

# To Secure These Rights: Rights, Democracy, and Judicial Review in the Anglo-American Constitutional Heritage

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Ever since the United States Supreme Court shocked the nation with its decision in *Brown v. Board of Education*,<sup>1</sup> the greatest judicial intrusion into policymaking since its obstruction of New Deal legislation in the early 1930s, constitutional scholars have been trying to understand—and implicitly to prescribe—the appropriate role of judicial review in a democratic political system. From the beginning there were those who insisted that the Justices should restrict themselves to overturning only the most palpable violations of the written fundamental law.<sup>2</sup> But most analysts, more sympathetic to judicial activism, tried to find a principled basis for that activism—something that would permit its continuation but would restrain Justices from simply imposing their personal social values on the country in the fashion of a super-legislature.<sup>3</sup> However, as the Warren Court's activism spilled into ever more areas, as it more and more readily found that long-existing legal procedures violated basic constitutional norms, as it more often imposed positive duties upon public officials rather than merely negating unconstitutional behavior, the problem of reconciling judicial review with democratic policymaking became the major focus of attention.<sup>4</sup> The Burger Court's curious blend of activism and restraint, which looks ever more like the mere reflection of the varying social values of its Justices, seems to have exacerbated the problem. For the past few years the scholarly debate over the proper role of the judiciary in a democracy has reached its greatest intensity since the 1930s.<sup>5</sup>

Both John Hart Ely's *Democracy and Distrust* and Jesse H. Choper's *Judicial Review and the National Political Process* address this problem.

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1. 347 U.S. 483 (1954).

2. Call, *Judicial Review vs. Judicial Supremacy*, 62 DICK. L. REV. 71 (1957); Catterall, *Judicial Self-Restraint: The Obligation of the Judiciary*, 42 A.B.A.J. 829 (1956); Forrester, *The Supreme Court and the Rule of Law*, 4 SO. TEX. L.J. 107 (1959); Pittman, "The Law of the Land" Yesterday, Today and Tomorrow, 19 GA. B.J. 309 (1957). For a moderate but clear call for judicial restraint, see L. HAND, *THE BILL OF RIGHTS* (1958).

3. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); Henken, *Some Reflections on Current Constitutional Controversy*, in *THE CONSTITUTION RECONSIDERED* (C. Read ed. 1968); Kauper, *The Supreme Court and the Rule of Law*, 59 MICH. L. REV. 531 (1961); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

4. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 2 (1971); Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Freund, *The Judicial Process in Civil Liberties Cases*, 1975 ILL. L.F. 493; Goodpaster, *Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973); Rehnquist, *Observation—The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977).

5. R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1978-79); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191 (1978).

Both urge limitations on the judicial role and broader reliance on the democratic process to protect "rights" (the reason for the quotation marks will become clear below, I hope). But despite these similarities, it is hard to imagine two more disparate prescriptions for how to do it.

Professor Choper argues that judicial review should be limited to three areas: 1) protection of those individual rights the Constitution puts beyond infringement by any branch of any level of government; 2) protection of national jurisdiction against state encroachments; 3) protection of judicial authority against usurpation or limitation by either other branch of the national government. The two other traditional areas of judicial activity—protection of state rights from national government encroachment and protection of the jurisdiction of the executive and legislative branches of the national government, each against the other—should be eliminated, he insists.

For Choper, the key determinant of whether the judiciary should review the constitutionality of any category of government activity is the effectiveness of the political process in protecting rights when the relevant decisions were made. The states and both the legislative and executive branches of the national government have ample power to protect their rights within the political system, he argues; minorities and the national judiciary do not.

Although Choper clearly is concerned with the relation of judicial review to democracy, in his prescription he cheerfully ignores the usual contours of the debate over the judicial role, both activism versus restraint and what Ely calls "interpretivism versus noninterpretivism." (Ely defines "interpretivism" to be the conviction that judges may enforce only those constitutional requirements that are fairly drawn from the text of the Constitution itself. "Noninterpretivism" permits judges to range beyond the words of the Constitution to apply fundamental values imputed to such open-ended constitutional provisions as the due process of law or cruel and unusual punishment clauses.<sup>6</sup>) Those who complain of judicial infringement upon democracy generally complain that the Justices impose their own values under the pretense of enforcing constitutional limitations. None that I know of before Professor Choper has suggested that the Supreme Court stop enforcing *clear* constitutional mandates simply because the parties involved ought to be able to protect themselves through the normal political process. Usually this is the test that those who urge judicial restraint suggest when the constitutional mandate is *unclear*.<sup>7</sup> In fact, judicial acceptance of Professor Choper's proposals would amount to the most revolutionary change in patterns of American government ever to have been imposed by the Court. For the Supreme Court to reverse a century-long tradition of judicial function that has been

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6. J. ELY, *DEMOCRACY AND DISTRUST I* (1980) [hereinafter cited as ELY].

7. *Id.*; A. BICKEL, *THE MORALITY OF CONSENT* 29-30 (1975); Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A. L. REV. 467 (1967); Yarbrough, *Justices Black and Douglas: The Judicial Function and the Scope of Constitutional Liberties*, 1973 DUKE L.J. 441, 451-52; Rehnquist, *Observation—The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977).

acquiesced in by the other branches of government and presumably by the people who elect them would be “noninterpretivism” on a grand scale—not only a reading of judges’ values into constitutional texts where they may not belong, but a refusal to apply the plain words of the Constitution itself.

