The Proud Pre-eminence

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JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST, by Sanford Byron Gabin. Port Washington, New York: Kennikat Press. 1980, pp. 122, notes. $15.00.

JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT, by Jesse H. Choper. Chicago: University of Chicago Press. 1980, pp. xviii + 494, notes & index. $28.50.

DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, by John Hart Ely. Cambridge, Mass.: Harvard University Press. 1980, pp. viii + 268, notes & index. $15.00.

In 1825 Associate Justice John Bannister Gibson[1] of the Pennsylvania Supreme Court attacked what he thought was one of the greatest usurpations of judicial power in history: judicial review. In a dissenting opinion in *Eakin v. Raub*,[2] he rejected the proposition that a state court could ever decide the constitutionality of acts of the state legislature. Gibson conceded that unconstitutional legislation could not stand. However, reasonable people could differ on questions of constitutionality, and nothing but a few cryptic words from Chief Justice Marshall in *Marbury v. Madison*[3] gave the courts authority to second guess the legislature.[4] After all, Gibson reasoned, "the oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government. . . ."[5] If that is so, every governmental official should have a voice in determining a law's constitutionality. Gibson con-

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1. He became Chief Justice of the Pennsylvania Supreme Court in 1827.
2. 12 Serg. & Rawl. 330 (Pa. 1825).
3. 5 U.S. (1 Cranch) 137 (1803).
4. 12 Serg. & Rawl. at 345.
5. *Id.* at 352.

cluded that arguments for judicial review ultimately beg the question, for all such arguments begin with the assumption that one branch of government ought to pass upon the acts of a coordinate branch. But "in what part of the constitution are we to look for this proud pre-eminence?" Justice Gibson searched logic, history and his constitution and found no support for the doctrine of judicial review.[6]

Justice Gibson was one of the great majoritarians of the Jackson era. He believed that elected officials such as legislators ought to have the primary obligation of making law. Like James Madison in *The Federalist*[7] and Thomas Jefferson in his response to *Marbury v. Madison*,[8] Justice Gibson was acutely conscious of the antimajoritarian potential lurking in the doctrine. Judicial review could permit a small group of appointed officials with little political responsibility and a great deal of independence to effectively subvert the will of the majority.

The earliest disputants in the great American dialogue over judicial review framed the issues clearly,[9] and in almost two centuries the debate has changed very little. At one time or another it has focused on three broad questions: first, which branch (or branches) of government should have the final authority to review the acts of other branches; second, what test or standard should be applied; and finally, under what conditions should legislative, executive and judicial acts be reviewed?

The first and most basic question, whether the courts properly have the "authority" to pass on the constitutionality of the acts of other branches of government, has become rather academic. The fact is that the courts do it, and no one is likely to stop them. That does not mean the debate over the first question is over, however. As recently as 1958 Learned Hand argued that the doctrine of judicial review is not only absent from the Constitution, but is probably inconsistent with the notion of separation of powers as well.[10]

6. *Id.* at 348. Gibson was objecting to judicial review of state legislation under the state constitution. He did not object to judicial review of state legislation for inconsistency with the federal constitution. *Id.* at 345, 356-57.

7. THE FEDERALIST No. 44 (J. MADISON) (Rossiter ed. 1961 at 285-87).

8. *See* D. MALONE, JEFFERSON THE PRESIDENT 151-53 (1970).

9. *See generally* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

10. *See* L. HAND, THE BILL OF RIGHTS 1-31 (1958). For a reply to Justice Hand, see Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

However, this issue of *who* should declare acts unconstitutional often surfaces in a subtler way, when judges consider how much they should defer to an independent legislative or executive judgment when deciding whether an act under consideration is constitutional. In this context, the question of who should decide merges with the second question—what standard should be applied? In an article written in 1893, James Bradley Thayer suggested that judges engaging in judicial review should apply a "reasonable doubt" test.[11] In other words, a court should ask whether a group of legislators could reasonably have concluded that a particular statute was constitutional. As Thayer noted, that test takes a significant amount of responsibility for determining constitutionality away from judges and gives it to the legislature. Applying this test would require the courts to exercise "not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it."[12] In Thayer's paradigm every governmental official is required by his oath of office to make an initial determination of constitutionality. The judiciary simply acts as an appellate court.

The debate over the third question—the proper scope or range of judicial review—likewise returns to the initial question of legitimacy. The political question doctrine, for example, is not really based on a notion that some questions are not answered in the Constitution and therefore judges should not pass on them. Judges frequently decide issues not explicitly addressed in the Constitution—as, for example, in the abortion case.[13] At bottom, political question decisions rest on judicial assumptions about basic authority to pass on the constitutionality of certain acts. In some cases the Court decides that other branches of government are better equipped to make this decision; in others, the Court assumes this

"Hand's main thrust was judicial abnegation; he preferred that the Court defer, save in exceptional and clear cases, to the political branches of government . . . .

