudicatory process offers institutional constraints that limit the Court's discretion and focus the Court's attention on the substance of the rights at issue. *See, e.g.*, Dworkin, *supra* note 12; Fiss, *supra* note 1; Sandalow, *supra* note 7; Tribe, *supra* note 12; Wellington, *supra* notes 7, 27.

66. *See* M. PERRY, *supra* note 7, at 93-113; L. TRIBE, *supra* note 1, at 892-93; Wellington, *supra* note 27. *Compare Lochner*, 198 U.S. 45, *with Nebbia*, 291 U.S. 502; *compare* Hammer v. Dagenhart, 247 U.S. 251, *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1; *compare* Roe v. Wade, 410 U.S. 113, *with* Maher v. Roe, 432 U.S. 464 (1977); *compare* Furman v. Georgia, 408 U.S. 238 (1972) *with* Gregg v. Georgia, 428 U.S. 153 (1976).

67. *See, e.g.*, Wellington, *supra* note 27.

68. *See infra* part IIC.

69. For diverse elaborations of this interpretation of equal protection, see J. ELY, *supra* note 2; Brest, *In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1 (1976);

value judgments.[70] Nevertheless, the judicial inquiry does not focus on the justification for material inequalities and disproportionate outcomes between groups. Rather, it looks for we-they preferences in the decisionmaking process, as well as the stigmatizing consequences that accompany such caste distinctions.[71] This procedural inquiry eschews use of "strict scrutiny" to balance the interests of discrete and insular minorities against the state's interest in a particular legislative classification. Instead, the inquiry centers on whether the legislature, in its lawmaking process, has singled out members of some group as inherently undeserving of personal respect and concern regardless of their individual worth.[72]

Dimond, *The Anti-Caste Principle*, 30 WAYNE L. REV. 1 (1983); Sunstein, Naked Preferences and the Constitution (forthcoming article). Whether this approach to equal protection review also requires that legislation be general rather than special is an open question. *See* Yudof & Kirp, A Revisionist View of Equal Protection (forthcoming article). The extent to which rational relationship review under either equal protection or its due process twin plays a role in the proposed alternative framework is discussed *infra* at notes 75-78, 82, 139-40 and accompanying text. The modern Court has virtually eschewed any role for such rational relationship review. *Compare* Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (due process) *with* New Orleans v. Dukes, 427 U.S. 297 (1976) (equal protection).

Insofar as the Court's "heightened scrutiny" under the "fundamental interest" prong of two-tier equal protection analysis concerns substantive rights, *see, e.g.*, Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969), such cases would be decided by invoking the Privileges or Immunities Clause under the alternative framework. Some fundamental interest decisions, however, may involve issues of procedural fairness or unjustified we-they preferences in the decisionmaking process that should be addressed under due process or equal protection. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Korematsu v. United States, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting). Such analytic rigor might aid the reasoning and the results of the Court's decisions. Moreover, when substantive rights rather than procedural issues are at stake, interpretation under the Privileges or Immunities Clause would give the Court a broader authorization to initiate a principled dialogue about such issues as rights to self-actualizing expression and creativity, personal autonomy and privacy, and minimum protection.

70. *See* Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446 (1981).

71. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11-12 & n.11 (1967); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880). *See also* Brest, *supra* note 69; Dimond, *supra* note 69.

72. *Compare* Korematsu v. United States, 323 U.S. 215, 216-19 (1944) (Black, J., opinion for the Court) (weighing public necessity of particular war power action against "suspect classification" of Japanese-Americans) *with* 323 U.S. at 223-24 (Murphy, J., dissenting) (examining racial defects in the decisionmaking process that led to racial classification against Japanese Americans). *See also* Dimond, *supra* note 69, at 8 n.19.

Principled application of this search for invidious we-they distinctions underlies Supreme Court decisions striking down grossly unrepresentative legislative apportionment schemes. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982); Reynolds v. Sims, 377 U.S. 533 (1964). Decisions striking down various qualifications on the right to vote may also emerge from a desire to remove bias from our representative legislative bodies. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). *See generally* J. ELY, *supra* note 2. In the context of provisional review, most voting cases may

Although this judicial search for bias in state decisionmaking processes necessarily involves exploration of all relevant evidence, including the foreseeable impact of the act and the substantive reasons behind the legislature's particular classification, the wrong relates primarily to the process of decisionmaking and not to the material outcomes or substantive inequalities flowing from the particular act. Upon review of several cases revealing similar patterns of prejudice, the Court may begin to develop prophylactic rules of thumb and presumptions to infer invidious purpose from disparate effects.[73] But the central wrong still relates to the class- or caste-based defect in the decisionmaking process.[74]

This process-oriented interpretation also offers an interesting nonconstitutional approach to understanding rational basis review "with teeth." Consider Justice Brennan's dissent in *United States Railroad Retirement Board v. Fritz*.[75] Brennan pointed out that the statutory classification divested railroad retirees of earned benefits. The express purpose of the Railroad Retirement Act, however, was to preserve "vested earned benefits of retirees." Thus, Brennan argued that the classification was "not only rationally unrelated to the Constitutional purpose; it [was] inimical to it."[76] Due to this blatant conflict between the law's provisions and its stated purpose, Brennan refused to accept the government's *post hoc* justification for the classification. He argued that rational basis review requires the Court to examine the objectives of the statute and determine whether the challenged classification furthers these objectives.

In similar circumstances, the Court often uses a means-end analysis as one aid in determining whether an invidious purpose or naked preference has skewed the official decisionmaking process.[77] Under a process-

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also be understood as a component or precondition of the due process of lawmaking. In any event, the Court intended these decisions to end the hegemony of vested interests that control legislative decisionmaking.

73. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

74. *See supra* note 69. No reader, however, should mistake this description of equal protection as approving the Burger Court's articulations and applications of an "intent" standard; nor should any reader assume that this interpretation offers little power to expose and root out the most entrenched forms of caste discrimination. *See* Dimond, *supra* note 69.

75. 449 U.S. 166 (1980) (Brennan, J., dissenting). Although the case is decided under rational relation review under the Fifth Amendment's Due Process Clause because the challenged legislation is a congressional act, the analysis is the same under rational relation review pursuant to the Fourteenth Amendment's Due Process and Equal Protection Clauses. *See also supra* note 69.

76. *Fritz*, 449 U.S. at 186 (Brennan, J., dissenting).

77. This analysis should be viewed as one aspect of the sensitive judicial inquiry for a caste-based defect in the legislative decisionmaking process, not as a different standard of equal protection review of "suspect classifications." *See* J. ELY, *supra* note 2, at 136-41, 145-48, 246

oriented interpretation, however, the Court need not tie Congress' hands by reaching a final judgment on this difficult inquiry. Rather, the Court could first impose a "suspensive veto."[78] Without deciding the constitutionality of the statute, the Court could remand the statute to the legislature to reconsider its classification. The legislature could either explain how the classification meets the stated goals or develop a new classification altogether.[79] This nonconstitutional mode of Supreme Court review of legislative action may be useful in structuring a principled dialogue between the Court and legislatures over the substance of constitutional rights, the nature of constitutional violations, and the form and scope of effective remedies.