Professor Ely’s work falls into the more traditional framework. Ely has no quarrel with judicial enforcement of clear constitutional mandates. In fact, when the text of the Constitution clearly imposes limits upon government he favors active judicial enforcement of them, demonstrating the truth of his assertion that “interpretivism” and judicial restraint are not synonymous.<sup>8</sup> He may not be satisfied that enforcing the constitutionally enshrined will of generations long dead comports very well with true democracy,<sup>9</sup> but at least the discretion of judges is limited to a source of substantive values other than their own personal feelings. It is not too likely that Professor Ely will find much positive to say about Professor Choper’s proposal to provide judges with a *carte blanche* when the funds of clear constitutional mandates upon which to draw are most scarce and to close the account when the funds are most plentiful.

Professor Ely urges full enforcement of constitutional provisions mandating clear constitutional imperatives. But he also urges judges to adopt what he calls a non-clause-bound interpretivism. That is, when the Constitution seems to require the protection of rights not clearly defined in the text itself, as in the due process clause, judges must range beyond the document. In an incisive criticism of the traditional process by which jurists seek to define fundamental rights, however, Ely insists all efforts to do so are suspect. There simply is not a principled way to determine what rights are inherently fundamental; all efforts turn out to require judges to impose their own individual preferences. Therefore, when the language of the Constitution itself seems to require judges to go beyond the words of the document, Ely urges judges to interpret this in a way that reinforces the democratic spirit of the Constitution and American government. The elastic clauses of the Constitution should be interpreted as a mandate to open the political process to all groups.

Ely recognizes, however, that the mere fact that minorities may participate in the political process is not itself a guarantee against unfair discrimination. When minorities are so isolated and unpopular that they cannot forge with other groups the sort of alliances that underlie the give-and-take of American politics, the technical right of political participation cannot protect their rights. To Ely, the primary question is whether government acts that work to the disadvantage of minorities work to the disadvantage of more powerful segments of society in the same way. If they do not, he argues, the judiciary should scrutinize them carefully. If they do, judges should not void them unless they can fairly be held to violate a well-defined constitutional

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8. ELY, *supra* note 6, at n.1.

9. *Id.* at 11–12.

provision. This Ely calls a "participation-oriented, representation-reinforcing" approach to judicial review.<sup>10</sup>

Ely never makes explicit what the effect of his approach would be on present constitutional doctrines. But logic and hints scattered through his treatise suggest it would expand rather than contract the judicial role. Although Professor Ely does not make very clear just which clauses of the Constitution would be brought into play by specific elements of his theory, the logic of his argument suggests that the due process clause of the fourteenth amendment would give the Court the same latitude that it now has to monitor police and legal procedures; the privileges and immunities clause would provide authority to see to it that the political process remains open, guarantee free speech, press, open legislative proceedings, and the like; and the equal protection clause would authorize the courts to equalize the political process à la *Baker v. Carr*<sup>11</sup> and to scrutinize those actions that seem to affect isolated minorities negatively without similarly affecting the rest of society. (Despite early allusion to the open-ended quality of the ninth amendment, it is not clear when Ely would have it come into play.) Although some present judicially imposed restrictions on states—such as those in the first amendment's religion clauses—could not be enforced directly under Ely's formulation, government acts that worked to the disadvantage of religious minorities without affecting other sects and denominations in the same way would come under scrutiny under the equal protection clause. Government intrusions into other areas that the Court has held off-limits in recent years—most notably the "privacy rights" protected in *Griswold v. Connecticut*<sup>12</sup> and *Roe v. Wade*<sup>13</sup> and the freedom of the press rights involved in pornography cases—presumably would no longer be subject to judicial review unless they somehow discriminated against isolated minorities.<sup>14</sup>

As a legal and constitutional historian, I feel a bit reluctant to jump into the philosophical debate these books are bound to stimulate on the nature of constitutionalism and the role of judicial review in a democratic society. I think that may safely be left to my colleagues in this Symposium. I am struck, however, by how both Professor Ely's and Professor Choper's conception of rights fits in with what historians perceive to have been the fundamental theme of American development over the past century—what has been called "the organizational synthesis."<sup>15</sup> This understanding of American history posits that changes in the American economic system between the Civil War

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10. *Id.* at 87.

11. 369 U.S. 186 (1962).

12. 381 U.S. 479 (1965).

13. 410 U.S. 113 (1973).

14. ELY, *supra* note 6, at 164-70.

15. See S. HAYS, *THE RESPONSE TO INDUSTRIALISM, 1885-1914* (1957); R. WIEBE, *THE SEARCH FOR ORDER, 1877-1914* (1967); Cuff, *American Historians and the 'Organizational Factor'*, 4 *CANADIAN REV. OF AM. STUD.* 19 (1973); Golombos, *The Emerging Organizational Synthesis in Modern American History*, 44 *BUS. HIST. REV.* 279 (1970).

and the New Deal led to so complex a society, with so many centers of immense private power, that individuals no longer could cope with it as individuals. Therefore, people with similar interests organized in order to compete more successfully. This took place in all areas of American life—business, labor, agriculture, the professions, academia, and others. The Progressive and New Deal eras witnessed the adjustment of government to the new social and economic organization, with the establishment of policy-making and administrative machinery geared to servicing organized interest groups and providing a forum for them to battle over policy and negotiate compromise. This created what historians have called “the broker state,”<sup>16</sup> so responsive to organized interest groups rather than electoral pressure that it has fostered the development of special interest groups in almost every area in which government might have an impact; for example, among exponents of equal rights for various minorities, equal treatment for women, benefits for the elderly, among environmentalists, welfare recipients, and even among those simply engaged in the “Common Cause.” Government through the “broker state” implies that policy decisions are made through conflict and negotiation among groups with varying interests. The rights of *individuals*, separate from their identification with one group or another, are anomalous in this system. Perhaps that is why their protection has more and more been delegated to the judiciary.