"Professor Weschler . . . admonished the Justices to make decisions in accordance with 'neutral' or 'impersonal' principles or 'the Law as it has been received and understood.'" Miller, *The Elusive Search for Values in Constitutional Interpretation*, 6 HASTINGS CONST. L.Q. 487, 505 (1979) (footnote omitted).

11. Thayer, *supra* note 9.

12. *Id.* at 144.

13. Roe v. Wade, 410 U.S. 113 (1973).

task itself.[14] But despite our being accustomed to the Court's defining the legitimate scope of judicial review, scholars continue to question the wisdom of allowing the Court to define the parameters of its own review powers.

The three books reviewed here were published within a few months of each other. Each develops at least a partial doctrine of judicial review. All three accept with little argument the premise that judicial review is "legitimate," at least in some minimal sense. Each author believes that in some cases a judge will have to decide that an act of a non-judicial governmental institution is unconstitutional. Interestingly enough, however, each author would place substantial limits on the power of judicial review—either by changing the standard to make it more difficult for judges to determine that an act is unconstitutional, thus placing more responsibility upon the legislature or executive; or else by limiting the scope, thereby reducing the number of cases in which judicial review is appropriate.

I. A Narrow View of the Role of the Court: Judicial Review and the Reasonable Doubt Test

Professor Sanford Gabin argues a single issue with simplicity and vigor.[15] His argument is the easiest of the three to state, and for that reason the easiest to attack. A judicial pacifist, closely schooled in the tradition of Raoul Berger,[16] Gabin accepts Berger's

14. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3534 (1975 & Supp. 1980).

15. S. GABIN, JUDICIAL REVEIW AND THE REASONABLE DOUBT TEST (1980).

16. *See* R. BERGER, CONGRESS V. THE SUPREME COURT (1969); R. BERGER, GOVERNMENT BY JUDICIARY (1977) [hereinafter cited as GOVERNMENT BY JUDICIARY]. Berger's attack on judicial review under the Fourteenth Amendment in GOVERNMENT BY JUDICIARY sparked a significant amount of commentary. See Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603 (1978). A recent symposium in this publication presented a number of differing views. *See generally* Abraham, *"Equal Justice Under Law" or "Justice at Any Cost"? The Judicial Role Revisited: Reflections on Government by Judiciary: The Transformation of the Fourteenth Amendment*, 6 HASTINGS CONST. L.Q. 467 (1979); Kutler, *Raoul Berger's Fourteenth Amendment: A History or Ahistorical? Id.* at 511; Lusky, *"Government by Judiciary": What Price Legitimacy, Id.* at 403; Mendelson, *Raoul Berger's Fourteenth Amendment—Abuse by Contraction vs. Abuse by Expansion, Id.* at 437; Miller, *The Elusive Search for Values in Constitutional Interpretation, Id.* at 487. For Berger's response to his critics, see Berger, *The Scope of Judicial Review: An Ongoing Debate, Id.* at 527.

invitation to explore the historical origins of judicial review.[17] Gabin believes that for a long time, and particularly since the beginning of the Warren era, the Supreme Court has assumed too much authority, primarily because judges have used the wrong standard of judicial review. Looking back to Hamilton, Madison, Marshall and particularly to Thayer's 1893 article, Gabin argues that in all cases of judicial review judges ought to apply a "reasonable doubt" test instead of exercising their own "independent judgment." That is, legislation may not be overturned unless it is shown to be unconstitutional beyond a reasonable doubt.[18] In Gabin's paradigm it is relatively easy to determine when a judge is exercising "independent judgment" and when he is not. Such a perspective gives Gabin's arguments a distinctly pre-Freudian or at least "pre-Realist" tone.

The original understanding of the Framers is very important to Gabin. Of course, here he has a problem: it is extraordinarily difficult to discern the Framers' original understanding with respect to judicial review, and even more difficult to discern their original understanding with respect to the standard judges should adopt. For that reason Gabin's argument is not grounded in the ideas of the members of the Constitutional Convention, nor in those of the authors of *The Federalist* nor in those of Justices Marshall or Gibson. All Gabin can demonstrate is that these people said some things that are *consistent* with the reasonable doubt test. Gabin's *real* "original understanding" comes from Thayer, whose own theory of judicial review came largely from a textual analysis of the Constitution itself. *Every* branch of government and not just the courts, concluded Thayer, has explicit and implicit mandates to defend and uphold the Constitution. The real issue in judicial review cases is not whether the *judge* believes an act is unconstitutional, but whether the branch of government whose act is questioned did its job properly. The judge must ask whether a reasonable Congress (or President, or state legislature) could have concluded that this act is constitutional. To answer "yes" forecloses judicial review, regardless of the judge's personal

