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The Federal Judiciary: America's Recently Liberated Minority

RANDALL BRIDWELL*

May we thrust aside the
dead hand of Earl Warren?

M.J. Sobran, Jr.**

This essay acts as an introduction to the two articles that follow: Secretary Harris' address to the Fellows of the American Bar Foundation and Professor Raoul Berger's response to that address represent opposing positions on the interpretation of the fourteenth amendment of the Constitution in its role of providing protection for minorities. In addition, however, these articles are indicative of a fundamental disagreement between constitutional law scholars regarding the relationship between the Constitution and the power of the judiciary. It is the last point that Professor Bridwell addresses.

One of the most important current issues in American constitutional law concerns the requirement of a constitutional foundation or justification for judicial action, especially for judicial action that is not rooted in any particular provision of the Constitution, or is arguably contrary to the "meaning" of particular provisions.¹ This problem arises when judicial action goes outside of

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** Sobran, *Taking the Fourteenth*, 30 NAT'L REV. 283, 284 (1978).

1. The "meaning" of particular constitutional provisions referred to in this essay should be taken not as a reference to any technical or scientific semantic elaboration of the constitutional text. Instead, it should be viewed as referring to the variety of ways in which the federal judiciary, particularly the Supreme Court, relates its decisions to the Constitution for purposes of distinguishing their judicial function under the Constitution from a purely discretionary command. See generally Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

Most of the specific provisions in the Constitution fall considerably short of being self-executing statements directed precisely to the problem or dispute under consideration by

the finite and determinable bounds² of the Constitution that have been legitimatized by majoritarian consent, that is, by the vote of the population at large.³ The question is whether the majoritarian pronouncements embodied in the Constitution can be reconciled with these Supreme Court decisions that do not rely upon any particular constitutional authorization—decisions that

the modern Court. Some attempt is usually made to provide a constitutional justification for what the Court does. Raoul Berger searches for some guiding “intent” of the framers of any given provision, as illustrated in his *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1978); similarly, Joseph Story represents another traditional approach to generate principled and defensible extrapolations from the text by applying some definite and uniform technique of construction. See 1 J. STORY, *COMMENTS ON THE CONSTITUTION OF THE UNITED STATES* 282-325 (3d ed. 1858). This is generally felt necessary because of the almost universally accepted importance of consent as a prerequisite to valid and binding rules of constitutional (or other) laws—because of the primacy of democratic theory in our constitutional scheme. Thus, as one writer aptly remarked:

When the rule applied by a court in the exercise of judicial review can be persuasively demonstrated in a reasoned, principled way to derive from the Constitution, and not from judges’ values and policy preferences of the sort appropriate to legislative judgment, the morality of consent is not contravened, even though the will of an electoral majority, as expressed through a legislative majority, is set aside.

Holland, *American Liberals and Judicial Activism: Alexander Bickel’s Appeal from the New to the Old*, 51 *IND. L. J.* 1025, 1042 (1976). It is in response to that requirement that the task of using the Constitution to resolve an evolving series of novel problems has been furthered by the common-law tradition, which dictates there must of necessity be much recourse to analogizing and extrapolation in order to close the gap between a pertinent constitutional text and a rule of decision purportedly derived therefrom. *Id.* The elaborate decisional techniques of the common-law process, however, are in sharp contrast to the often experimental method by which doubtful or debatable policy choices are made through a legislative process, since the common law is, among other things, “confined through presumptive adherence to precedent and commitment to a course of principled development.” Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 *HARV. L. REV.* 1117, 1132 (1978). See R. BRIDWELL & R. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINE OF SEPARATION OF POWERS AND FEDERALISM* 11-34 (1977). For the variety of techniques used by the Court to shape constitutional law in a manner faithful to the democratic tenets of the Constitution, see P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 47-87, 102-71 (1975).

2. The belief that the bounds of the Constitution are determined by reference to the framers’ intent is basic to Mr. Berger’s approach. “More accurately, I hold that if the intention is clear, it governs.” Berger, *Academe vs. the Founding Fathers*, 30 *NAT’L REV.* 468 (1978). The result is that the Court is to a large extent excluded from the role of policymaking and is confined to an implementation of the framers’ intent. See R. BERGER, *supra* note 1, at 300 n.1.

3. See generally A. BICKEL, *THE MORALITY OF CONSENT* (1975), and Holland, *supra* note 1, for an excellent analytical review of this book. Even the advocates of the most extensive sort of judicial power recognize the basic concern of those committed to a limited form of judicial review of the text of the Constitution that is tied to a majoritarian or democratic political theory. See Perry, *The Abortion Funding Cases: A Comment on the Supreme Court’s Role in American Government*, 66 *Geo. L.J.* 1191, 1206 (1978).