Professor Ely raises this understanding to a constitutional principle. For him, the central value of the American political system is representation in the process by which decisions are made. If there is any fundamental right implicit in American government, it is this right to participate in it effectively. His “representation-reinforcing” mode of constitutional review is designed to open the process to all groups and to provide close scrutiny of government action only when the system seems to have failed. Throughout his treatise he analyzes government action in terms of its effect on minority groups, never individuals. In Professor Ely’s construct, individual rights hardly have a place. So long as all groups are equally denied nonpolitical rights (and apparently so long as the actual enforcement procedure comports with “due process”), the judiciary must sustain the deprivation.

On the surface, Professor Choper seems more sensitive to the notion of individual rights. His first proposition is what he calls his “Individual Rights Proposal”—that the fundamental duty of the Supreme Court be to protect those rights that individuals have against any government action. Nonetheless, he too seems most comfortable when he assesses those rights in terms of “suspect classifications” of people subject to government sanctions, a notion

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16. See G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966); T. LOWI, *THE END OF LIBERALISM* (1969); Hawley, *The New Deal and Business*, in *THE NEW DEAL: THE NATIONAL LEVEL* 50 (Braeman ed. 1975); Chandler & Golombos, *The Development of Large-Scale Economic Organizations in Modern America*, 30 J. ECON. HIST. 201 (1970); Hawley, *The Discovery and Study of Corporate Liberalism*, 52 BUS. HIST. REV. 309 (1978).

similar to Professor Ely's.<sup>17</sup> More important for understanding the limitations in Professor Choper's conception of rights are his justifications for dropping judicial review of cases involving state rights and separation of powers between the executive and legislative branches of the national government. Those justifications suggest a confusion between rights and interests that undermines his Individual Rights Proposal.

Professor Choper provides three main justifications for his "Federalism Proposal" to end judicial protection of state rights against national encroachment. First, he points out that the trend of judicial decisions since the New Deal has been to sustain national power anyway. But more important, Professor Choper insists, state interests are adequately—more than adequately, he hints—protected in national forums by the ordinary democratic process. And finally he argues that disputes over *which* level of government has the authority to affect individuals' interests are of far less importance than those in which individuals challenge the right of *any* level of government to take the offending action; the former simply should not deflect the courts from their primary duty of adjudging the latter.

For a historian, the fallacy of the first justification is patent. It presumes that a trend which lasted since the 1930s will continue forever. History shows that such reliance on the recent past to predict the long-term future is misplaced. Judicial interpretation of the federal system has always been subject to ebb and flow. The nationalism of the Marshall Court was followed by the dual federalism of the Taney, Waite, and Fuller Courts;<sup>18</sup> the nationalistic Court of the Progressive era was followed by a Court, less committed to expansive national power, that emasculated the legislation of the early New Deal;<sup>19</sup> and the intensely nationalistic post-New Deal Court may now be giving way to one with a renewed concern for state jurisdiction.<sup>20</sup> The gradual trend towards nationalism reflected the fact that society changed from 1789 to

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17. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 70-79 (1980) [hereinafter cited as CHOPER].

18. See E. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* (1936); F. FRANKFURTER, *THE COMMERCE POWER UNDER MARSHALL, TANEY AND WAITE* (1937); A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 257-83, 322-32 (5th ed. 1976); Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39.

19. See A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 522-79, 649-55, 697-709 (5th ed. 1976); A. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 57-60, 88-99 (1958); P. MURPHY, *THE CONSTITUTION IN CRISIS* TIMES, 1915-1967 18-21, 46-47, 50-54, 128-51 (1972).

20. See Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 883 (1946); A. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 109-16 (1958); P. MURPHY, *THE CONSTITUTION IN CRISIS* TIMES, 1915-1917 153-69 (1972); C. PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947* (1948); Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950). For signs of renewed concern for protection of state jurisdiction, see *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), and *Juidice v. Vail*, 430 U.S. 327 (1977), which stress the duty of federal courts to abstain from interfering with state judicial opinions until they have run their course. At the same time the Court has been more reluctant than in the past to impose federal court procedures and standards upon state courts. *Williams v. Florida*, 399 U.S. 78 (1970); *Apadoca v. Oregon*, 406 U.S. 404 (1972). In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court implicitly has revived some of the principles of classic "dual federalism." Compare it to *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870).

the 1930s as local institutions became national. It is too much to presume that this shift is irreversible. Changes in technology may make for growth in localism. A conviction that national decisions unfairly jeopardize the rights of local people may slowly work a change in our institutions. There are presently growing complaints about national nuclear waste disposal policies that put the entire burden upon one or two states,<sup>21</sup> the "sagebrush rebellion" of the western mountain states,<sup>22</sup> western complaints about national wilderness policy,<sup>23</sup> and disputes over national permissiveness in off-shore oil exploration.<sup>24</sup> What if these concerns culminated in constitutional amendments designed to limit national government action in these areas? Professor Choper's Federalism Proposal would leave no sanction for such amendments, effectively depriving Americans of a traditional mode of allocating government powers in a manner beyond the power of Congress to alter. Such a sanction is unnecessary, Professor Choper insists, because state rights are so well protected in both Congress and the executive branch. But this illustrates his confusion of rights with interests.