17. S. GABIN, *supra* note 15, at 1.

18. *Id.* at 27-46. Even if "the preponderance of reasons lay against the act's constitutionality, the judge could not void the act yet. He would have to ask further whether the act was unconstitutional beyond a reasonable doubt, a judgment requiring more than the preponderance of reasons against constitutionality." *Id.* at 34.

feelings about the act.[19]

One can observe two things about the reasonable doubt test. First, it is not the same as simply saying that legislative acts must be accorded a "presumption of constitutionality." Such a statement says nothing about what would defeat the presumption. Second—and this is a point that Gabin sometimes overlooks—Thayer's "reasonable doubt" test differs from the test the Supreme Court actually applies to most regulatory legislation. For example, the rational basis test the Court uses to judge regulatory legislation under the equal protection clause asks whether Congress had a rational basis for doing what it did.[20] Asking whether Congress had a rational basis for thinking the statute was constitutional is quite a different question. Many things that may appear reasonable are quite unconstitutional, and many things that are silly might be perfectly constitutional. Professor Archibald Cox once noted that "[h]onest men not only could, but many do, conclude after serious study that academic progress of children is greater when the races are segregated."[21] One might think that school segregation is reasonable—but that does not give him a basis for thinking that it is constitutional. In fact, when unconstitutional acts *are* quite reasonable there is a substantial likelihood a legislature will try to enact them. Depriving people of their constitutional rights is often eminently reasonable from at least one point of view, and this is what makes judicial review so important.

Gabin generally assumes that there is little difference between the reasonable doubt test and the rational basis test. Thus, he generally approves the way the Court has handled regulatory legislation during the last forty years. His complaint about today's Court (he also has some bad things to say about the *Lochner* era) centers upon individual rights cases—particularly the progeny of the famous footnote four in Justice Stone's opinion in *United States v. Carolene Products Co.*,[22] which suggested "more searching judicial inquiry" than the rational basis test for statutes or policies that disadvantage "discrete and insular minorities."[23] Gabin is outraged by this conclusion — which he finds unwarranted by the Constitu-

19. Thayer, *supra* note 9, at 148-49.
20. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 994-96 (1978).
21. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 60 (1976).
22. United States v. Carolene Prod. Co., 304 U.S. 144 (1938).
23. *Id.* at 152-53 n.4.

tion — that "nonproperty rights are more important than property rights" and therefore that judicial protection of nonproperty rights requires a more intrusive test.[24]

Gabin attacks the post-New Deal Court, particularly the Warren Court, judging it by the standard of the reasonable doubt test. However, Gabin's analysis often exposes the flaw in his most important presumption: that by using the reasonable doubt test a judge can avoid "independent judgment" of constitutionality. He fails to recognize that every conceivable judicial review test requires a certain amount of independent judicial judgment. Gabin too easily follows judicial language that suggests a reasonable doubt test is being used when actually it is not. For example, when the Court unanimously struck down Texas's "white primary" in 1927,[25] Justice Holmes stated for the Court: "the answer does not seem to us open to a doubt. . . . [I]t is too clear for extended argument that color cannot be made the basis of a statutory classification. . . ."[26]

Gabin believes that Justice Holmes' language is a superb example of the reasonable doubt test in action. In fact, however, reasonable persons *could* have disagreed about the constitutionality of all-white primaries in 1927. Since nominating primaries had not been invented in 1868 when the Fourteenth Amendment was ratified, the abolition of racially exclusive primaries was clearly not part of the "original understanding" of the Framers of the Fourteenth Amendment.[27] Even today there is respectable academic opinion that the Framers of the Fourteenth Amendment did not intend to give blacks the vote.[28] Furthermore, in 1927 there was substantial support for the proposition that a nominating primary was not an election; therefore, a citizen's right to vote in one should not be protected under either the Fourteenth or Fifteenth Amendment. One federal district judge who upheld the statute decided that the process by which a state nominates candidates for public office was eminently a matter of state concern, and federal intervention was inappropriate.[29] In fact, the Supreme Court itself

24. S. GABIN, *supra* note 15, at 71.

25. Nixon v. Herndon, 273 U.S. 536 (1927).

26. *Id.* at 540-41. The *Herndon* court decided the case under the equal protection clause of the Fourteenth Amendment, not under the Fifteenth Amendment.

27. *Id.* at 538.