amount to obligatory commands of a small group of nonelected officials.⁴

The two essays that follow illustrate divergent approaches in the constitutional dialogue that has developed in response to this question. The basic difference between the positions taken by Professor Berger and Secretary Harris does not rest upon decisional technique or a difference of opinion on how the requirement of majoritarian consent should be met, but rather upon a difference of opinion on whether it is necessary to speak in majoritarian; consent-oriented terms at all. Professor Berger is of the school that cannot tolerate action without constitutional authorization or its equivalent, majoritarian enactments.⁵ He looks only to the Constitution and its legislative history to determine the extent of the judiciary's power and relies upon the will of the majority thus expressed for the content of constitutional rules, including those protecting minorities. Professor Berger assumes that the Constitution has a limited meaning and is addressed to particular problems; to him it is not a license to resolve judicially all problems or issues generically alike or analogous to those treated in the document itself.⁶

Secretary Harris' camp treats the judicial power exercised by the Supreme Court as largely self-defined and discretionary, without any meaningful limitations derived from the Constitution itself. Scholarly justifications for this type of unlimited authority are various. One position holds that a general "common-law" authority exists that differs from ordinary constitutional law or conventional judicial review and endows the Court with a broad rule-making power not tied to the Constitution.⁷ Another

4. This theme is at once the most engrossing and the most perdurable of that strand of political philosophy that goes under the rubric of constitutionalism—how to reconcile with the central premise of popular self-government a scheme of constitutional adjudication which to a greater or lesser degree tends to displace elected representatives in the resolution of questions of moral value and policy preference.

Holland, *supra* note 1, at 1032.

5. See Bridwell, Book Review, 1978 DUKE L.J. 907, 908-10.

6. For Berger, to go beyond the limited goals that may be attributed to the Constitution through a search for the intent of the framers "is to substitute wishful thinking for historical fact." Berger, *The Fourteenth Amendment: The Framers' Design*, 30 S.C.L. REV. 495, 503 (1979).

7. The debates about the integration of the common-law system with our form of constitution are as old as the Republic. As one earlier commentator remarked,

In other words, the inquiry is, whether the Federal Courts have a right independent of the people of the United States or their representatives, by virtue of some occult power supposed to be derived from the *common law*, to mould

the Constitution as they please, and to extend their own jurisdiction beyond the limits preserved by the national compact?

P. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES vi (1824). Du Ponceau distinguished between different theories of the common law, rejecting the notion of unlimited discretionary authority to fashion rules for any case brought that satisfied the subject matter jurisdiction of the federal courts. Du Ponceau rejected any extra-constitutional common-law power, sharply distinguishing between “jurisdiction of” the common law, which implied some pre-existing legal principle of decision attributable to the Constitution with which the court could resolve a case, and “jurisdiction from” the common law, which implied “a power in direct opposition to the letter and spirit of our national charter” because it characterized “the common law” as a judicial decisional function guided only by the court’s discretion. *Id.* at vi-vii. See R. BRIDWELL & R. WHITTEN, *supra* note 1, at 11-33. Indeed some of the most hotly contested issues in our early legal history concerned the courts’ common-law power. *Id.* at 35-98. Unfortunately, most of the modern commentary that seeks to base extensive judicial policy-making power upon the common-law system itself is ahistorical and tacitly accepts a theory of the common law that was rejected during the early national period. It also uncritically characterizes the common-law rules of the Supreme Court as the discretionary implementation of “subconstitutional policy concerns.” Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 28 (1975). Indeed, rather than exploring the various meanings attached to the term “common law,” Monaghan merely assumes that it signifies only some discretionary decisionmaking by a court, rather than any technique of elaborating rules of decision within the limits of particular textual or precedential restraints. “The more a rule is perceived to rest upon debatable policy choices or uncertain empirical foundations, the more likely it will be seen to be common law.” *Id.* at 34. In an important article that attempts to reassert a legislative classification for debatable policy choices, Professors Thomas Schrock and Robert C. Welsh sharply assail Monaghan’s *a priori* assumption that the “common law” is a mere rationalization for judicial action and justly point out the implications of “subconstitutional” common-law judicial power for supposed constitutional limitations on it. Schrock & Welsh, *supra* note 1, at 1120, 1132. They articulate a different and more traditional definition for common-law authority that distinguishes it from legislative or policy-making functions and emphasizes the basic result orientation of the advocates of the “occult power” version of common-law authority. *Id.* at 1150. In their blunt critique of Monaghan, these authors underscore the pathological traits of much of the modern constitutional law commentary, a critique that aptly applies to the approach taken by Secretary Harris in her essay with its belief in the self-evident rightness of the course of action pursued by an activist court. Schrock and Welsh also identify other features of this school of thought: the inability to resolve questions of authority essential to majoritarian theory, *id.* at 1126; the simplified characterization of judicial action (*i.e.*, the “common law”), *id.* at 1132; the failure to distinguish the type of authority they advocate, such as “subconstitutional” power, from other powers, such as “real” constitutional law, *id.* at 1146; the constant confusion of the question of competency with the merits of an issue, *id.* at 1150; and the utilitarian assumption that the sole measure of the Court’s power is whether or not its efforts have been successful in implementing a policy some regard as desirable, *id.* at 1121, 1125. See also Alfange, *On Judicial Policy-making and Constitutional Change: Another Look at the “Original Intent” Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603 (1978).