It is plain from Professor Choper's discussion of how securely "state rights" are protected in the legislative process and in the executive administration of the government that he really recognizes no state *rights*, but only state *interests*. All of his examples of the way in which state "rights" are protected in the political process relate to state authority in the aggregate. The national government cannot take action unless the majority of representatives from the states concur, Professor Choper points out. These representatives are highly susceptible to pressure from state officials and special interest groups. The minority is represented and has had ample opportunity to resist. But this misconstrues the nature of a "right." The essence of a "right" is that it provides an immunity against action whether or not you are represented in the process that leads to its infringement. An *interest* may be weighed against other interests in an appropriate forum. A right is what Ronald Dworkin calls a "trump."<sup>25</sup> It overrides all other interests, and it does not matter how small the minority that possesses it. The fact that the interests of state constituencies are carefully considered by congressmen in framing legislation will not protect a single state from the decision of representatives of all the others, for example, to use it as a nuclear dumping ground or to make a large part of it a

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21. Carter, *Nuclear Wastes*, 200 *SCIENCE* 1135 (1978); Carter, *Trouble Even in New Mexico for Nuclear Waste Disposal*, 199 *SCIENCE* 1050 (1978); Jakimo & Bupp, *Nuclear Waste Disposal: Not in My Backyard*, *TECH. REV.*, March, 1978, at 64.

22. Beck & Reese, *Sagebrush Revolt: Controversy Over Federal Land Ownership*, *NEWSWEEK*, Sept. 17, 1979, at 38.

23. Fineberg, *The Alaska Land Question: Anger on the Last Frontier*, 228 *NATION* 456 (1979); Schiefelbein, *Alaska: The Great Land War*, *SATURDAY REV.*, Feb. 17, 1979, at 14; Shaine, *Alaska Land: A National Issue*, *CURRENT*, April, 1978, at 3; *Alaska Lands Controversy*, 57 *CONG. DIG.* 289 (1978).

24. *N.Y. Times*, Sept. 8, 1976, at 40 col. 1; *Approving the Sale of 1.25 Million Acres of Oil Leases Near the Channel Islands*, *NAT. PARKS AND CONSERVATION*, Jan., 1976, at 25.

25. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1976).

national park for the benefit of the rest of us. Of course, as the Constitution now stands the interstate commerce power and the national government's power to dispose of its own property gives Congress ample power to do both. But if the Constitution were amended to limit that power, it is hard to see how mere representation in Congress would vitiate a state's right to be exempt from such an imposition.

Moreover, I think Professor Choper's differentiation between "state rights" and "individual rights" will not bear close scrutiny. "State rights" are far more than those the state has in its corporate capacity. By limiting the national government to certain areas of jurisdiction the Framers gave individual Americans an important right: to have certain decisions that affect them made in a forum in which the interests to be weighed and the relative power of interested parties would be different than in the national forum. The consequences can be crucial in the most practical way. Few will need to be reminded of the practical consequences for southern blacks of leaving questions of racial equality to be decided in state legislatures rather than the national Congress. Legislation to regulate child labor, hopelessly stalled in southern state legislatures during the Progressive era, sailed through Congress once the decision was made on the merits rather than the constitutional question of state rights.<sup>26</sup> I trust few Ohioans will challenge me if I suggest that efforts to restrict the burning of high-sulfur coal would find a different reception on the floor of the Ohio state legislature than they have in the national legislature.

Now, if one believes that judges should be protecting some set of human rights inherent in natural law, most of the freedoms enumerated in the Bill of Rights are likelier candidates for such enforcement than the right to have the state legislature rather than Congress decide some aspect of public policy. But if one believes that Americans' rights are defined by their written Constitution—a notion which even the most dedicated judicial activists concede<sup>27</sup>—then I do not see how the right to have decisions made in the forum designated by the Constitution can be converted into an interest to be brokered away by a majority of the representatives in Congress.

The problem with Professor Choper's proposal that the judiciary refuse to decide separation of powers cases is identical. The separation of powers provided for in the Constitution guarantees individuals that certain kinds of decisions will be made in certain forums. Once again that right has important practical consequences. Professor Choper argues that because the owners of

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26. E. DAVISON, *CHILD LABOR LEGISLATION IN THE SOUTHERN TEXTILE STATES* (1939); W. TRATTNER, *CRUSADE FOR CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA* 79-93, 98-105, 119-32 (1970).

27. See Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 705 (1975). The Justices of the American Supreme Court debated whether they could measure laws against "fundamental justice," rather than against specific constitutional prohibitions, quite early in their career. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). As Edward S. Corwin pointed out over 65 years ago, those who insisted that only constitutional provisions could be enforced against legislative acts won the war of rhetoric. Their opponents won the war of reality. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 *MICH. L. REV.* 247, 250 (1914).



the struck steel mills President Truman seized in 1952 were liable to having them seized by a congressional law anyway, the Supreme Court should not have considered whether Truman's acts exceeded his powers. No fundamental right of the mill owners was at stake, he insists. The Court ought only to protect those individual rights secured against all government; if Congress believed the President had usurped its authority, it had ample power to protect its jurisdiction through legislation (or, presumably, impeachment) and did not require the Court's solicitude.<sup>28</sup> But is it true that no right of the mill owners was infringed if Truman exceeded his constitutional authority? The conservative Congress of 1950 was far more sympathetic to business interests than the labor-beholden Truman. It is not unreasonable to suppose that the mill owners could have averted takeover legislation in Congress far more easily than they could forestall similar action by the President. If the Framers of the Constitution designated Congress to be the forum in which such decisions were made, then it seems plain that the owners had a right to have them decided there, where the results were likely to have been different. The fact that, according to Professor Choper, Congress could by various means have forced Truman to rescind his order does not obviate the deprivation. As Choper recognizes at other places,<sup>29</sup> the balance of forces and institutional structure of Congress make it much easier to obstruct action than to secure it.

Ultimately, Professor Choper's confusion of "rights" with "interests" in the areas of federalism and separation of powers must undermine his proposal to have the Supreme Court concentrate on defending individual liberties. For if the ability of states to defend their interests in Congress justifies judicial abstention from cases involving state rights, if the President's and Congress' power to defend their interests each against the other justifies judicial abstention in separation of powers cases, then it is hard to see how Choper can resist Professor Ely's conclusion that the Court should abstain from individual liberties cases when the parties have had similar opportunities fairly to protect themselves in the decisionmaking process.