The diverse judicial interpretations of the three section 1 clauses raise the question of the respective roles of the Court and Congress under the Fourteenth Amendment. Section 5 of the Fourteenth Amendment gives Congress power to "enforce" individual rights against state action.[80] Do the text and structure of the Fourteenth Amendment impose any "internal limits" on congressional enforcement power under section 5? The text provides the Court with several plausible choices for imposing such limits. Congress may "enforce" but not "dilute" or "reverse" rights defined by judicial interpretation of section 1; it may "enforce" but not "define" additional rights not yet interpreted by the Court under section 1; it has broad power to "remedy" proven or declared state defaults in failing to carry out duties under section 1, but no authority to anticipate such defaults or to legislate directly to protect individual rights. Each of these "internal limits" can be distilled from the Fourteenth Amendment.

Yet section 5 is an affirmative grant of power to Congress. The Court's opinions that recognize substantial internal limits on Congress' enforcement power under section 5 strain hard to find a principled rationale for the limits. This search is reminiscent of the Court's unsuccesssful definitional approach used to impose internal limits on the

n.45; Dimond, *supra* note 69, at 8 n.19; Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 130-31.

78. Sandalow, *Judicial Protection of Minorities*, *supra* note 28, at 1187-90; Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, *supra* note 28, at 702-09.

79. A more difficult constitutional dilemma arises if the legislature merely re-enacts the law without change or explanation upon this remand. Whether the Court should then choose to strike down the act as arbitrary or irrational if no invidious influence can be found in the legislative process comes close to mimicking the parable with which Ely ends his book. *See* J. ELY, *supra* note 2, at 181-83.

80. U.S. CONST., amend. XIV, § 5.

commerce power during the *Dagenhart* era.[81] The Court may therefore choose to use a more deferential standard to review internal limits on congressional enforcement power under section 5: did Congress have a rational basis for finding it was "enforcing" a right under section 1? If so, did Congress use appropriate means to accomplish this legitimate end? If the Court chose this interpretation, section 5 would not impose any artificial internal limits on this particular congressional enforcement power.[82]

Whether the Court should adopt this approach when interpreting the Fourteenth Amendment depends, in part, on the nature of its impact on prior decisions like the *Civil Rights Cases*,[83] *Katzenbach v. Morgan*,[84] *Roe v. Wade*,[85] and *Brown v. Board of Education*.[86] That impact cannot

81. Note the similarity of the diverse opinions in Oregon v. Mitchell, 400 U.S. 112 (1970), and Katzenbach v. Morgan, 384 U.S. 641 (1966), to the majority's rationale in Hammer v. Dagenhart, 247 U.S. 251 (1918). *See supra* note 51 and accompanying text. Justice Holmes' dissent in *Hammer* undercuts the viability of invoking any definitional approaches to inferring artificial internal limits on the grant of any congressional power. *See also* L. TRIBE, *supra* note 1, at 261-72.

82. Nevertheless, the Court could give substantial nonconstitutional teeth to review of legislation that Congress purports to pass pursuant to its section 5 enforcement power. Consider the following hypothetical: In a case challenging segregation of schools and housing throughout a metropolitan area, the Supreme Court holds that a state-condoned caste system of racial ghettoization denies equal protection to all persons in the community and is a substantial cause of the continuing racial separation. The Court therefore affirms an order directing the state (a) to desegregate its schools in the area and (b) to implement a program of voluntary incentives to begin to transform the dual housing system. Based on its own hearings, Congress responds by passing the Equal Opportunity Act. It finds that such systems of unconstitutional segregation exist throughout the country and must be dismantled, but bars any pupil reassignments to accomplish desegregation, bars any housing desegregation incentives, and provides only compensatory aid to ghetto schools. In reviewing the Act, the Court could respond with a suspensive veto remanding to Congress for reconsideration because the Act's substantive provisions do not fit its articulated findings and purpose. *See supra* notes 69-72 and accompanying text.

Suppose Congress then responded with the same findings and articulated purpose, but provided substantial support for majority-to-minority pupil transfers, new integrated learning centers open to all in the affected areas, incentives for integrative housing choices, as well as compensatory aid to minority victims of caste segregation. The Court would be more likely to find that the means chosen fit the articulated purposes. *See* Dimond, *supra* note 69. On the other hand, if Congress responded to the remand by passing the original substantive provisions of the Act and declaring that racial separation in every metropolitan area resulted from voluntary choice and nondiscriminatory ethnic clustering, the Court would then be faced with the sensitive task of reviewing whether the lawmaking process was tainted by racial discrimination under the Fifth Amendment's Due Process Clause, an external limit that binds all congressional power. *See infra* notes 98-101, 147-49 and accompanying text.

83. 109 U.S. 3 (1883) (holding that the congressional enforcement provisions of the Thirteenth and Fourteenth Amendments did not authorize the Civil Rights Act of 1875).

84. 384 U.S. 641 (1966).

85. 410 U.S. 113 (1973).

86. 347 U.S. 483 (1954).

be gauged until we consider the external limits on *all* congressional power. Does either the means or the end of an act passed pursuant to Congress' section 5 enforcement power run afoul of other provisions of the Constitution, particularly the Bill of Rights?[87]

C. Individual Rights Against the National Government

Article I, section 9, and the Bill of Rights impose the primary external limits on Congress when legislating pursuant to enumerated powers.[88] This inquiry, however, addresses only provisions in the Bill of Rights that are relevant to determining which judicial interpretations of

87. *Cf.* L. TRIBE, *supra* note 1, at 272 & n.61; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975) (similar analysis of plenary congressional enforcement power, subject to external limits of Bill of Rights, but interpreting section 5 of the Fourteenth Amendment as a substantive limit on Congress coextensive with limits imposed by section 1 of the Fourteenth Amendment on the states). Internal limits on congressional power to enforce section 1 of the Fourteenth Amendment are plausible, *see* Katzenbach v. Morgan, 384 U.S. at 651-52 n.10, but the operation of provisional review does not depend on finding the enforcement power in section 5 plenary. Congressional power to reverse, modify, or otherwise alter the Court's interpretation of rights under section 1 would nevertheless be plenary under Article I, section 8, subject only to the external limits imposed, for example, by the Bill of Rights. *See infra* note 116.