28. *See* GOVERNMENT BY JUDICIARY, *supra* note 16, at 52-68.

29. Chandler v. Neff, 298 F. 515, 518-20 (W.D. Tex. 1924).

had once held that primary elections were "in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer. . . ."[30]

In short, the test Holmes applied was clearly *not* whether the Texas legislature could reasonably have concluded that the white primary statute was constitutional. Reasonable people could differ about that question, and in fact they had. One might conclude that the only time cases reach the Supreme Court is when people on both sides have come to a reasonable conclusion that their position is correct.

A world with conflicts predetermines that both sides of many questions will appear reasonable. What is reasonable to the winners is generally not so reasonable to the losers. When a judge passes on constitutionality he is acting as referee between two competing interest groups—the legislative body that passed the statute, and the people who are disadvantaged by it. The result of the reasonable doubt test is that there is no such referee to protect political "out" groups. To be sure, legislators have a duty to uphold the Constitution. However, one cannot infer from that duty that legislators treat issues of constitutionality with much seriousness.[31] Legislators have political debts that must be paid, and usually their principal creditors are those in the majority.

The reasonable doubt test sets the lowest possible "reasonable" standard for constitutionality. The process creates an opportunity for the kind of majority tyranny that the institution of judicial review was designed to prevent. There is almost always a reasonable basis for the majority to give itself more of something, and someone else less. Fulfillment of a group's self-preferences is an eminently reasonable urge. At the same time, however, such an effort can be morally bankrupt. For example, Gabin disapproves of the Court's ruling that upheld the claim of Jehovah's Witnesses that West Virginia's compulsory flag salute statute was unconstitutional.[32] Paraphrasing Felix Frankfurter, Gabin claims that it is

30. Newbury v. United States, 256 U.S. 232, 250 (1921). *See also* State v. Michel, 121 La. 374, 46 So. 430 (1908).

31. Professor Choper finds considerable evidence that Congress frequently shirks the duty imposed upon it by the oath to uphold the Constitution. In fact, Congress often avoids the issue of constitutionality and passes the question on to the courts. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 224-26, 235-41 (1980).

32. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

surely reasonable to believe that good citizenship and patriotism are values commended by the Constitution. It might even be reasonable to believe that legislatures should have the duty "of training children in patriotic impulses."[33]

That such suppositions *are* reasonable indicates clearly the failure of the reasonable doubt test. Gabin is confident that the legislative process operating alone will solve every individual rights problem. After all, he says, "the Jehovah's Witnesses were not barred access to the political process, and all channels of affirmative free expression remained open to them. . . ."[34] But when the time came for West Virginia's legislators to pay their political debts, the Jehovah's Witnesses were not among the creditors. The result was not simply a statute that disadvantaged Jehovah's Witnesses, but one that, for a small benefit to the state, treated them as if they did not exist, or as if their religious views did not count.

Gabin's penchant for dogmatically asserting that a judge is "wrong" if he disagrees with Thayer is orthodoxy with a vengeance. Justice Stone was simply "wrong," then, to suggest in footnote four of *Carolene Products*[35] that statutes which discriminate against discrete and insular minorities might invite a stricter standard of judicial review.[36] The result is an inflexible and unprincipled theory of constitutional decisionmaking. Gabin believes policymaking should be done by legislatures and not by judges. To this end he places great confidence in the beliefs of such consensus liberals of the 1950's and 1960's as Robert A. Dahl[37] that all rights will be protected if the legislative process can be kept working smoothly. In Gabin's book there is no consideration of the political pressures customarily put upon legislators—pressures that can easily force them to subordinate academic questions of constitutionality to immediate issues of expedience. Gabin infers from the existence of the oath to uphold the Constitution that legislators must act like judges when they consider legislation. Sometimes perhaps they do—but more often they do not, and to think otherwise is to overlook the realities of American politics. In 1950, for instance,

33. Letter from Felix Frankfurter to Harlan F. Stone (May 27, 1940), *quoted in* S. GABIN, *supra* note 15, at 80.

34. S. GABIN, *supra* note 15, at 82.

35. United States v. Carolene Prod. Co., 304 U.S. 144 (1938).

36. *Id.* at 152-53 n.4.

37. *See* R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

any southern Congressman who openly advocated school desegregation would have been defeated in the next election. When one's career is at stake, notions of justice and constitutionality can quickly give way to politics.

Likewise, Gabin does not consider the relative insulation of judges, particularly federal judges, from that same process. The rule announced in *Brown v. Board of Education*,[38] for example, could *only* have been created by federal judges. *Plessy v. Ferguson*[39] and its "separate but equal" test was the law; a reasonable doubt test for constitutionality would never have changed the status quo.