It is interesting to note the degree to which even lower federal judges claim the right to legislate, justifying that claim by mere assertion. For example, U.S. District Judge Robert W. Hemphill is credited with stating that “one role he has faced several times on the bench during the past two decades has been *the need for the judiciary to take over some of the legislative functions of government.*” *The State*, Jan. 7, 1979, § A, at 20, col. 1 (emphasis added). It would be interesting if an executive order from the state governor decreed that the legislative and judicial branches have failed to adequately register the

explanation locates the source of the Court's power in the Constitution, but only as it represents an historical occasion upon which the judiciary and its powers sprang to birth; the authority of the Court is said to be self-determined, rather than being limited by any analytical or intellectual process of interpreting the original document. Under this approach the Constitution is, technically speaking, the source of judicial authority, but the power the Court actually wields permits it to take its own purely "normative judgments" and "transubstantiate" them into constitutional law, to borrow the ludicrously pretentious jargon common place in this camp.⁸ As Justice Hans Linde has pointed out, the advocates of this position typically equate the "role" of the Supreme Court with its constitutional authority.⁹ In the Harris approach, quite often a number of commonplace and obvious features of judicial decisionmaking are emphasized to the exclusion of all other components of judicial action: the recognition that decision making entails judgment and discretion; the recognition that John Marshall's famous *dictum* in *Marbury*, which depicts a literal comparison of the plain text of the Constitution and challenged law,¹⁰ is overdrawn and not literally true; and the recognition that Supreme Court decisions do, over time, reflect the values and intellectual milieu of the Court. These and other insights seemingly reinforce the "realist" interpretation of judicial action as *only* discretion that justifies itself by a patently false ceremony. According to this theory, the Court's real primary function is to actively propound and enforce whatever values and priorities the Court perceives around it, refusing to bow to the "dead hand" of the past.¹¹

will of the majority and that he would henceforth promulgate ordinances having the effect of statutory law, or if the governor simply declared the courts ineffective at efficiently resolving litigation (perhaps citing their expanded caseloads) so that it would be necessary to hold a governor's court of general jurisdiction at stated times until the problem cleared up.

8. Perry, *supra* note 3, at 1192 (identifies the Supreme Court's opinion in *Roe v. Wade*, 410 U.S. 113 (1973), probably correctly, as the "Court's normative judgment transubstantiated into constitutional law."). Again, in confirmation of what Schrock and Welsh call the "prescriptive realist" approach—*i.e.*, the favoring of judicial policy-making limited only by some unformed approval (presumably from the enlightened camp of academe)—Perry acknowledges "metatextual" sources of the Court's rule-making power such as "conventional morality." *Id.* at 1202.

9. "Characteristically, questions of constitutional law and questions of the role of the Supreme Court are generally treated as the same thing." Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972).

10. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-79 (1803).

11. A particularly perfervid example of this orientation to the present is Miller, *An*

Whether one argues that the Supreme Court has “extra-constitutional” powers (some would say “subconstitutional” powers) or that its powers, though derived from the Constitution, are defined only by the Supreme Court’s discretion is to make a distinction without a difference. The fundamental problem remains for those who insist on consent or majoritarian justification for judicial commands.¹² The essays that follow offer instructive examples of two divergent approaches to this difficult problem. They are interesting and important representatives of viewpoints as philosophically opposed to each other as those that surrounded the creation of the Constitution. This dialogue has been sparked by the role of the federal courts, particularly the Supreme Court, as the focal point for a veritable storm of advocacy for activism in nearly every conceivable direction.¹³ It would be impractical here to essay all the various views represented in scholarship and judicial opinion on this issue, but it is instructive to identify some of the characteristics of these two approaches and of the literature in general.

Many of the advocates of judicial activism proceed unencumbered by the burden of a constitutional theory that supports the results they seek; they simply attempt to substitute in place of constitutional theory an attractive and emotionally moving

Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers, 27 ARK. L. REV. 583 (1973). This article exemplifies all the shopworn clichés that are used in favor of government action to cure whatever ails us. They are declared with the nonanalytical, rhetorical exuberance that has become the hallmark of the “prescriptive realist” or experimental, result-oriented advocate of judicial reform. *Id.* at 590. In a farsighted prognosis preceeding the Nixon debacle, the author laments the irreversible shift to executive hegemony, *id.* at 591, and admonishes us to forget the past and grapple with our own peculiar “social flux” as best we can. *Id.* at 585, 595. Oddly enough, a discussion of separation of powers is not to be found in this article, despite its promising title.

12. Supposedly, some would prefer a democratic solution to our problems but tend to accept, sometimes regretfully, the Court’s new role as super-legislator because our democratic institutions have allegedly failed. See A. COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1968). It has been pointed out, however, that rare instances do exist in which a popular majority in possession of certain privileges—for example, the privilege of the franchise—has decided to extend those benefits or privileges to a class excluded from them, and all without prodding from the Supreme Court. For example, consider the fifteenth, seventeenth, nineteenth, twenty-third, twenty-fourth, and twenty-sixth amendments, mentioned in Holland, *supra* note 1, at 1029 n.13. Some have also justified the Court’s creative use of power to change the Constitution because the amendment process is so cumbersome and difficult. This, however, would seem to be an equally good argument *against* unrestrained judicial rule-making at the constitutional level because we will be hard pressed to gain relief from their decisions. Some commentators have emphasized just this point. See 1 J. STORY, *supra* note 1, at 314.