88. Other limits on congressional power may arise from interpretation of Article III. For example, in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Court interpreted clause 2 of section 2 as denying Congress the power to expand the original jurisdiction of the Supreme Court. Similarly, the Court has interpreted "case or controversy" as a restriction limiting any judicial action to a process of adjudication. *See, e.g.*, Muskrat v. United States, 219 U.S. 346 (1911); L. TRIBE, *supra* note 1, at 52-109. In United States v. Klein, 80 U.S. (19 Wall.) 128 (1872), the Court interpreted the grant of judicial power "to one Supreme Court and such lower courts as Congress may establish" as denying Congress the power to tell the Court how to decide a pending case. Some take this line of argument further and posit that Congress may not act in a fashion that strips the Supreme Court of its "essential role." *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). Similarly, the Court has suggested that judicially prescribed remedies for federal violations of the Bill of Rights may be altered by Congress, but only to the extent that Congress substitutes "equally effective" alternatives. Carlson v. Green, 446 U.S. 14 (1980). This holding is consistent with the primary *Marbury* power of judicial review: the Court has the duty to interpret the external limits on all federal action imposed by the Constitution. Although the shibboleth of tailoring the remedy to fit the violation fails to comprehend the nature of this function of judicial review, the Court cannot allow Congress, acting in the guise of promulgating alternative remedies, to undercut the values interpreted into the external limits by the Court. *Cf.* Fiss, *supra* note 1; Dimond, *supra* note 69. Apparently, even Choper agrees that the Court should decide such separation of powers disputes involving its own turf. *Compare* note 14 *supra*, *with* J. CHOPER, *supra* note 1, at 380-413.

Personal rights may also be inferred from the federal structure of the Constitution. *See* C. BLACK, *supra* note 15. As discussed in part IIA *supra*, the Court's role in framing and refereeing such issues in the first instance is critical; however, if the federal structure imposes no external limit on congressional power, Congress retains the final power to resolve any federalism issue. *See supra* note 41.

section 1 of the Fourteenth Amendment cannot be overturned by Congress.

The framework for dialogue over rights under provisional review can now be brought into sharp focus: unless an external limit restricts congressional power, Congress may reverse, modify, or expand the Court's interpretation of rights under section 1 of the Fourteenth Amendment. Only the Court's interpretation of external limits restricts the power of Congress to overturn the Court's decisions interpreting section 1 of the Fourteenth Amendment.

Consider, for example, a judicial interpretation of the Privileges or Immunities Clause of section 1 that declares political speech a fundamental national right of United States citizens. Based on this interpretation, the Court strikes down a state law prohibiting criticism of the governor's political acts. This decision directly binds the states under the Fourteenth Amendment, and it cannot be overturned by Congress to the extent that the Court also interprets the First Amendment as prohibiting Congress from making any law abridging political speech.[89] The Court, then, has the final authority to trump a congressional act that seeks to overturn a judicial interpretation of political speech as a national right.[90] Under its traditional power of judicial review,[91] the Court may interpret the First Amendment as an external limit restricting congressional power to pass such a law.[92]

The Court may play this Bill of Rights trump over congressional

89. Interpreting the First Amendment's Free Speech Clause as protecting the "marketplace" of political ideas offers one plausible interpretive choice. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Bork, *supra* note 6; Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

90. If judicial interpretation of the Free Speech Clause is limited to political speech, the Court's role is representation reinforcing rather than anti-majoritarian. *See* J. ELY, *supra* note 2, at 105-16. The Court could then choose to promote a dialogue with Congress over personal rights by interpreting the Privileges or Immunities Clause of the Fourteenth Amendment as protecting other forms of expression against state restriction. Consider, for example, a Supreme Court decision striking down state suppression of self-actualizing expression as violating a citizen's fundamental national rights under the Privileges or Immunities Clause. Such expression falls outside the core of political speech absolutely protected by the First Amendment. *See supra* note 89. Nevertheless, such expression is so fundamental that it should not be abridged by the States. *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970); L. TRIBE, *supra* note 1, at 578-79, 588, 900, 906. Under provisional review, such an interpretation would bind the States, but Congress would be free to respond to the Court's decision so long as Congress addressed the merits of the issue on a principled basis without prejudice and without abridging the First Amendment. Given this understanding, provisional review might encourage the Court to protect expression relating to self-actualization, personal development, and individual conscience from abridgment by the states.

91. Marbury v. Madison, 5 U.S. (1 Cranch) (1803). *See also* W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 8-30 (1980).

92. *See* L. TRIBE, *supra* note 1, at 272 & n.61; Cohen, *supra* note 87, at 620.

acts in other areas as well.[93] When interpreting external limits on enumerated congressional powers, the Court's decision is final and binding,[94] but the scope of the Court's power depends on the extent of the external limits placed on congressional power by the Bill of Rights. Although a range of interpretive choices exists, there is a core theme that can be used to guide the Court's choice. With the exception of the Third and Eighth Amendments, citizens' rights against the national government primarily guarantee a representation reinforcing framework for the informed operation of the democracy.[95]

This theme does not deny that the first eight amendments also guarantee important individual rights, but only suggests that in the framework of provisional review they operate directly as external limits on the enumerated powers of the national government. They establish the structure within which informed citizens can fully and freely participate in a representative democracy, rather than dictate particular substantive outcomes.[96] Under this approach, the final and binding power of judicial review preserves the structure of the process by which the people and their representatives make public decisions, rather than overseeing the distribution of society's goods, services, benefits, and burdens. A dialogue between the Court and the people through Congress decides which substantive rights to guarantee. While Court decisions interpreting substantive national rights under section 1 of the Fourteenth Amendment bind the states, they are not final as against Congress.[97]

93. These areas would include free exercise and nonestablishment of religion, press, petition, and assembly (First Amendment); unreasonable search and seizure and warrants (Fourth Amendment); double jeopardy, self-incrimination, just compensation when taking property (Fifth Amendment); notice of charges, jury trial, confrontation, counsel, compulsory process (Sixth and Seventh Amendments); excessive bail, excessive fines, cruel and unusual punishment (Eighth Amendment); and deprivation of life, liberty, or property without due process of law (Fifth Amendment). Each of these clauses, like the Free Speech Clause, guarantees individual rights against the national government.

94. The congressional power over jurisdiction enumerated in Article III should also be subject to the same external limits that apply to all other congressional powers. Suppose, for example, the Court had decided that political speech was a national privilege or immunity of United States citizens and Congress responded by passing a statute depriving the Supreme Court of jurisdiction to review whether such speech was a privilege or immunity. The Court could interpret the First Amendment as an external limit on this congressional power by holding that the act abridges freedom of speech. *See supra* notes 87, 92.

95. *Cf.* J. ELY, *supra* note 2, at 63-69 (representation reinforcing values as limit to final judicial interpretation of Constitution). In this democracy, a wall of separation between Church and State has also been erected to avoid mixing religion and government, and fundamentally fair procedures are required when government confronts the individual.

96. *Id.*

97. This approach is consistent with the approach to judicial review of federalism disputes discussed in part IIA *supra*. Section 1 of the Fourteenth Amendment imposes a duty on states not to abridge the privileges or immunities of United States citizens. The Court resolves any

The Due Process Clause of the Fifth Amendment, however, offers additional support for the Court's power to override congressional acts by interpreting external limits. First, it can incorporate the same procedural protections against federal action as the Due Process Clause of the Fourteenth Amendment imposes on state action. "Due process of law" can also apply to congressional lawmaking, including a sensitive search to ferret out naked we-they preferences that might infect the legislative process.[98] This application strengthens the basic premise that representation reinforcing values should guide interpretation of the other external limits on congressional power.[99] The Court's decision in *Bolling v. Sharp*[100] struck down federal statutes tainted by just such prejudice. There, caste distinctions infected the legislative perpetuation of segregation in Washington, D.C. public schools. The Court held that "segregation in public education is not reasonably related to any proper governmental objective."[101]

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controversy between a state and an individual over claims of deprivations of national rights, but Congress retains the ultimate power (unless barred by an external limit) to decide this federalism dispute. It may set a different national policy for substantive rights or authorize the states to establish different policies. As discussed in part IIB *supra*, this approach is also one way of interpreting congressional enforcement power under section 5 as plenary, subject to the external limits on all congressional power. *See supra* notes 81-87 and accompanying text.