II. Broader Views of Judicial Power.

Professor Jesse Choper and John Hart Ely are liberals. Both were clerks to Chief Justice Earl Warren[40] and both share the Warren Court's concern for minority rights. They both believe that judicial review is appropriate and should cut broadly whenever the rights of political "out" groups are at stake. However, Choper and Ely challenge a number of Warren era doctrines. Both advocate theories of judicial review that would require the Court to abandon a part of its record and begin on a clean slate. Ely would perhaps wipe the slate a little cleaner than Choper, but the difference is one of degree rather than principle.

A. Judicial Review and the National Political Process.

Professor Choper begins his work[41] with one broad premise: whenever the political process seems to be working we should prefer it to the relatively nonpolitical alternative of judicial review. Deciding if the political system is working, however, is a subjective matter. If the majority always gets what it wants, then from its perspective the political process is working very well. Choper shares the belief of most liberals that democracy has a duty to guarantee individuals "certain inalienable minimums of personal freedom"; when this is not happening, the political process is not

38. 347 U.S. 483 (1954).

39. 163 U.S. 537 (1896).

40. Choper clerked for Chief Justice Warren from 1960 to 1961; and Judge Ely from 1964 to 1965.

41. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

working well.[42] For this reason he believes that the protection of the rights of minorities is the "paramount justification for judicial review."[43]

Choper defends this proposition in a number of ways. First, he finds his thesis explicit in the original understanding of the Framers—particularly as reflected in *The Federalist,*[44] in *Marbury v. Madison,*[45] and in Justice Jackson's powerful words in the second flag salute case: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[46] Secondly, Choper develops a "functional" justification for the same conclusion: although judges are not "nonpolitical," they are relatively removed from the political process. At the very least, their tenure seldom depends on their vote in a particular case.[47] To a limited degree they can afford to do that which is unpopular.

Choper explains and defends a series of theses or "proposals" concerning the use of judicial review in certain kinds of cases. His first recommendation, the "Individual Rights Proposal," is similar to the Court's current approach. This proposal recommends active judicial review of any law or policy that adversely affects a claimant's individual constitutional rights. Choper argues that "experience . . . demonstrates the shortcomings of the political process in affording adequate security for fundamental personal liberties."[48] The Court has always stood as referee between the political branches of a government and abused minorities. Choper proves his argument easily with respect to the post-New Deal courts. He has more difficulty making the same arguments for earlier courts. However, even the Court of the *Lochner* era saw itself as a guardian over *some* identifiable minority groups whose individual rights were being threatened by the majority.[49]

When Choper turns away from individual rights and considers

42. *Id.* at 7.
43. *Id.* at 64.
44. THE FEDERALIST No. 44 (J. Madison).
45. 5 U.S. (1 Cranch) 137 (1803).
46. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943), *quoted in* J. CHOPER, *supra* note 41, at 67.
47. J. CHOPER, *supra* note 41, at 68.
48. *Id.* at 79-80.
49. *Id.* at 83-84.

questions about how governmental power is divided, his work becomes much more controversial. He argues that judicial review should be severely limited in those areas of federal jurisdiction that do not involve individual rights claims. For example, the constitutional notion of federalism—the relative assignment of powers between the federal government and the states—involves "considerations of practicality rather than principle."[50] Thus Choper concludes that "the Court should not decide constitutional questions respecting the power of the national government vis-a-vis the states."[51] Professor Choper qualifies his "Federalism Proposal" to the extent that he would prohibit judicial review of federal legislation alleged to impinge on state power, but would permit review of state legislation alleged to impinge on federal power.

In the "Separation Proposal" Choper argues that power struggles between Congress and the President ought to be resolved by the political process and not by the Court; thus federal courts should avoid judicial review of any presidential act alleged to usurp congressional authority, and vice versa.

Finally, in the "Judicial Proposal," Choper argues that all congressional regulation of judicial authority or jurisdiction should be subject to Court review—particularly when Congress attempts to give federal courts more jurisdiction than is apparently permitted by the Constitution, or when it tries to bypass the federal system through the use of administrative or other "legislative" courts.

Presenting these arguments places Choper in a rather awkward position—he must explain why judicial review is important when individual rights are at stake, but is otherwise much less significant. He does this essentially by arguing that too much judicial review is not a good thing—that the Court "expends its capital" every time it exercises judicial review. When the Court thwarts the majority will by overturning legislation, its esteem falls in the eyes of the public as well as in the eyes of the other branches of government. When the Court engages in judicial review that is popularly perceived as thwarting the majority will, for example, it encourages either open or hidden noncompliance with its orders, as happened in the South with respect to *Brown* desegregation orders. Choper produces a long, well-documented record of noncompliance

50. *Id.* at 2.
51. *Id.* at 2-3.