13. Holland, *supra* note 1, at 1027 n.8.

rhetorical dress for what is actually a simple statement of desired results.¹⁴ Average readers are often beguiled into thinking the advocate is doing more than attempting to elicit support for a favored result. They are led astray by the classification of this literature as "constitutional law," charitably assuming that the law journals' editorial standards have classified it within this genre because some principle independent of the results was being examined. Many interested readers would be offended by the realization that *only* a policy debate over results is involved in much constitutional law scholarship, and perhaps some would be too embarrassed to conclude that they had been so far outside the prevailing ideological fashion that they failed to realize that a jargonized, result-oriented dialogue had largely replaced the analytical device of separating principles from results. Actually, however, many scholars have accepted the belief that any "analysis" of constitutional law is comprised solely of eliciting support for results the Court has produced in particular cases or by hypothesizing the terrible alternatives to result orientation.¹⁵ When the Court has adopted a purely result-oriented approach, a scholar's "analysis" of the Court's powers in functional, constitutional terms generally concludes that the sole measure of the Court's authority to act is the success it achieves in promulgating and enforcing policy in a "frankly experimental" fashion.¹⁶ This constitutional analysis is curiously indistinguishable from an evaluation of the results themselves. Thus, at least one variety of constitutional scholarship exists that seeks to obtain a favorable nose count on particular results or policy choices by addressing an appeal to whatever group or clientele reads or is influenced by the particular publication in question. Ironically, the proponents of the variety of constitutional law that perceives the judiciary as a forum for implementing policy choices scarcely ever perceive their approach as a rather unique form of majoritarian politics. It is tempting to view this variety of scholarship

14. See *Grey Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 711-12 (1975), in which the argument favoring expansive judicial powers is structured around the horrible results that will allegedly occur without it. This article vividly illustrates the studied avoidance of any consideration of institutional competence by modern constitutional scholars. This feature is probably because of its almost exclusive preoccupation with the desirable result that can be attained if authority and competence considerations are dismissed. In a curious tautology, what passes for a defense of a particular form of judicial power rests almost entirely upon the assumed advantage that would accrue to its existence. See Schrock & Welsh, *supra* note 1, at 1150.

15. Grey, *supra* note 14.

16. Linde, *supra* note 9 at 228; Schrock & Welsh, *supra* note 1, at 1120-21.

as a process of galvanizing support of a majority of a relatively small, but possibly influential, component of the national community—legal scholars—around particular policies that emerge from current judicial decisions. A peculiar hybrid form of majoritarian politics has thus been created. If constitutional scholarship has become largely a form of highly politicized journalism, one would expect the relative merits of any particular contributor to be measured by the avidity with which the writer declares himself in sympathy with the prevailing fashion. In any case, whether from detached analysis or merely from “voting” through scholarly publications, the academic community has clearly leaned toward a form of utilitarian policy analysis generally favoring judicial activism. “Legal realism” and the conviction that courts are primarily a forum for policy debates has become “the common core of tradition shared by most scholarship and appellate judging today.”¹⁷ Thus, the primarily result-oriented form of constitutional scholarship simply fails to address the issue of majority rule.

An occasional attempt is made, however, to ground these evolving policy choices made by the courts in some type of formal majoritarian process.¹⁸ These attempts are plagued by the formidable problems that accompany harmonizing the concept of judicial action as unfettered but enlightened policy choices with the traditional majoritarian or democratic justification of judicial action. The failure to deal with this issue, however, tends to confirm the qualms felt by some over the nondemocratic nature of a growing body of “constitutional” rules. Inconvenient questions immediately arise and multiply once consent as a basis for these rules is taken too seriously by scholars whose primary concern is with results. For example, can a majoritarian statement of constitutional law embodied in an amendment to the Constitution¹⁹ be overridden by formally different majoritarian “expression of dis-

17. Linde, *supra* note 9, at 227.

18. Perry, *supra* note 3, at 1233-35.

19. It is critical to Mr. Berger's thesis, fully developed in his recent book, that the fourteenth amendment created only particular and limited protections for minorities and that this protection excluded the subjects of voting and school desegregation. See Bridwell, Book Review, 1978 DUKE L.J. 907, 909-11. For a fuller account of the adoption of the fourteenth amendment (in addition to Professor Berger's book, *supra* note 1), see H. BRANNON, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1901); H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); H. MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT (1977). Additionally, for some further comments by Professor Berger in response to recent reviews, see Berger, *Response: Government by Judiciary: Some Countercriticism*, 56 TEX. L. REV. 1125 (1978).