I find Professor Ely's outline of a "representation-reinforcing" mode of judicial review far less subject to criticism of its logic. At the very least it provides a consistent approach to enforcing the fourteenth amendment's equal protection clause, something that it seems to me has eluded jurists until now.<sup>30</sup> And if one accepts Professor Ely's premise that "majori-

28. CHOPER, *supra* note 17, at 316-26 (in the light of 281-305).

29. *Id.* at 185.

30. It is simple to state the problem: since nearly all regulation classifies the population in some way, subjecting some portion of it to rules not applicable to others, how can one enforce a rule requiring all persons to be treated equally? The solution is harder to find. To require only that individuals in the same class be treated equally negates the obvious intent of the requirement, since it would permit discrimination against black people, for example, so long as all individual blacks were treated alike. This interpretation would permit discrimination against the precise group the fourteenth amendment was designed to protect. On the other hand, nowhere does the language of the amendment suggest that only racial categorization is prohibited by the equal protection clause. So how does one decide what kinds of categorization are illicit? If one requires only that classifications be "reasonable," then judges must either abstain or usurp the legislative function, since it is legislators who decide the reasonability of proposed legislation in our system. In recent years the solution has been to define

tarian democracy is . . . the core of our entire system,"<sup>31</sup> then his analysis of the Bill of Rights, in which he interprets many of its provisions into "harbinger[s] of the Equal Protection Clauses concerned with avoiding indefensible inequities in treatment,"<sup>32</sup> is compelling.

As I have already noted, Professor Ely does not clearly spell out just how far he thinks his assessment ought to be taken. For example, he seems to exempt "procedural" guarantees from his representation-reinforcement test. Judges are to determine what process is due by weighing the social costs of providing individuals with effective hearings.<sup>33</sup> This approach leaves enough latitude for judicial activism to have earned a trenchant rebuke from that crusty opponent of "government by judiciary," Raoul Berger.<sup>34</sup> But Professor Ely's analysis could well be utilized by those more rigidly committed to judicial restraint than he. The notion that so long as the democratic political process is working properly, courts should not interfere with resulting substantive judgments militates against judicial review of the substance of laws in any case in which reasonable men might disagree about their constitutionality.

But is the "core of our system," the fundamental American value, democracy? To demonstrate that it is, Professor Ely turns to our historical tradition and appeals to a present consensus, both of which he discounts in other places as bases for discovering fundamental values,<sup>35</sup> and to a close reading of the language of the Constitution and its amendments, which is persuasive primarily in light of his account of their history. I think that a brief recapitulation of the origins of American commitment to democracy will clarify its place in our hierarchy of values.

The heritage of the American democratic tradition can be traced as far back as the great English constitutional crises of the seventeenth century and even beyond, to the dimly perceived origins of the English conviction that there were limits to what their kings could rightfully do. A leading scholar of English constitutional thought in the 1400s has expressed this understanding:

The king has the right to command in his ordinances, his writs, his letters, and his words, and his subjects ought to obey his commands, so long as they are not incompatible with the true ends of kingship. He has the right to be provided with sufficient material resources for the due discharge of that great and all-embracing duty of pursuing Justice, but that right does not mean that he may take what is not his own, for that would be to encroach on the right of others, which it is his duty to protect; the rights of others may be encroached on only with their free consent . . . .<sup>36</sup>

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certain classifications as "suspect" and therefore requiring more than mere "reasonability" to justify them. But according to what consistent principle can "suspect classifications" be defined? See ELY, *supra* note 6, at 145-56; Loewy, *A Different and More Viable Theory of Equal Protection*, 57 N.C. L. REV. 1 (1978); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

31. ELY, *supra* note 6, at 7.

32. *Id.* at 97.

33. *Id.* at 18-21.

34. Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1978).

35. Compare ELY, *supra* note 6, at 5-9, with 60-69 and 77-87.

36. S. CHRIMES, *ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY* 343 (1966).

By the 1300s the king began to secure that consent by sending writs to the sheriffs of the counties in England, instructing them to arrange the selection in every county and in every town of representatives to a great "speaking," or "parleying"—or "parliament." The king instructed in these writs that those representatives "are to have full and sufficient power for themselves and their respective communities to do and consent to those things which in our parliament shall be ordained . . . ."<sup>37</sup> By the 1300s it was agreed that consent to taxation was essential. But those rights that could not be infringed without the consent of the subjects were often held to mean more than the right to property alone. Claims of this sort expanded and contracted in the course of pre-seventeenth century English history. In the 1400s, a high-water mark of limited-monarchy thinking in England, subjects were even conceived to have a right in existing laws, so that they could not be changed except by the consent of the people, given by representatives in Parliament.<sup>38</sup>

Such broad claims contracted again during the reign of the Tudors in the 1500s, but the idea that the subject had liberties upon which the king could not rightfully encroach without consent through representatives in Parliament was held by all Englishmen when the first Stuart, James I, came to the throne in 1603.<sup>39</sup> From that year until 1688 there were a series of clashes between Parliament and the Stuart kings, precipitated when members of Parliament began to refuse to consent to the imposition of taxes unless the King modified the policies adopted in administering the government. This the Stuarts interpreted as an infringement on the royal prerogative, especially when the policies in question involved religion, foreign policy, the choice of government ministers, and the right of determining the line of succession to the throne itself. To defend their authority the Stuarts tried to undermine Parliament's power over taxation, collecting levies without parliamentary consent under various legal pretexts and at one point even accepting secret financial support from England's arch-enemy, the King of France. Parliament in turn perceived this and the Stuarts' pro-Spanish, pro-French foreign policies as attacks on English liberty. The consequence was two revolutions. The first was bloody and ultimately unsuccessful. The second was bloodless and a success, driving King James II out of England, to be replaced at the invitation of a "convention" of the people by William and Mary.<sup>40</sup>

37. Quoted in G. HASKINS, *THE GROWTH OF ENGLISH REPRESENTATIVE GOVERNMENT* 6-7 (1948). By the 1300s it was agreed that consent to taxation was essential. It was not yet believed that it could be secured only in a parliament. Cf. G. SAYLES, *THE KING'S PARLIAMENT OF ENGLAND* 90-91 (1974).