—enough to explode any idealist's notion that people always do what the Supreme Court says. From this Choper concludes that the less judicial review the Court performs, the more credibility (and compliance) it will command.

> Both the Federalism Proposal . . . and the Separation Proposal . . . seek to ease the commendable and crucial task of judicial review in cases of individual constitutional liberties . . . . Both proposals seek to shield the Court from categories of clashes with the populace and the politicans and thus to narrow the range of disobedience and retribution. . . . [T]he Court should avoid the federalism and separation of powers areas . . . because its activity there is unnecessary to effective preservation of the constitutional scheme.[52]

While this argument may not be bad, it is in some respects unconvincing. When the Court announced the *Dred Scott* decision[53] in 1857, it had not invalidated a federal statute in fifty years. However, the decision did not gain the Court profound respect because it had called upon a weapon that had been used only infrequently and with great care. On the contrary, the record of noncompliance and hostility following *Dred Scott* is one of the longest and most violent in all our history.[54] The record of noncompliance with *Brown* and its progeny is similar,[55] although by that time the Court was using the equal protection clause to overturn one racial classification after another.

Though one can argue that too much judicial review is a bad thing and encourages noncompliance with Supreme Court decisions, that argument is contrary to a powerful presumption recognized in the social sciences that behavior can be changed by changing the rules and institutions that influence people.[56] Thus the frequent use of judicial review may be more likely to increase acceptance of it as a fact of life. As John Hart Ely argues, "one of the surest ways to acquire power is to assert it."[57] Similarly, its infrequent use, as in the *Dred Scott* era, is more likely to outrage peo-

52. *Id.* at 169.

53. Dred Scott v. Sandford, 60 U.S. 393 (1857).

54. *See* D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 417 (1978).

55. *See* R. KLUGER, SIMPLE JUSTICE 748 (1977).

56. *See, e.g.*, W. MUIR, PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE (1967).

57. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 48 (1980).

ple and convince them that the Court has fallen prey to politics.

Nevertheless, Choper's "depleting capital" argument is intriguing. To prove or disprove it one would have to make a broad study of the response to judicial review in relatively active and passive judicial periods. Choper's argument relies on empirical data, but most of it is highly selective, gathered for a different purpose, and too inconsistent in quality or conclusion to clearly demonstrate his thesis.

Having decided that too much judicial review is bad in some situations, Choper then tries to identify those areas where it should be limited or abolished. His "Federalism Proposal" is sound if one accepts his premise that questions of the distribution of governmental power are matters of practicality and not of principle. That premise is itself both value-laden and controversial, however. It assumes that the set of individual rights a State must protect is a matter of principle, while the structure of the State itself is merely a matter of politics. Within some ethical views—Marxism or Social Darwinism, for example—the structure of the State itself can be very much a matter of principle. But Choper's liberalism inclines him to regard the State as nothing more than a means to a given end—an idea which is probably uncontroversial to most Americans.

Given this, most aspects of the Federalism Proposal would be both practical and efficient. Choper argues that United States Senators and Congressmen in fact have two "constituencies"—they must respond to a set of national interests as well as to the people back home. The result, argues Choper, is that state interests are usually protected adequately in the federal political process, and judicial review of federal legislation alleged to impinge upon state interests is unnecessary and unwise. The give and take of politics can handle this problem much more efficiently, and certainly more democratically. On the other hand, state legislators do not have the same level of consciousness about federal interests, and the federal interest may not be well represented in the state lawmaking process. Choper therefore concedes that "insufficient reflection of the national interest in the state legislative scheme justifies the Court's oversight of state action that allegedly invades or nullifies federal prerogatives."[58]

58. J. CHOPER, *supra* note 41, at 207.

Choper argues also that power conflicts between the President and Congress should be resolved by the political process and not by the courts. He believes, for example, that questions of executive privilege, such as those that arose during the Watergate crisis, should generally be nonjusticiable. His argument is pragmatic: such power disputes do not involve real principles of democracy or individual rights and the political process itself will ensure an acceptable outcome. Here, too, Choper's argument is premised upon the idea that Supreme Court intervention into such disputes depletes the "capital," or prestige of the Court, and encourages noncompliance with its decisions.[59]

The argument advanced for the nonjusticiability of executive privilege questions is based in part on the text of the Constitution. The Constitution has little to say on the subject; as a result, in such cases the Court is acting more as "administrator" than as an interpreter. Choper argues that judicial intervention in a power struggle between Congress and the President, where the Constitution favors neither side, is manifestly inappropriate.[60]

At this point, however, Choper dodges some of the consequences of his own, highly pragmatic view of the role of the Court. One can concede that the Watergate disputes over executive privilege to withhold certain information were "political" in the sense that no individual rights were at stake; nor did they involve any fundamental "principle" of the structure of the State. Perhaps the political process alone would eventually have resolved the issues. However, without a court determination President Nixon might have refused to comply with Congress or the Special Prosecutor. The political confusion that would have resulted, regardless of eventual outcome, would have severely frustrated Americans desperate for a clear and final resolution of the issue. Choper is correct when he says that in such cases the Court is not "interpreting" the Constitution, but is acting as administrator or umpire. How-

59. *Id.* at 260-379.