satisfaction” with what was originally adopted?²⁰ Presumably the court is permitted to divine this majoritarian rejection of a previously approved rule in the litigation process and relieve us of its effect. But what standards do they employ in discerning sufficiently broad and intensely felt majority dissatisfaction with what was previously put in the Constitution? Moreover, if the case before them concerns the protection of a minority group or a member thereof, must not the protection or assistance the Court affords be by definition *in spite of* expressed majority values? If it is, must it not then be justified by *some* previous majoritarian statement such as a constitutional provision or amendment? If majoritarian premises are scrupulously maintained, then a further admission seems to be required that the actual content of the previously created majoritarian concessions to the minority is *somehow* limited and determinable, and is thus tied to the Constitution itself. Another possibility is to resort to the democratic process to define those concessions, rather than to resort to some roving judicial commission to protect minorities against majorities in all cases.²¹ Unless some action like this is taken, the Court’s actions would consistently obstruct rather than vindicate majority will. Of course, these questions will only be raised if majoritarian consent is felt to be required for judicial action. The alleged ongoing power to judicially revise previous majoritarian expressions in light of current ones seems inconsistent, however, with identifying the Constitution as the source of constitutional protection for minorities. If majoritarian justification for the com-

20. One theme within the pro-activist or apologetic school of constitutional scholarship tends not only to justify the Supreme Court’s foray into policy-making in result-oriented terms, but also to add the additional justification that the normal democratic processes, like the state legislatures, had simply “failed to adapt” to changing social conditions and problems. See A. Cox, *supra* note 12, at 115-16. The technique of apologizing for judicial reform in result or policy terms has often been recognized as directly implicating the traditional theory of a separation of powers, in that debatable policy choices are generally allocated to the legislative branch in our democratic constitutional system. As Professor Holland observed: “To some it might seem odd that a scholarly justification for the Court’s more than occasional failure to observe the limitations which differentiate the functions of adjudication from legislation should rest upon consideration wholly applicable to the latter.” Holland, *supra* note 1, at 1028 n.9.

21. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978). In his discussion of constraints on the “utilitarian morality” under which majority decisions may affect a minority, Professor Ely rejects unfettered judicial discretion to formulate antimajoritarian principles out of some prevalent judicial philosophy that might determine the content of those principles: “Even assuming further side constraints on a utilitarian morality are appropriate, their content should be determined, I shall argue, by the democratic process rather than in accord with a philosophical system one or more commentators may find appealing.” *Id.* at 406 n.29.

mands of the Supreme Court is a serious goal, then *some* limited, definable content to the constitutional provisions for the protection of minorities or some limited form of judicial decision-making must be sought. In addition, it must logically be a content to *some* extent immune from overt judicial revision if the protection is to be meaningful, lest today's perceived majority bent on discrimination find support in a court willing to overlook particular express constitutional guarantees created in the past. The dead hand of Earl Warren may be as easily thrust aside as that of Rufus Peckham. If majoritarianism in some form is to continue as a basis for our constitutional law, then there is little room for the position that the Supreme Court must as a matter of constitutional imperative vindicate any identifiable minority against all majority action. To allow such a position, we would have to interpret our constitutional history as the spectacle of a people whose actions are theoretically sanctioned by majoritarian consent, using their authority to destroy themselves by forever disabling them from taking a position contrary to any minority interest.

Suffice it to say that these quandaries result largely from the efforts of constitutional law literature to harmonize equivocally result orientation with a democratic theory of law and to equate the "role" of the Court with its constitutional powers. Most writers to date have been pitched between two problematical extremes in dealing with this problem: (1) an approach that is almost totally impressionistic, ahistorical, nonanalytical, polemical, journalistic, and, which is designed to promote "popular" judicial action; and (2) a preoccupation with rendering one component in the overall process of constitutional interpretation—such as the framers' intent—into a hypertechnical and possibly exclusive guide to constitutional law. The literature has employed various designations to roughly distinguish these two basic divisions, though numerous minor differences do exist within each group. Some prefer to distinguish between the apologist for and the critics of our new judicial authority by referring to the former as "noninterpretivists" and the latter as "interpretivists;"²² some designating the former as "prescriptive realists" and the latter as proponents of "interpretive judicial review";²³ some calling the one a "functional" approach and the

22. Ely, *supra* note 21.

23. Schrock & Welsh, *supra* note 1 at 1172.

other a "textual" approach.²⁴ Whatever nomenclature one prefers, general features that typify those two opposed positions can be readily identified in the following essays.

Secretary Harris' impressionistic reaction to the Constitution suggests that perpetual unlimited minority vindication is a fundamental, perhaps *the* fundamental, axiom of constitutional law. She shrugs off the consensual problem and the problem of defining constitutional content by emphasizing highly general features that she deems essential to the Constitution; she discerns not so much particular principles as pervasive trends, such as the concern for minority rights. She also alleges that the primary concern of certain important figures in the development of our Constitution was minority rights and that this paramount objective had become a constitutional imperative.²⁵ Another element of her interpretation of the Constitution is the characterization of the meaning of some constitutional provisions as "open-ended"²⁶ or "open-textured"²⁷ as a justification for a broad interpretation of their purpose. These provisions are construed as being so open-ended that they arguably support whatever interpretation the judiciary makes of them.²⁸ In this respect, the provisions are not

24. Perry, *supra* note 3, at 1203, 1206; see also Perry, Book Review, 78 COLUM. L. REV. 684 (1978).

25. Harris, *Address to the Fellows of the American Bar Foundation*, Midyear Meeting in New Orleans (Feb. 1977), reprinted in 30 S.C.L. Rev. 485, 486 (1979).