98. *See supra* notes 69-79 and accompanying text.

99. *See* J. ELY, *supra* note 2, at 135-70.

100. 347 U.S. 497 (1954).

101. 347 U.S. at 500. Justice Murphy made this same interpretive choice more directly in his dissent in *Korematsu*, 323 U.S. at 233.

A tougher issue, however, is whether this undue process "deprived" any person of "liberty" or "property." One way to resolve this question is to first determine if public education for Washington, D.C., children is an entitlement. If so, the only issue remaining is whether the racial restrictions in the dual school law "deprived" any person of that property interest. "Partial" deprivations and restrictions are enough to trigger due process review. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975). In these circumstances, the caste system amounted to a severe "deprivation" in the form of official racial restrictions on schooling for all children in the District of Columbia.

Another way to approach the question asks whether reputation is a property interest and, if so, whether the District of Columbia's "Jim Crow" system of schooling deprived any person of his or her interest in a good name. Under this approach, the purpose and stigmatizing effect of the dual school law was to treat blacks as inherently inferior. It is hard to imagine a greater official slander of a person or a more direct deprivation of any property interest in a good name. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 557-60 (1896) (Harlan, J., dissenting); Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880); Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424-27 (1960); Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 158 (1955); Dimond, *supra* note 69, at 23-25; Dimond, *supra* note 7, at 508-11.

In Bolling v. Sharp, however, Chief Justice Warren wrote for the Court that the system of forced segregation "imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their *liberty* in violation of the Due Process Clause" of the Fifth Amendment. 347 U.S. at 500 (emphasis added). This holding appears to represent a substantive due process ruling, albeit one 180 degrees removed from Taney's alternative hold-

The crucial question for provisional review, however, is whether the Fifth Amendment's Due Process Clause should also receive substantive content. The first eight amendments contain no substantive rights provision akin to the Privileges or Immunities Clause of the Fourteenth Amendment. Two choices are available: interpret Fifth Amendment due process as relating to substantive restrictions regardless of the procedure used, or interpret it solely as a procedural protection. The first choice would insulate most judicial interpretations of substantive rights from congressional reversal.[102] The second choice would give Congress ultimate authority over the substantive rights of individuals against the states, as well as against the federal government.

Regardless of which Fifth Amendment path is followed, the heretofore dormant Ninth Amendment may limit congressional power in just the same fashion as the Privileges or Immunities Clause restricts state discretion. The Ninth Amendment may act as an external limit to restrict congressional power whenever Congress denies "rights retained by the people,"[103] but this literal interpretation is not compelled. The text permits an alternative reading: the Ninth Amendment augments the Tenth Amendment by explicitly reserving individual rights under state law from federal encroachment. Some Framers feared that the new federal government posed a greater threat than the states to individual liberty. Indeed, before the adoption of the Fourteenth Amendment, the entire Bill of Rights applied only to the federal government, not to the states.[104]

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ing in Dred Scott v. Sandford, 60 U.S 393, 427 (1857). Yet *Bolling* can also be understood as holding that the same racial defect that infected the legislation itself constituted the deprivation of liberty: "[S]egregation in public education is not reasonably related to any proper governmental objective," 347 U.S. at 499- 500, but instead amounts to the most naked type of prejudice. This patent racial defect led to passage, retention, and enforcement of the Jim Crow school law. If there is a liberty interest in being free from government caste discrimination, it is a patent deprivation of liberty without due process of law when such caste distinctions infect any official decisionmaking process. *See* Korematsu v. United States, 323 U.S. at 225-33 (Roberts, J., dissenting).

102. *See supra* notes 87, 92. The Court's notorious brush with interpreting such a "substantive" due process external limit on all federal action in *Dred Scott* should give pause. There, Chief Justice Taney argued that a congressional act limiting the spread of slavery deprived the master of his property interest in his slave without due process of law. In responding to such fundamental "moral" judgments about substantive rights, some form of dialogue between the Court and the people should exist as an alternative to civil war and constitutional amendment.

103. U.S. CONST. amend. IX. For diverse discussions of the possible meaning of the Ninth Amendment, compare J. ELY, *supra* note 2, at 34-41; Laycock, *supra* note 11, at 348-56; and C. BLACK, *supra* note 7, at 44-56, with Griswold v. Connecticut, 381 U.S. 479, 520 (1965) (Black, J., dissenting); Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); and Van Alstyne, *Slouching Toward Bethlehem with the Ninth Amendment*, 91 YALE L.J. 207 (1981).

104. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833).

That view seems consistent with the notion that the Ninth Amendment should not be read as an open-ended clause guaranteeing unenumerated national rights. Rather, it only counsels against interpreting "rights" enumerated in the federal Constitution to undercut individual personal rights secured by state law.[105]

Thus, the Ninth Amendment provides a final interpretive choice. The right answer may depend, at least in part, on the impact a particular choice has on the nature of the dialogue between the Court and the people. The Ninth Amendment is available to the Court if it wishes to impose an external limit on the power of Congress to overturn or to modify substantive rights interpretations of the Privileges or Immunities Clause that would otherwise bind only the states. When the Court utilizes the Ninth Amendment as its ultimate trump card, however, the Court's dialogue with the people reverts to constitutional amendment, as with *Dred Scott*[106] and *Oregon v. Mitchell*, [107] or erosion and reversal, as with *Lochner*,[108] *Hammer v. Dagenhart*,[109] and *National League of Cities v. Usery*.[110]

Under provisional review, the Court would refrain from using the Ninth Amendment as an ultimate trump in order to allow the people, through their congressional representatives, to participate in the dialogue over which fundamental national rights should be immune from any governmental interference, federal and state alike. The Court's role would then be: (1) to posit substantive national rights by interpreting the Privileges or Immunities Clause of the Fourteenth Amendment;[111] (2) to guarantee, through nonconstitutional powers of statutory construction and legislative remand, that any congressional responses directly address

105. This interpretation of the Ninth Amendment may also affect the Court's construction of congressional statutes and initial refereeing of federalism tensions in diversity cases, *cf.* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974), as well as its general refusal to review state court decisions based upon independent and adequate state law grounds. *See, e.g.*, Hanna v. Plummer, 380 U.S. 460 (1965); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 365 U.S. 525 (1958); Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875). Generally, Congress should have ultimate power to resolve federalism issues provided it does not breach any external limits nor infringe on the exclusive power of the judiciary under Article III. *See supra* note 88. This approach also preserves the capacity of state courts and state constitutions to create and to protect substantive individual rights under state laws that do not conflict with the United States Constitution or federal statutes. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

106. 60 U.S. 393 (1857) (discussed *supra*, note 101).