60. Choper notes that one of the Watergate cases, United States v. Nixon, 418 U.S. 683 (1974), did not involve a conflict between the President and the Congress, but between "the Art. II powers of the President" and the "function of the courts under Art. III." Here the Court ruled that executive privilege to withhold information must yield to the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 707, *quoted in* J. CHOPER, *supra* note 41, at 336. Since this issue involved the authority of the article III courts, however, it would have been justiciable under Choper's Judicial Proposal. *See* J. CHOPER, *supra* note 41, at 380-415.

ever, when, as in the Watergate crisis, the nation needs a decision to be made publicly by someone with stature, authority and a relative degree of neutrality, only the Supreme Court is able so quickly to neutralize a tense and dangerous situation. To assert simply that struggles between Congress and the President are "political" and not matters of principle is insufficient; after all, one principle is eminently appropriate: the State must create an appearance of fairness and competence in the handling of internal disputes.

B. Democracy and Distrust.

Professor Ely's book[61] takes a very different approach than Choper's but comes to remarkably similar conclusions. Ely begins with the premise that the Constitution is fundamentally a "process" document: that its basic purpose is (and was) not to guarantee a certain set of substantive rights, but to insure that decisions are made in a certain way. Ely is concerned mostly with questions of individual rights; he has little to say about problems involving the distribution of governmental power. As a result, Ely's book is not as complete a theory of judicial review as Choper's. However, the effect of Ely's approach is very similar to Choper's. He assigns the Court a very strong role in the judicial review of actions that affect individual rights, but a weak role or perhaps no role at all in the review of actions involving only the distribution of powers.

Ely disagrees with Choper about the nature of the constitutional document. "The political theory ordained by the Constitution forbids popular majorities to abridge certain rights of individuals," writes Choper, "even when the latter may be part of the majority and even though their interests may be forcefully represented and carefully considered in the political process."[62] Ely, on the other hand, argues that certain minorities or politically "out" groups have a right to have their interests forcefully represented, carefully considered and fairly determined—but once that consideration has been given they do not have a right to a particular outcome.[63]

Ely agrees with Choper that arguments based on the "original understanding" of the Framers of the Constitution are neither en-

61. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
62. J. CHOPER, *supra* note 41, at 64.
63. J. ELY, *supra* note 61, at 82-87.

lightening nor compelling. The conclusions to be derived from such arguments are either impossible to determine or else irrelevant. Ely concludes that it is not very important to determine whether the Constitution created a list of substantive rights at some time in the past, or whether constitutional decisionmaking ought to protect an identical, or at least similar, set of rights today. Ely believes that what is discernible today, and what the Framers *did* put into the Constitution, is an extraordinary sensitivity to the manner in which legislative and executive decisions are made.

Ely is on solid ground when he refers to the due process clauses and the equal protection clause. "Due process" quite clearly (and historically) talks about "process"—not about the nature of a benefit, but about how it is to be given or denied.[64] Likewise, "equal protection" makes a great deal of sense when one looks at it as a theory of *how* legislatures discriminate between groups.[65] Even the article IV, section 2 privileges and immunities clause may be regarded as a rule that a state may not discriminate against citizens of other states, rather than as a guarantee of a substantive list of rights called "privileges and immunities."[66] However, it is harder to explain the Thirteenth Amendment's prohibition of slavery as anything other than the protection of a substantive right. One does not need to do a great deal of "original understanding" analysis to understand these words of the Constitution: someone who is sold into slavery without having been convicted of a crime has been denied something that the Constitution guarantees. Further, it seems not to matter how much concern, respect and fairness such a person has been accorded in the making of the decision to enslave him. Even if Congress unanimously passed a statute that made members of the House the chattel slaves of United States Senators, a member of the House who proposed the statute could come to the Supreme Court later, show that the statute violated the Thirteenth Amendment, and win his freedom. Ely would argue, of course, that Congress will never pass such a statute, and it won't. But that is a different matter.[67]

That is not to argue tht Ely is wrong. Within his own view of the world he is precisely right. Ely's critics have been fond of