26. Alexander Bickel is credited with first advancing this feature of the language of the fourteenth amendment as a justification for its recent interpretations. R. BERGER, *supra* note 1, at 99.

27. Ely, *supra* note 21, at 414-15.

28. Referring to the privileges and immunities clause of the fourteenth amendment, Professor Ely observes that "the invitation apparently extended by the clause is frightening." *Id.* at 425. Significantly, this and other portions of the fourteenth amendment are viewed by Professor Berger as having a clear historically determined content. R. BERGER, *supra* note 1, at 3-10. See Ely, *supra* note 21, at 433-35 nn. 128 & 129 for Professor Ely's criticism of Berger's methods of construing the amendment's history and determining the framers' intent. Occasionally a scholar will venture a critique of the reliance on framers' intent as an exclusive tool of constitutional interpretation, but normally the criticisms employed amount to no more than a syllogistic assertion that the Constitution is more important than mere statutes, which are traditionally subject to an "intent of the makers" rule, and consequently the Constitution should not be subject to such a rule. See Alfange, *supra* note 7, in which the author observes that "[i]n view of that critical characteristic, it would not seem that the original intent of the framers of a constitution should be accorded the same controlling effect given the intention of those who enact a statute." *Id.* at 610 (emphasis added). Indeed, one may wonder how inescapable the conclusion really is that a document "intended to endure for ages to come" should be less circumscribed by the meaning that its drafters seriously meant to give it than a statute that the author regards as "ephemeral." *Id.* at 609. How minimization of the intended meaning of utilized words enhances, rather than reduces, the longevity of the document in any but a

made to speak to particular issues, such as reapportionment or segregation, but to general goals, such as “equality” or the like (Secretary Harris opts for general minority protection). Thus the particular issues are made to appear as subcategories of larger objectives and not as important as the objective itself. This would permit judicial abolition of segregation under the banner of the fourteenth amendment, even if previous generations (including the framers) would not have given it that effect. The result can be explained by way of determinist philosophy as the continued unfolding of events compatible with the previously stated—though imperfect and incomplete—attempt to promote some general trend or objective.²⁹ This approach will satisfy some

formalistic sense is not as crystal clear as most such writers assume. It is one weakness of this analysis that comprehensive and sweeping statements about constitutional interpretation are based upon what “would seem” apparent to the analyst, but “would not seem” apparent to many others. Resolution of an issue by an analytical apparatus that is entirely impressionistic and that seeks to re-enforce one side of the debate merely by assuming the answer to the issue *a priori* and yet produces writing of considerable length is quite a tribute to the science of extenuated literary embellishment and composition. Under the rule that good things usually come in pairs, or perhaps bundles, this “analytical” technique is generally accompanied by the realist clichés about the “dead hand” and the passage of time—thought to add some weight to the other *a priori* declarations. This approach attempts to treat constitutional problems as if they involved only semantic issues. For example, in discussing the *Dred Scott* case Alfange remarks:

Even assuming the validity of Chief Justice Taney’s view of the intent of the framers with regard to the word “citizens,” why should the meaning of that word not be allowed to change with the passage of time so that all persons who, in a different generation, are looked upon as citizens can be considered as being included within the scope of the word?

Id. at 113. It is submitted that the “either intent or escape from the dead hand of the past” dialectic misses the real problems in this area. Justice Story, for example, also rejected any literal theory of framers’ intent, see 1 J. STORY, *supra* note 1, at 287-88, and asserted that “[n]othing but the text was adopted by the people.” *Id.* at 288. Yet Story clearly believed that “[a]rguments drawn from impolicy or inconvenience ought here to be of no weight” in constitutional interpretation. *Id.* at 303. Obviously Story had something more in mind than treating constitutional questions as if they were identical to semantic questions, i.e., whether the term “citizen” should be allowed to change with the passage of time. The problems of constitutional interpretation implicate questions of institutional competence and political philosophy that are not captured by a purely semantic analysis. It is certainly possible that the framers’ intent was in fact compatible with these semantic insights and recognized the need for evolving applications of the language of the Constitution. Attempts to work out a system of interpretation that accommodates this intent and the need for limits in judicial authority are more helpful, and more difficult, than this semanticist’s approach to the text. See Ely, *supra* note 21, at 413-18. In a manner similar to Story’s, Ely observes that “the most important datum bearing on what was intended is the constitutional language itself.” *Id.* at 418. Yet, in his analysis, he goes far beyond an equation of constitutional interpretation with semantics. See also R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 131-49 (1977).