38. See S. CHRIMES, *ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY* 59-61 (1966); G. HASKINS, *THE GROWTH OF ENGLISH REPRESENTATIVE GOVERNMENT* 21-44, 57-62, 76-81 (1948); Hinton, *English Constitutional Doctrines from the Fifteenth Century to the Seventeenth*, 75 *ENG. HIST. REV.* 410 (1960); McIlwain, *The English Common Law, Barrier Against Absolutism*, 49 *AM. HIST. REV.* 23 (1943).

39. M. JUDSON, *THE CRISIS OF THE CONSTITUTION: AN ESSAY ON CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND, 1603-1645* 34-43 (1949); J. KENYON, *STUART ENGLAND* 37-41 (1978).

40. See J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 48-173 (1956); M. JUDSON, *THE CRISIS OF THE CONSTITUTION: AN ESSAY ON CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND, 1603-1645* (1949); J. KENYON, *STUART ENGLAND* 13-267 (1978); B. LANDON, *THE TRIUMPH OF THE LAWYERS: THEIR ROLE IN ENGLISH POLITICS, 1678-1689* (1970); C. ROBERTS, *THE GROWTH OF RESPONSIBLE GOVERNMENT IN STUART ENGLAND* 48-173 (1966); J. TANNER, *ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY, 1603-1689* (1957).

To justify this "Glorious Revolution," the "Whigs" who led it raised the old English tradition that certain liberties could not be infringed without consent to the level of natural right. John Locke articulated their principles in his *Second Treatise of Government*.<sup>41</sup> Before men join together in society, they live in "a state of nature," in which no man has the right to deprive another man of his "estate," Locke wrote. Men form societies and delegate to a "Supreme Legislative" the right to govern them in order to better preserve those estates. But the Supreme Legislative gains no right to deprive individual members of the society of their property.

For it being but the joint power of every Member of Society given up to that Person or Assembly which is Legislator, it can be no more than those persons had in a State of Nature. . . . For no Body can transfer to another more power than he has in himself.<sup>42</sup>

Thus, "The *Supream Power cannot take* from any Man any Part of his *Property* without his own consent."<sup>43</sup> If a government violated these restrictions, it would become a destroyer rather than a protector of peoples' estates, thus dissolving the compact by which the society was formed. That would return its members to a state of nature, in which they could form a new society and vest the legislative power somewhere else.<sup>44</sup>

The consequence of this great constitutional struggle was the emergence of Parliament as the single most powerful institution of the English government. The astute William and Mary and the Hanoverian monarchs who succeeded them determined to rule through it rather than despite it. This they did by making certain that their ministers could always command a majority of the votes in the body.<sup>45</sup> Possessed of such a majority, eighteenth century English monarchs were tolerant of the exaltation of the place of Parliament in English constitutional theory. Since Parliament was the institutional mechanism through which the English people consented to acts that otherwise would be infringements of their liberties, by definition there could be no limitation upon the laws passed with its approval. By the time Blackstone undertook his *Commentaries on the Laws of England* in the mid-1700s, Englishmen recognized Parliament as the locus of ultimate legislative sovereignty in their realm.<sup>46</sup>

Thus the English arrived at what we can recognize as a system of representative government. But the motivating force had never been a commitment

41. J. LOCKE, *TWO TREATISES OF GOVERNMENT* (1698) (originally published 1690). For the relation of Locke to Whig thought and Whig leaders, see P. LASLETT, *JOHN LOCKE: TWO TREATISES OF GOVERNMENT* 16-66 (1963); J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 162-68 (1956).

42. J. LOCKE, *TWO TREATISES OF GOVERNMENT* 135 (1698).

43. *Id.* at 138.

44. For the general discussion, see *id.* at 4-15, 77-142, 199-243.

45. The classic study of how they did this is L. NAMIER, *THE STRUCTURE OF ENGLISH POLITICS AT THE ACCESSION OF GEORGE III* (1929).

46. W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765). See J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 188-91 (1956); C. MCILWAIN, *CONSTITUTIONALISM AND THE CHANGING WORLD* 63-64 (1939).

to democracy nor even to representative government itself. Parliament had been committed to a single goal: preservation of liberty. The essence of that liberty had been the requirement that the monarch secure consent for acts that deprived subjects of "estates." Over the eighty-five years' struggle, the opponents of "Stuart tyranny" had been driven to conclude that only through self-government could liberty be preserved.<sup>47</sup> The distance between this and belief in democracy is manifest in the dismay with which the English gentry who dominated Parliament contemplated the proposals of a handful of radical Whigs and alienated Tories, who in the eighteenth century suggested that a King-corrupted Parliament, in which whole cities were unrepresented and for which only a tiny fraction of the people voted, could hardly give consent for the entire people. These so-called Commonwealthmen urged that Parliament be made truly representative by reforming the apportionment of seats, requiring that members live in the districts they represented, holding frequent elections, and democratizing the franchise.<sup>48</sup> To these criticisms and propositions, orthodox Whigs responded with the theory of "virtual representation." All Englishmen, whether they voted or not, were represented in the English Parliament, they insisted, because honorable and patriotic legislators carefully considered the welfare of the whole realm when they determined policy.<sup>49</sup>