64. *See id.* at 14-21.
65. *See id.* at 30-32.
66. *See id.* at 22-30.
67. *Id.* at 181-83.

pointing out that, contrary to what Ely says about the Constitution being a "process" document, the words themselves explicitly protect a large number of substantive rights. As Ely's colleague Laurence H. Tribe observes, a major difficulty for Ely's theory is "the stubbornly substantive character of so many of the Constitution's most crucial commitments. . . ."[68]

But Tribe is missing the point. Ely is not arguing that Congress could enact itself into slavery if it wanted to. Nor is he arguing that nothing in the Constitution has a substantive content. Instead he is saying that the Constitution will be more useful to us today if we regard it as a process-determining, not a fact-establishing, document. This is like Bishop James Pike's testimony that "I cannot say the Apostles Creed, but I can sing it."[69] Certain things like religious creeds can have a meaning that transcends the facts they assert—and they continue to have that meaning even if the "facts" are proven wrong. When we read the Constitution as poetry we get some different things out of it than when we read it as the (rather dull) prose it often appears to be.

Ely's biggest problem is that he does not own up to this. His book is far more radical than he would have us believe. He neglects to tell us that he is reading the Constitution in a different way than constitutional scholars have read it in the past. The result is that he sends everyone running to the library to see if the Constitution really does say some substantive things about slavery or jury trials or letters of marque and reprisal. It still does.

Like Choper, Ely believes there is no fine distinction between law and politics. A judge's immunity from the political process is relative, and all decisionmaking is political to some degree. The judge is not doing something "better" or appealing to a higher standard that is beyond the reach of legislators. Ely and Choper both believe that the vast majority of interest group conflicts should be resolved through the legislative and executive processes. The job of the judge should be to ensure that these processes are working correctly. Ely's theory of judicial review is more closely

68. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065 (1980).

69. The statement appears to be unpublished, but it comes to the author from an interview with Bishop Pike's former colleague, Robert E. Hoggard, Vice-Dean (ret.), Grace Cathedral, San Francisco, California. See also, J. PIKE, A TIME FOR CHRISTIAN CANDOR 25-36 (1964).

synchronized to the political processes than many other such theories. The "original understanding" analysis, for example, begins with the premise that judicial review should be governed by the ideas of some people who were alive in the 1780's or 1860's, with little regard for what legislators or justices might think today.[70]

Similarly, the "neutral principles" theory of judicial review developed by Herbert Wechsler suggests that the Court should base its decisions on certain politically neutral statements of principle—that is, statements that are sufficiently general to extend beyond individual disputes to general policies, and that do not favor one group over another. Neutral principles analysis tries to elevate judicial review beyond politics by pretending that some values can be "nonpolitical" or "interest-free."[71]

Ely harbors no such naivete about the role of judges. Ely believes *all* decisionmaking, even the judicial kind, is in some degree political. There are no workable neutral principles. The task of the judge interpreting the Constitution is not to transcend, balance or eliminate the influence of the political process. On the contrary, his job is to make sure the political process is well tuned—that it represents every interest to the fullest extent possible and does not ignore anyone in the process. The word "justice" has no meaning if it is used to describe a list of substantive outcomes, for one can never prove that a particular thing, like Affirmative Action, is on the list. However, the notion of justice as fair consideration, or as equal concern and respect, may have a measurable meaning when one discusses the legislative process. It can mean, for example, that every individual should have a vote and proportional representation; it can mean that political "out" groups should be granted the same goods and opportunities granted to "in" groups, or it may require that legislators offer a very good and public explanation when this does not happen. Beyond that we do not have to worry about whether Congress will enact itself into slavery. As Ely notes, "an effective majority will not inordinately threaten its own rights."[72] If judges would concentrate on ensuring that the political process functions in this way, argues Ely, then it would not often be faced with the task of defining and enforcing substantive rights.

70. *See* J. ELY, *supra* note 61, at 11-41.
71. *See id.* at 54-55.
72. *Id.* at 100.

Ely has stated a principle—certainly a controversial one, but one that is appealing to liberals who for a long time have been uncomfortably wedged between history and natural law. Before his principle can become a theory of judicial review, however, Ely must set forth some specific proposals. For example, simply determining when a congressional decision to create a disadvantage for an "out" group is "legitimate" and when it is not can be difficult—more difficult, perhaps, than Ely's analysis suggests.[73] We do not need another liberal theory of jurisprudence that is unable to answer its own hard questions. Nevertheless, Ely's principle is intriguing and simple, and it sounds like justice. Perhaps he will get around to singing a few more bars of his constitution.

73. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 197-205, 223-39 (1977).