29. Harris, *supra* note 25, at 488. “I believe that the theory [of Professor Berger] does not account for the overriding concern of the framers of the Constitution with the

even if the currently mandated results are at odds with or contrary to a previously adopted constitutional provision, because of the rationalization that the context in which the provisions operate changes with time.³⁰ Secretary Harris attempts to align herself with this school of thought by observing that the founding fathers were characteristically unable to transcend the time in which they lived—much as we are—and adduces as proof the curious example of President Washington suffering at the hands of eighteenth century healers, whose techniques would be inconsistent with modern medical methods.³¹ It is always tempting to wonder whether this argument is not totally demolished by puzzling whether we would behave as we do if we were transposed into the eighteenth century, and knew precisely what the founding fathers knew.

Secretary Harris' essay exemplifies the pathological features of one school of thought generally favoring the judicial action or "activism" of recent years: she places great faith in the litigational process to solve complex social problems.³² Her view of constitutional issues emphasizes highly general, subjective, and perhaps speculative themes in constitutional development, such as her perception of a transcendent and overriding trend favoring the vindication of minority positions generally by an active court.³³ Her exegesis of the scope and function of the Constitution is not mired in any historical detail and eschews precise or limited

protection of minorities." She also describes the focus on minority protection as "a precise and unanimous desire of the founding fathers." *Id.* Curiously, Secretary Harris adduces as support for her "general spirit" theory: Alexander Hamilton, who would "brook no possibility of rule by majority fiat," *id.* at 486; James Madison, who saw the "need to form a nation in which the rights of minorities prevailed over any tyrannical social policy the majority might wish to impose," *id.*; and Thomas Jefferson, who "had he been present would have agreed with the need to protect the minority," *id.* Professor Berger takes issue with the accuracy of Secretary Harris' estimate about the primacy of minority protection in the scheme of values of these examples of eighteenth century liberalism, observing that not only did some of them appear to find less problems with the mandate of the "rich and well born" than with the "mass of the people," Berger, *supra* note 6, at 499, but also that some were slaveholders who were anxious to increase the representational basis and hence the political power of the slaveholding section of the country. As Berger remarks, "Madison is hardly the man to cite for protection of the black minority." *Id.*

30. See Miller, *supra* note 11, at 595-97, for some superb examples of presentist rhetoric *cum* constitutional scholarship.

31. Harris, *supra* note 25, at 492.

32. As she observes, "The fact that major social conflicts can be resolved by the legal process is a crucial accomplishment for this nation." *Id.* at 492; Schrock & Welsh, *supra* note 1, at 1151; Holland, *supra* note 1, at 1127.

33. See note 27 *supra*.

rules in favor of general trends or goals. She ignores completely the majoritarian basis for constitutional rules, as is characteristic of a result-oriented perspective that views law as competition for the enforcement of particular policy measures by the sovereign—represented here by the judiciary. Typical of a purely policy- or ends-oriented view that law entails only the vindication of particular policy preferences without regard to theoretical or institutional limitations, she ventures an opinion about the motives of those who question the desirable results achieved by the courts, attributing their reservations to a resentment of minority progress. Additionally, she transposes the consideration of the results of particular judicial decisions into issues of competence and power,³⁴ speaking as if the two were assumedly the same.³⁵

At the other pole from the school of thought followed by Secretary Harris is an interesting minority position, represented by the painfully blunt statements of Professor Raoul Berger concerning what he regards as the novel and constitutionally unjustified actions of the Supreme Court, particularly those under Earl Warren. His controversial *Government by Judiciary: The Transformation of the Fourteenth Amendment*³⁶ provides an interesting example of the same approach that is reflected in Mr. Berger's essay.³⁷ For Professor Berger, the discernable intent of the framers

34. Harris, *supra* note 25, at 489.

35. See Schrock & Welsh, *supra* note 1, at 1150.

36. R. BERGER, *supra* note 1.

37. Interestingly, Professor Berger has characterized the vicissitudes of his own distinguished scholarly career partly in terms of how well the results pointed to by his research suited the goal of a predominantly liberal scholarly community. Referring to his argument in his book, *GOVERNMENT BY JUDICIARY*, *supra* note 1, that "the Court has exercised a power that the Constitution withheld from it," Berger remarks:

Since I question, in that book, whether the Court is empowered to act as an instrument of "revolution," I anticipated that academicians who were enamored of the judicial results—never mind their legitimacy—would vigorously defend the role of the Court. What was unexpected was the denigratory tone of their rebuttals, a tone unworthy of scholarly discourse.