Like all Englishmen, Americans inherited the belief that they could be deprived of rights only by consent. Just as in England, that conviction had led to representative government in the American colonies. But the heart of what we call government by the consent of the governed remained protection of subjects' "estates" from arbitrary (that is, nonconsensual) infringement. Therefore, when Parliament in 1763 enacted the first element of what was probably to be a systematic program of taxation, Americans perceived it to be as much a violation of their fundamental rights as the Stuarts' effort to levy taxes without parliamentary consent had been over a century earlier. No dissertation on "virtual representation" could convince them that members of Parliament in England could legitimately consent to infringement of American liberties. "Virtual representation" made sense only if the actual

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47. On the fundamentally conservative purposes of Parliament when the struggle began, see J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 55 (1956); M. JUDSON, *THE CRISIS OF THE CONSTITUTION: AN ESSAY ON CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND, 1603-1645* 17-106 (1949); J. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 36-55 (1957).

48. See B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 34-54 (1967); C. BONWICK, *ENGLISH RADICALS AND THE AMERICAN REVOLUTION* 3-52 (1977); C. ROBBINS, *THE EIGHTEENTH CENTURY COMMONWEALTHMAN* (1959); Pocock, *Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century*, 22 *WILLIAM & MARY Q.* 22 (1965).

49. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 163-64 (1967). The concept of "virtual representation" grew out of a long tradition of considering Parliament to be an almost mystical representation of the whole realm rather than merely an aggregation of constituencies' representatives. See S. CHRIMES, *ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY* 131 (1966); M. JUDSON, *THE CRISIS OF THE CONSTITUTION: AN ESSAY ON CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND, 1603-1645* 274-310 (1949); J. KENYON, *STUART ENGLAND* 35-36 (1978).

representatives shared the interests, experiences, and attitudes of those who had no voice in selecting them, and it was plain to Americans that no such sympathy did or could exist.<sup>50</sup> Throughout the conflict, in pamphlet, legislative debate, and resolution, Americans reiterated that basic theme: "The supreme power cannot justly take from any man, any part of his property without his consent, in person or by his Representative."<sup>51</sup>

Professor Ely recognizes that controversy over representation played a central role in precipitating the Revolution. But I think he is mistaken when he writes that "input into the process by which they were governed" and frustration at unequal treatment were all there was to it.<sup>52</sup> His argument that they demanded representation because they believed that "justice and happiness are best assured not by trying to define them for all time, but rather by attending to the governmental processes by which their dimensions would be specified over time"<sup>53</sup> strikes me as similarly off base. Both observations are based on Professor Ely's definition of democracy as a process by which governmental decisions are made. To him, therefore, the problem Americans faced during the Revolution was to get rid of an inequity in the process (lack of representation) that made decisions unfair. But that was not how the American revolutionaries understood the representative element of their English system of government. For them, the purpose of representation was to protect liberty. And they understood full well what their specific rights were. They were defined by the common law and detailed in the two great documents of the seventeenth century English constitutional struggle: the Petition of Right of 1628 and the Declaration of Rights of 1689. Representative government was designed to protect those liberties from arbitrary infringement, not to replace them.<sup>54</sup>

Nonetheless, if the development of American constitutional theory had gone no further than this conviction that consent was essential to legitimate

50. For the most important rebuttals, see Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies . . . by Act of Parliament*, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 610 (Bailyn ed. 1965); Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, in 2 THE WORKS OF JAMES WILSON 721-46 (McCloskey ed. 1967). See also C. ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY 333-35 (1953).

51. Boston Resolutions, November 20, 1772, in 2 THE WRITINGS OF SAMUEL ADAMS 350, 357 (Cushing ed. 1904-1908). See, e.g., the Massachusetts Circular Letter of February 11, 1768, in 1 *id.* at 184; Resolutions of the Stamp Act Congress, October 19, 1765, in PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA 457 (Niles ed. 1822); Oration by Joseph Warren, March 5, 1772, in *id.* at 5; Oration by Benjamin Church, March 5, 1773, in *id.* at 11; Philadelphia Resolutions, January 3, 1774, in *id.* at 170; Dickinson, *Letters of a Farmer in Pennsylvania*, in 14 MEMOIRS OF THE HIST. SOC. OF PA. 277, 318-20 and *passim*; Petition from the Assembly of Pennsylvania to the King, March 9, 1771, in *id.* at 451; Resolutions of the Continental Congress, October 14, 1775, in 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 68-69 (Ford ed. 1904-1937); Hopkins, *The Rights of the Colonies Examined*, in TRACTS OF THE AMERICAN REVOLUTION, 1763-1776 41, 54-59 (Jenson ed. 1967); Hicks, *The Nature and Extent of Parliament's Power Considered*, in *id.* at 164 166-69; Adams, *A State of the Rights of the Colonists*, in *id.* 233, 239-42.

52. ELY, *supra* note 6, at 89.

53. *The Declaration of Independence and the Constitution of the United States of America*, H. R. DOC. NO. 459, 84th Cong., 2d Sess. (1956).