107. 400 U.S. 112 (1970).

108. *See supra* note 63.

109. *See supra* notes 44-46.

110. *See supra* notes 47-53.

111. *See supra* notes 57-67 and accompanying text.

the merits of the issue;[112] and (3) to guarantee, through First and Fifth Amendment interpretation, that the congressional lawmaking process will be fully informed and open, truly representative, and free of invidious we-they influences.[113]

Naturally, this framework for provisional review and for restructuring the dialogue between the Court and the people involves choosing among values. The choice is not dictated by the Constitution, but it is authorized. Part III therefore examines whether to adopt provisional review or to keep the type of final and binding judicial review and limited dialogue that, at least in theory, we now have.

III. Provisional Review in Perspective

A. Relation to Traditional Doctrines

Under the provisional form of judicial review, federalism and most substantive rights issues are treated similarly. The Court interprets the Constitution to resolve controversies between state and federal governments over the allocation of decisionmaking authority and the structure of our federalism, and between states and individuals over fundamental personal rights. This approach is authorized by the relevant text and structure of the Constitution and supported by major doctrinal traditions established by the Court.[114]

Following the Court's initial resolution, decisions in both types of cases become subject to oversight by Congress, acting pursuant to its

112. *See supra* notes 75-79, 82 and accompanying text.

113. *See supra* notes 69-73, 98-101 and accompanying text. It may seem counterintuitive to some that judicial interpretation of substantive rights under section 1 of the Fourteenth Amendment would bind the states but not Congress. Yet the result is inevitable if the restrictions on the federal government contained in the Bill of Rights are read as excluding any open-ended substantive rights limit while the restrictions on the states contained in the Fourteenth Amendment are read as including such a limitation. Moreover, this alternative structure for judicial review makes sense if the Court is to be able to stimulate a principled dialogue over fundamental substantive values. The Court may strike down offending local actions, but Congress retains ultimate power to legislate a different national consensus or to authorize diverse responses among the states. Under this structure, Congress would not challenge the Court's authority by overturning judicial interpretations of substantive rights decisions limiting the states. Instead, Congress would exercise its enumerated powers, subject to judicial review of the external limits on all congressional power. The Court would choose not to interpret these limits as including an open-ended substantive rights restriction comparable to that imposed on the states by the Fourteenth Amendment. Even Ely concedes that "the problems of democracy" for judicial review under such an alternative structure "are substantially attenuated." J. ELY, *supra* note 2, at 187 n.13. The availability of such an approach demonstrates that judicial review of substantive rights need not conflict with the democratic character of the Constitution.

114. *See supra* parts IIA-B.

enumerated powers. At this point the Court can constrain congressional action only by imposing limits on the lawmaking process, for example, by interpreting external limits of the Bill of Rights that bind all federal actions. This last element in provisional review is also authorized by the relevant text and structure of the Constitution and supported by major doctrinal traditions established by the Court.[115] In this sense, provisional review is unexceptional. It does, however, articulate a coherent and consistent framework—a general theory of judicial review—for understanding the Court's diverse functions in adjudicating cases that arise under the Constitution.

The alternative approach does posit one fundamental change from current Supreme Court doctrine: the external limits on all federal action imposed by the Court's interpretation of the Fifth Amendment Due Process Clause would be largely confined to procedural fairness, including prohibition of purposeful discrimination, and would exclude most substantive rights limitations. Except in rare circumstances, the Court would refrain from substituting interpretation of the Ninth Amendment for the substantive rights interpretations previously given the Due Process Clause.[116] The result would be significant. Although the Court's substantive rights interpretations of section 1 of the Fourteenth Amendment would continue to bind the states, they usually would be subject to modification or reversal by Congress provided it acted consistently with the fair lawmaking procedures of the Fifth Amendment's Due Process Clause.[117]

In addition, provisional review would build upon available nonconstitutional doctrines of statutory construction and legislative remand to

115. *See supra* part IIC.

116. Provisional review also posits that the Court will choose to limit interpretation of the Due Process Clause of the Fourteenth Amendment to fair process and to interpret the Privileges or Immunities Clause as the substantive national right clause binding on the states. Consistent with the general theory of judicial review, this alternative also suggests that the Court review any internal limits on Congress' section 5 enforcement power under the same deferential standards for review of congressional powers enumerated under Article I, section 8. But these three significant changes from traditional doctrine are not preconditions for the effective operation of this alternative framework for dialogue. As long as the Fifth Amendment Due Process Clause is limited to fair procedure, and the Ninth Amendment is not substituted as a substantive rights limit on congressional power, Congress may respond directly under its comprehensive commerce and spending powers to judicial interpretation under section 1 of the Fourteenth Amendment of national substantive rights.

117. Arguably, substantive external limits on congressional power can be imposed by judicial interpretations of the Third and Eighth Amendments. The modern Court, however, has issued few—if any—decisions imposing other substantive rights restrictions on congressional power. In particular, the modern Court has not used substantive due process to strike down many acts of Congress.

insure that congressional representatives actually addressed the merits of the fundamental issues presented. For example, the Court could use rational relationship review "with teeth" or a suspensive veto to remand congressional responses that do not fit the articulated purposes of the statute.[118] Statutory construction and clear statement requirements could also be invoked to the same end.[119] Add to this the Court's ability to use the Fifth Amendment Due Process Clause as a constraint on biased decisionmaking, and it becomes apparent that the Court would have the power and the responsibility to structure a principled dialogue over substantive rights. This power would represent a significant judicial check on congressional determination of national rights, but it would not divest Congress of ultimate control.[120] With minor exceptions, the Court's *Marbury* power of final and binding judicial review would be limited to imposing procedural and structural restraints on the process by which Congress decided issues of federalism and substantive national rights.

Nevertheless, the Court would have a prominent, albeit not final, role in resolving federalism disputes and positing fundamental national substantive rights. But consistent with the democratic character of the

118. *See supra* notes 69-82, 98-101 and accompanying text.

119. *See supra* note 53 and text accompanying notes 75-79; *cf.* Bickel & Wellington, *Legislative Purpose and the Judicial Process*, 71 HARV. L. REV. 1 (1957).

120. Ely's suggestion that the nonconstitutional aspects of these restraints on the congressional lawmaking process are misguided may be premised on his apparent assertion that the Court should have no role in interpreting substantive national rights. *See* J. ELY, *supra* note 2, at 125-36. But this Article meets Ely's challenge, *see supra* notes 12, 113, by suggesting an alternative form of judicial review that permits judicial interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment consistent with the democratic character of the Constitution. Provisional review provides for a continuing, structured dialogue between the Court and the people through their congressional representatives. Fundamental issues of human rights, national conscience, and morality should not be treated as merely ordinary policy disputes decided at the whim of respresentative institutions. These issues are special and have been viewed as such for over a century by the Court, the Congress, and the people.