Berger, *Academe v. the Founding Fathers*, 30 NAT'L REV. 468 (1978). The impact that the political dynamics and forces of fashion have had upon the career of previous scholars has been noted in the past, along with mention of the survival of opinions within the scholarly apparatus. See, e.g., Wollan, *Crosskey's Once and Future Constitution*, 5 POL. SCI. REVIEWER 129 (1975) (provides an excellent account of the reception of Crosskey's controversial *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953)). As Wollan notes, much of the reaction to Crosskey's thesis that the United States Supreme Court was actually intended by the framers to be the nation's "supreme juridical head"—a role curiously compatible with the pro-activist scholarship of recent years—was vigorously critical but strangely light on any counter evidence to undermine or challenge the thesis at any but a polemical level. See, e.g., Hart, *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (1954).

of any given constitutional provision governs judicial action and can be modified only by a formal amendment.³⁸ In this way he, superficially at least, solves one of the more perplexing problems of the realists by linking extension of constitutional principles of a definite and limited content to the majoritarian process of ratification.³⁹ The judicial commands are tied to these majority statements and must be justified by them. Professor Berger has almost religious reverence for this Constitution as a guiding document.⁴⁰ His rather narrow and focused approach to giving that document significance for current problems relies upon the will of the majority, as proved by historical evidence, for the content of constitutional rules, including those rules protecting minorities. He relatedly assumes that the Constitution has a limited meaning and is addressed to particular problems.

The Berger and Harris essays have one thing in common—they both fail to articulate a viable judicial decisional technique or method to serve the chosen philosophical positions. Secretary Harris simply substitutes an impressionistic reaction to the Constitution, which interprets these transcendent constitutional themes according to the bias of the observer, for Professor Berger's admittedly insufficient method of settling the constitutional consent issue—namely, the assertion that the framers' intent is a useful, if not foolproof, generally applicable method of keeping faith with the Constitution and democratic government.

But Professor Berger's approach also has serious and obvious limitations. As Professor Ely has correctly observed "constitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open textured,"⁴¹ and in many cases the legislative history or any other evidence of what was "intended" for a currently litigated problem affected by the Constitution has serious shortcomings.⁴² It is consequently impossible

38. See Berger, *supra* note 37, at 468-69.

39. For a more general account of the accommodation of democratic theory within the amendment process, see A. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* (1978).

40. Berger, *supra* note 6, at 495-96.

41. Ely, *supra* note 21, at 413.

42. *Id.* at 433-34 nn. 128 & 129. See also Ely, *Toward A Representation-Reinforcing Mode of Judicial Review*, 37 Md. L. Rev. 451 (1978) (thorough discussion of Ely's theory to accommodate judicial treatment of the more capacious constitutional provisions with the overriding concern for democratic theory, which Ely has acknowledged as the "most serious" problem with untethered or unlimited judicial authority. Ely, *supra* note 21, at 404.). One problem with Professor Ely's approach to this question, however, is that he seems to proceed from an impression from a facial evaluation of the document about the

to rely upon the framers' intent to serve our philosophical preferences for limited government based on democratic principals when the intent is reasonably clear or evident for only some constitutional provisions. If it *really* is not clear, the insistence on its use will merely cause *de facto* judicial discretion to employ the trappings and terminology of interpretation based on "intent."

The two approaches are basically reflections of contrary responses to a much deeper and more fundamental question about our constitutional policy: Does the Constitution guarantee to us the supposed benefits flowing from unlimited experimentation by some supreme policy-making arm of the central government, calculated to make us better off, or contrawise does it protect us from exactly this form of experiment by insuring a permanent severance of legislative, discretionary policy formulation on the one hand and judicial authority on the other? In purely utilitarian terms, which are also the principle touchstones of the "realist" perspective, do we gain or lose from the policy initiatives of a "frankly experimental" judiciary? Naturally for those who count the democratic element of our Constitution in the calculation of gain and loss, perhaps even above other empirically or impressionistically identified "results," the answer is clear at least at the philosophical level.⁴³ The basic problem remains, however, that this great issue of judicial authority is still one of the most serious questions relating to our Constitution yet it receives very little analytically refined discussion between these extremes. As a bottom line, Professor Ely's observations suggest at least some accommodation of practical limitations or judicial decisional techniques in constitutional law on the one hand, and our philosophical preferences on the other.

If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to

vagueness or "open-textured" quality of particular constitutional amendments, and then does little to formulate solutions for the problems of meaning that plague the subject, other than to relate his own plausible but personal reaction to the language of the Constitution. For a similar criticism of his handling of the meaning of the Rules of Decision Act, see R. BRIDWELL & R. WHITTEN, *supra* note 1, at 178 n.94, and generally, *id.* at 78-95. While one may applaud Professor Ely's serious effort to work out a problem most simply ignore, we should also perhaps be careful to avoid extrapolating plausible, internally consistent theories from the face of the Constitution without more, lest the document become the object of a tradition more befitting the civilian than the analyst of our fundamental charter and the political heritage it symbolizes.

43. Ely, *supra* note 21, at 406.

representative democracy, responsible commentators would have to conclude, whatever the framers may have been assuming, that the courts should stay away from them.⁴⁴

Because the record of the Supreme Court in recent times gives very little cause for optimism, the real question remains whether or not this "principled approach" can be developed. Lastly, scholars should give serious consideration to whether their efforts ought to be directed at grappling with these important issues of political philosophy rather than simply speaking out, either for or against, the results of judicial activism in American constitutional law.

44. *Id.* at 448. See also Ely, *supra* note 42.