If Congress cannot decide such issues on the merits, *see* M. PERRY, *supra* note 7, at 100, then provisional review should be rejected altogether rather than retain judicial supervision to insure that Congress at least tries to decide such issues on the basis of reason and principle. Issues concerning fundamental substantive national rights ought not be resolved by logrolling, special interest groups, or even national referenda. After all, the Constitution authorizes a *representative* democracy. *See* THE FEDERALIST No. 10 (J. Madison). Is it too much for the Court to ask that the national legislators, each of whom has taken an oath to uphold the Constitution, decide the fundamental rights issues on the basis of principle rather than just as barometers responsive only to election returns? If Ely's answer to this question remains "yes," then his representation reinforcing approach (a) exalts form over both substance and liberal dialogue and (b) makes his discussion of substantive rights interpretations of the Privileges or Immunities Clause idle sport.

Constitution, judicial interpretations of the relevant text and structure would be subject to direct modification by Congress.

At first blush this form of judicial review might offend defenders of state sovereignty. Yet section 1 of the Fourteenth Amendment imposes duties directly upon the states. To the extent that those duties are interpreted by the Court or enforced by Congress, the states give up their sovereignty under the Constitution.[121] Even the staunchest proponents of state sovereignty on the Burger Court have recognized this fact.[122] Thus, it should come as a relief to defenders of "our federalism" that provisional review (a) recognizes the power of states to grant additional substantive rights that are not inconsistent with federal law, and (b) authorizes Congress to empower the states to promulgate diverse responses rather than have Congress enact its own uniform national standard or acquiesce in the Court's position. As the representative body for all the people, Congress should be free to determine by ordinary legislation whether a national standard or diverse state responses should govern.[123]

B. Impact of Provisional Review on Prior Decisions

With this understanding of provisional review, its impact on prior Court decisions concerning three critical issues can be evaluated.

1. Enforcement Acts

Under provisional review, congressional enforcement acts under the post-Civil War amendments would be reviewed pursuant to the same standard applied to congressional acts passed under Article 1, section 8.

121. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); *Ex parte* Virginia, 100 U.S. 339 (1880).

122. *See supra* notes 53, 121. The Burger Court's federalism decisions are now moving toward this understanding. *See supra* notes 47-53 and accompanying text. Indeed, in the one instance since 1937 when the Court imposed a "state sovereignty" limit on congressional power to promote individual rights under the post-Civil War amendments, the people responded with a constitutional amendment. *Compare* Oregon v. Mitchell, 400 U.S. 112 (1970) *with* U.S. CONST. amend. XXVI. Moreover, as personal rights and state duties are interpreted to fall within the scope of section 1 of the Fourteenth Amendment, the Court's continued reliance on the Quern v. Jordan, 440 U.S. 332 (1979), "clear statement" rule of construction and on the fiction of *Ex parte* Young, 209 U.S. 123 (1908), to limit citizen suits against the states in federal court is misplaced. Both have led the Court to search for individual wrongdoers in resolving claims of Fourteenth Amendment violations, rather than on a broader inquiry into any breach of duty a state, as a whole, owes to any person under section 1. In contrast, a clear statement rule for construing congressional responses to judicial interpretation of state duties and personal rights under section 1 would not serve a mischievous purpose; instead, it would assist Congress in addressing the merits of the substantive rights issues on a principled basis free of caste-based taints.

123. *See supra* part IIA.

Thus, for example, the *Civil Rights Cases*[124] would have been decided the other way, in a fashion similar to *Katzenbach v. McClung*,[125] *Heart of Atlanta Motel, Inc. v. United States*[126] or *Jones v. Alfred H. Mayer Co.*[127] Did Congress have a rational basis for concluding that (a) racial discrimination by common carriers, inns, and theaters amounts to a badge or incident of slavery (section 2 of the Thirteenth Amendment); (b) access to common carriers, inns, and theaters is a privilege or immunity of national citizenship (section 5 of the Fourteenth Amendment); (c) the state's failure to afford blacks equal access to common carriers, inns, and theaters amounts to an invidious racial defect in the state's lawmaking process (section 5 of the Fourteenth Amendment); or (d) racial discrimination in access to common carriers, inns, and theaters affects interstate commerce (Article I, section 8, clause 3)? If so, did Congress choose appropriate means to regulate the activity so that its actions fell within the scope of its enumerated powers?

Under this view, the constitutional power of Congress to pass the 1875 Civil Rights Act cannot be questioned. Congressional power to "enforce" or to create national rights—whether under the enforcement sections of the Reconstruction amendments or the powers enumerated in Article I, section 8—is comprehensive, subject to the external limits on all congressional power contained in the Bill of Rights.[128]

2. *Substantive Rights*

How would a case like *Roe v. Wade*[129] be decided under provisional review? Although premised on an interpretation of the Fourteenth Amendment Due Process Clause, the opinion posits a substantive na-

124. 109 U.S. 3 (1883). *See supra* note 83.

125. 379 U.S. 294 (1964) (upholding 1964 Civil Rights Act, which prohibited discrimination in restaurants, as a valid exercise of congressional Commerce Clause power).

126. 379 U.S. 241 (1964) (upholding 1964 Civil Rights Act, which prohibited discrimination in public accommodations, as a valid exercise of congressional Commerce Clause power).

127. 392 U.S. 409 (1968) (holding that 42 U.S.C. § 1982 bars all discrimination in the public or private sale of rental property and is a valid exercise of Congress' power to enforce the Thirteenth Amendment). *But see* 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES RECONSTRUCTION AND REUNION, 1864-88, at 1207-58 (1971).

128. Under this view, the decision in Katzenbach v. Morgan, 384 U.S. 641 (1966), upholding congressional power to ban literacy tests in state elections, would stand, but the dictum in footnote 10, reading the phrase "to enforce" in section 5 of the Fourteenth Amendment as imposing some kind of "ratchet" permitting Congress to expand but not limit national rights under section 5, would be stricken. Similarly, the Court's decision in Oregon v. Mitchell, 400 U.S. 112 (1970), restricting congressional power to declare the right of 18-year olds to vote in state elections, would fall. Congress would have the power under section 5 to declare such a right a national privilege or immunity, and the Court would defer to Congress on any resulting federalism dispute between state sovereignty and national authority. *See supra* part IIA.

129. 410 U.S. 113 (1973).

tional right, a woman's right to decide whether to bear a child. This right is related closely to the personhood, autonomy, and privacy line of cases beginning with *Pierce v. Society of Sisters*[130] and followed by *Skinner v. Oklahoma*,[131] *Griswold v. Connecticut*,[132] and *Eisenstadt v. Baird*.[133] In terms of the gradual, case-by-case process of extending decisional rules by analogy and limiting them by substantive distinctions, *Roe* is hardly remarkable. Under provisional review, the Court would have addressed the fundamental issues of morality and national conscience raised by abortion[134] by interpreting the Fourteenth Amendment Privileges or Immunities Clause.

Roe's result would be to posit a national right binding against the states. Women would be free to terminate any pregnancy pursuant to the conditions established by the Court, subject only to modification by (a) future interpretations by the Court, (b) constitutional amendment, or (c) congressional action—either redefining the national right or authorizing the states to promulgate diverse responses. This process, however, is not a radical departure from traditional constitutional analysis.

Modification through judicial evolution is not a process of finding a pre-ordained natural law; rather, it involves a complex process of growth, survival, erosion, or reversal in the context of adjudication.[135] It has long included aspects of dialogue with the people and Congress, as well as different understandings of the basic moral issues, the right answers, or the best instincts of our national conscience over time. Whether in a time frame of several decades[136] or just a few years,[137] the

130. 268 U.S. 510 (1925) (Oregon law requiring students between the ages of 8 and 16 to attend public school held to violate the liberty of parents to direct the upbringing and education of their children).

131. 316 U.S. 535 (1942) (procreation held to be a basic liberty).

132. 381 U.S. 479 (1965) (penalizing married couples for using contraceptives held to violate the fundamental right of privacy).

133. 405 U.S. 438 (1972) (Massachusetts law prohibiting distribution of contraceptives to unmarried couples held to violate the Equal Protection Clause of the Fourteenth Amendment).

134. Those issues include a woman's interests in making the final decisions concerning her own body, childbearing, and childrearing, as well as the burdens she is willing to bear on behalf of the fetus versus the interest of the fetus in birth and the state's interest in life.

135. *See, e.g.*, Fiss, *supra* note 1; Sandalow, *supra* note 7; Wellington, *supra* notes 7, 27.

136. Fifty-eight years passed before *Brown* finally overturned *Plessy* and the doctrine of "separate but equal."

137. *Compare* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) *with* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). In just three years the Court reversed its position regarding a compulsory flag salute and pledge of allegience in public schools. Expressly overruling *Gobitis*, *Barnette* held that action by local authorities compelling the flag salute and pledge exceeded constitutional limitations on their power by infringing the spirit of the First Amendment.

Court's binding decisions have not always proven final. They posit provisional answers that the people eventually accept or the Court modifies or rejects. Also, in the course of our constitutional history the people have sometimes responded to the Court's interpretations of federalism and individual rights issues with constitutional amendments.[138] The two processes of evolution and amendment allow the people to respond to the Court's constitutional interpretations and permit the Court and the people to engage in a moral dialogue.

Provisional review simply provides a more direct way for the people and their representatives to respond to the Court's positing of substantive national rights and to participate in a moral dialogue over fundamental issues. For example, subject to the external limits imposed by judicial interpretation of the Bill of Rights, Congress would have comprehensive power under section 5 of the Fourteenth Amendment or the Commerce Clause to reverse *Roe* on the merits and to prohibit abortions under any circumstances. Congress could do so by finding that a fetus is a person and that its personal right to life outweighs the mother's constitutional interest in her bodily autonomy, or that the ramifications, costs, and cumulative effects of abortion adversely affect interstate commerce. With respect to internal limits, the Court would only ask: did Congress have a rational basis for its finding and, if so, did Congress enact appropriate means to implement this end?

The Court would, however, retain power to structure the process by which the people and their representatives conduct the moral dialogue over the abortion issue. Thus, the Court could interpret the Fifth Amendment's external limit on due process of law to prohibit Congress from passing a law banning abortions if Congress was influenced by an anti-female bias. For example, if Congress flatly prohibited abortions without considering the unique burden it would impose on women, the Court might suspect that congressional resolution of the fundamental moral dilemma between the life of the fetus and the bodily freedom of the mother had been influenced by something akin to male chauvinist disdain for women.[139]

In such circumstances, the Court might remand to Congress for reconsideration and suggest that if the sole, articulated, and genuinely nondiscriminatory goal of the statute was to protect the life of the fetus, then

138. *See supra* note 25.

139. *Compare* Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979) *with* Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation held to be a basic liberty) *and* L. TRIBE, *supra* note 1, at 1010-11 (the decision to treat a right as fundamental may be based on a concern that government may oppress the powerless if granted discretionary power in a particular area).

why had Congress made no provisions for men—if not the federal and state governments—to share in the burdens of the woman's pregnancy? For example, Congress could have considered whether a father or the state should pay for the costs of any unwanted pregnancy, including compensating the unwilling bearer of the fetus for pain, emotional suffering, lost economic opportunities, and rehabilitation. A remand to Congress for reconsideration would be appropriate if the Court suspected that a male-dominated legislative process relied on archaic stereotypes in reaching its decision without considering the wrenching burdens that childbearing imposes on women who do not share the view that the government can decide the uses to which their bodies and their destinies can be put.[140]

Consider the situation if Congress passed a statute merely forbidding abortion except when the woman had been raped or the pregnancy would threaten her health. The Court could construe the statute as not being intended to reverse or to modify the operative rules of *Roe*: that is, it could be interpreted as authorizing the mother, in conjunction with her physician, to retain power to make the personal decision of bearing or aborting the fetus based on her general mental health and well-being. Through such statutory construction, the Court could remand the issue to Congress to insure that the people's representatives decide the issue on the basis of principle rather than by national referendum or in-house log rolling.[141] When reversing or modifying the Court's fundamental rights rulings, Congress must legislate unequivocally on the merits to achieve a national consensus among competing political factions.[142]

Finally, consider the situation if Congress passed a statute next year directly modifying *Roe* by authorizing states to replace the *Roe* guidelines with their own standards, provided that the unwilling mother was compensated for her burden and a pregnancy that seriously threatened a woman's life could be aborted. Assume Congress passed this law on the basis of principle, and its lawmaking process was not tainted by invidious discrimination against women. Assume further that the Court deferred to Congress and found the legislation constitutional. Thereafter, the political debate turns for the next ten years to the states, and twenty-five adopt no such law, thereby leaving *Roe* intact in those states. The other

140. *See supra* notes 75-78, 82, 98-101 and accompanying text.

141. On three occasions, the Court similarly read congressional anti-busing riders narrowly as not intended to overturn or to modify judicial decisions interpreting the Constitution. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16-18 (1971); 2 N. DORSEN, P. BENDER, B. NEUBORNE & S. LAW, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 693-94, 701-02 (1979).

142. *See* THE FEDERALIST No. 10 (J. Madison).

twenty-five states do enact such a statute, free of any anti-women bias, but by 1995 fifteen states repeal those laws through state legislative, constitutional, or judicial action. The Court might then be warranted once again in interpreting the Privileges or Immunities Clause as guaranteeing women a national right to control their own bodies. The changed legal landscape might well authorize the Court to posit that national substantive right and bind the remaining ten states with conflicting anti-abortion laws. But the people, through their representatives in Congress, would still be free to determine by ordinary legislation whether there should be such a national right binding on all states.[143]

Under provisional review, moreover, most people might still view the Court's initial substantive rights decisions in cases like *Roe* as persuasive if not authoritative. The mystique of finding specific answers from the Framers or the mantle of binding finality would be removed. But those myths might be replaced by honest recognition that the Court can act as a forum of principle, searching for right answers or the best instincts of the evolving national conscience. The Court would lead, shape, and structure dialogue with the people, rather than resolve for all time fundamental human rights issues. The Court's respect and legitimacy would depend even more than it does now on the persuasiveness of its reasoning and the substance of its decisions, as well as on its discretion in knowing when to duck.[144]

3. *Anti-Caste Principles*

Consider the Supreme Court's decision in *Brown v. Board of Education*[145] and subsequent per curiam decisions[146] interpreting the Equal Protection Clause as barring states from enacting, enforcing, or perpetuating segregation in schools and other aspects of community life. Under provisional review, how would the Court review a congressional act seeking to reverse that judgment? Initially, a number of nonconstitutional techniques of statutory construction and legislative remand might enable the Court to avoid a direct confrontation by allowing Congress to recon-

143. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 113, 129-31, 135-38, 164-66 (1982).

144. *Compare* Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40 (1961) *with* Gunther, *The Subtle Vices of the "Passive Virtues,"* 64 COLUM. L. REV. 1 (1964).

145. 347 U.S. 483 (1954).

146. Gayle v. Browder, 352 U.S. 903 (1956); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955); Holmes v. City of Atlanta, 350 U.S. 879 (1955); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954).

sider its action.[147]

If Congress insisted on passing a statute directly reversing or substantially modifying the judgment, the Court would have no choice but to review its constitutionality. Assuming that Congress acted within the scope of its enumerated powers, the Court would then determine whether any external limit on all congressional power—in this case the Fifth Amendment Due Process Clause—had been violated.[148] By enacting a statute that reversed *Brown*, was Congress influenced by a naked we-they preference in which the white in-group viewed the black out-group as inherently inferior and undeserving of respect and concern as persons? Did the act seek to impose or to perpetuate a badge of inferiority on the out-group? Under provisional review, the Court has the ultimate responsibility and final power to strike down any act of Congress that is tainted by such invidious discrimination in violation of the Fifth Amendment's external due process limit on federal action.[149]

Conclusion

This Article asked at the outset how judicial interpretations of the Constitution that are authorized but not compelled can be viewed as final and binding consistent with democratic principles. At the core of this dilemma is the stubborn fact that the text and Framers' intent do not always compel particular answers, but open a range of choices that cannot be narrowed solely by finding an answer from the past. In one sense, the alternative form of judicial review explored in this Article offers another choice; it provides a means for Congress rather than the Court to have the final word on most substantive policy choices. Nor does provisional review offer many insights into how the Court should define and apply substantive national rights against the states. Instead, it offers a mechanism by which the people can respond more directly through their congressional representatives to the Court's positing of fundamental national rights. Judicial oversight of Congress insures, however, that its lawmaking process is democratic and focused on the merits of the issue.

147. *See supra* notes 53, 75, 82, 118, 140-141 and accompanying text. In contrast, if Congress promulgated alternative remedies designed to address such caste-based segregation rather than to undercut the judgment, the Court would welcome the help. *See supra* note 82.

148. *See supra* note 101 and accompanying text.

149. The Court's "final" interpretation of the external limits that bind Congress, however, is subject to reversal or modification over time by the processes of constitutional amendment and evolution discussed above. In this sense, even the Court's interpretations of these external limits that bind congressional action are also provisional and depend, ultimately, on the Court's ability to persuade the people that they are right under the Constitution.

Although provisional review may not differ dramatically from current doctrine, it presents a radical departure from the common understanding that all Supreme Court decisions interpreting the Constitution are final and binding unless overturned by constitutional amendment. Although this common understanding may seem exaggerated when looking back at the rise and fall of various doctrines over time, it does reflect a basic truth for any particular Supreme Court ruling. The myth of the Court as final arbiter does usually cause the people to reflect and their representatives to pause.

The practical truth for our time may be that the people have come to look at the Court as one of the constitutional institutions that define and guarantee our personal liberties against any government, federal as well as state. Given the substance of what the modern Court has interpreted as personal rights, most people believe that our faith in the Supreme Court has not been misplaced. There is also the fear that Congress, as a representative institution always looking to re-election, simply cannot be trusted to decide fundamental issues of conscience on any basis other than temporary popularity or expediency. Perhaps the Court and the people already join in substantial resonance concerning what are the fundamental personal rights of each generation, and when they do not, perhaps the traditional means of judicial evolution and constitutional amendment provide enough of a democratic check on the Court's deviations from the people's tolerance to justify reliance on the Court as a better forum of principle than the Congress.[150]

This common understanding serves as its own democratic justification for the Court to act as the final arbiter of substantive human rights as well as of representation reinforcing values. It also counsels caution in

150. For Tribe, *supra* note 1, at 892, this process of resonance is aided by the form of the Court's substantive rights decisions concerning, for example, "personhood." Thus, in *Roe v. Wade*, a woman's fundamental right to decide whether she should bear a child is not absolute, but is weighed against the state's important interests in the potential life of the fetus and the mother's health. Such strict but not necessarily fatal "scrutiny of any governmental action or deliberate omission that appears to transgress what it means to be human at any given time or place" should help to encourage "wise reflection" by the people and their representatives. Although Tribe is understandably skeptical of the merits of the Court's subsequent decisions, *supra* note 1, at 933-34, n.77, *Maher v. Roe* and *Harris v. McRae* show that (a) some kind of dialogue is going on and (b) the Court is neither finally invalidating nor summarily rejecting all legislative attempts to disagree with the substance of the Court's moral judgment in *Roe v. Wade*. Yet Tribe, in the final analysis, argues that any such flexibility in defining and defending fundamental rights against all government action must ultimately be decided by the Court (or other forum of constitutional principle), not by majority will or national consensus. *See* L. TRIBE, *supra* note 1, at 896. In contrast, Wellington argues that " '[w]e the people' consent [to judicial review] . . . because we believe that, in one fashion or another, we have adequate control over the content of the law that governs us." Wellington, *supra* note 7, at 335.

choosing to interpret the Constitution to provide for provisional review. At most, the Court, the people, and their representatives in Congress should move slowly, if at all, toward any such alternative. As first steps, some Justices on the Court might consider whether the Privileges or Immunities Clause of the Fourteenth Amendment provides a more straightforward textual source than the Due Process Clause for interpreting substantive national rights the next time a case like *Roe v. Wade* or *Moore v. East Cleveland*[151] comes along. Or the next time Congress considers legislating to guarantee a personal right,[152] it could rely on its enforcement power under section 5 of the Fourteenth Amendment to define a privilege or immunity of national citizenship binding against the states.

By moving toward an interpretation of the Fourteenth Amendment Privileges or Immunities Clause that supports provisional review, we might all gain a little experience before embarking on an uncharted course for judicial review. Provisional review, no matter how alluring, is not necessarily better than the path set by the modern Court and followed by the people.[153]

151. 431 U.S. 494 (1977) (housing ordinance limiting occupancy to single family residents and defining family to prohibit a woman from living with her grandsons held invalid because it arbitrarily invaded family rights).

152. Examples of personal rights include the right of handicapped persons to decent education and treatment in the least restrictive setting, the right of relatives or friends to live together, the right to travel and to relocate, and the right to some safe harbors of minimum protection in a sea of free enterprise competition.

153. *Cf.* R. FROST, *The Road Not Taken* (1916).