54. See C. ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY (1953).

government infringements of liberty, the appropriateness of Professor Ely's "representation-reinforcing" mode of judicial review would be unchallengeable. Indeed, Americans' liberty-oriented political tradition would have been shifted to the democracy-centered one Professor Ely describes. No matter whether the ultimate purpose of representation is to protect liberty, so long as the only sanction for the protection of rights is the power of representative bodies to withhold consent to certain actions, the citizen's only practical right is the right to be represented. Once that right to representation is conceded and made effective, the citizen has no further claim upon the government. Therefore, Theophilus Parsons could offer the following definition: "[P]olitical liberty is the right every man in the state has, to do whatever is not prohibited by laws, to which he has given his consent."<sup>55</sup> But such a definition is a prescription for legislative absolutism, with the single limitation that the legislature cannot deprive the citizen of his voice in its own selection. Had Americans pressed no farther along the road to constitutional liberty, there would have been no need for Professor Ely to have prepared a treatise on the role of judicial review, for it is hard to see how judicial review could have developed under such a doctrine. And in fact, in the years following the Revolution, it was commonly believed by Americans that their state legislatures possessed sovereign power. The notion of "constitutionalism"—that "fundamental" law was somehow distinct from ordinary legislative law—was abroad in the land, but Americans were unable to assimilate it to their English libertarian heritage, which posited that consent legitimated infringement of liberty.<sup>56</sup>

Even before the Revolution ended, however, many Americans concluded that the right to representation alone was not enough to protect liberty. In the face of economic depression, state legislatures began to respond to pressure for laws that seemed to many Americans to protect the special interests of some elements of the community at the expense of the rest. This in turn caused a crisis in the accepted, consent-oriented doctrine of liberty. This doctrine, men began to perceive, was based on the notion that the legislature represented the people as a whole.<sup>57</sup> They began to see that such an idea,

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55. Quoted in *id.* at 408.

56. See D. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* 59–68 (1980); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* 344–53 (1969).

Bernard Bailyn argues that the concept of "constitutionalism" developed in America in the years preceding the Revolution, B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 175–98* (1967). But I think he exaggerates how widespread an advanced understanding of the notion was. As most revolutionaries conceived it, the idea that Britain was governed by a fundamental constitution was very limited in its practical application. For most of them, the common law defined the "ancient liberties" of English subjects. These were part of a fundamental constitution that governed the realm. But this did not place them beyond the powers of *any* government institution to infringe. Rather, the revolutionaries constantly defined these "fundamental liberties" to be those that could not be infringed *without their consent*. It was Parliament's effort to do that which violated the fundamental constitution of the realm. See the documents cited in note 51 *supra*. A broader understanding of constitutional rights was implicit in the argument of the revolutionaries, see G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* 259–91 (1969), but it was the wave of the future.

57. Cf. D. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* 72 (1980).

developed when Parliament represented all the people in consultation with a king who was charged with the business of government, offered incomplete protection for individuals' rights when the legislature itself did the governing. It was too easy for the interests of a majority to be permanently separated from those of the minority. In that case the majority could no more consent to the infringement of the rights of the minority than Parliament could consent to the infringement of the rights of Americans. The necessary identity of interests, experiences, and attitudes were not present. The result was an increasing demand that legislatures somehow be restricted from infringing on certain rights at all.<sup>58</sup>

As men came to doubt that the mere requirement of consent would protect rights against infringement, the application of the idea of "constitutionalism" began to broaden. Through the 1770s most Americans believed that the English constitution defined rights so fundamental that they could not be infringed without consent. With consent no longer relevant, they began to believe that rights must be beyond the power of any governmental institution to infringe. Therefore, in the 1780s state courts began to refuse to enforce laws that they believed infringed on rights.<sup>59</sup> Although the Framers of the American Constitution did not clearly proceed upon this premise in 1787–1788, their arguments during the ratification controversy finally established a secure theoretical foundation upon which judicial review could be built. Basing their argument on the old connection between representation, consent, and the power to infringe on rights, Anti-Federalists charged that the remote national government would wield unlimited power because its president and legislature represented the people rather than the states. Proponents of the Constitution responded by arguing that sovereignty remained with the people who established governments. Those governments received only such power as the people delegated to them.<sup>60</sup> The implications of this for judicial review are plain: if authority to infringe on rights is not delegated, if in fact it is specifically withheld by the terms of bills of rights incorporated into constitutions, then the legislature exceeds its powers when it violates them. Such a law is no law and the courts are bound not to enforce it. This is precisely the argument John Marshall made in *Marbury v. Madison*.<sup>61</sup> Although Professor Ely stresses the "relentless" expansion of democracy from 1789 to the

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58. This discussion and that which follows is based on G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969). See also D. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* 72–84, 118–24 (1980).

59. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* 453–63 (1969); Corwin, *The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 *AM. HIST. REV.* 511 (1925). Several of these decisions proceeded upon the proposition that courts ought not to enforce laws that violate *natural* rights, perhaps a different and vaguer group of rights than those embodied in the British constitution. However, that is not critical to my argument. What is important is that no matter what the origin of rights, judges were beginning to hold that mere representation in legislatures was not enough to justify their infringement—that is, that consent through legislative representatives was no longer a relevant criterion to judge the legitimacy of governmental action.

60. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* 519–64 (1969).

61. 5 U.S. (1 Cranch) 137 (1803).



present,<sup>62</sup> one might just as well stress the “relentless” development of judicial review. I think it would be difficult to determine which has prospered more.

All this indicates that both representative democracy and judicial review developed as means to secure a greater end—protection of rights. There is no historical basis, therefore, for the worry that judicial protection of rights somehow violates a deeper commitment to democracy. Professor Ely is correct in his contention that constitutional protections for rights developed out of a concern that democracy (or, better, “representative government”) might not deal with all people equitably. But since the founding fathers did not perceive “democracy” to be more important than “liberty,” they did not worry themselves into devising “representation-reinforcing” modes of protection. They looked with favor on any institution that protected rights, and whatever the rights that are protected by what Professor Ely calls the “open-textured” or “open-ended” clauses of the Constitution,<sup>63</sup> they are just that—*rights*. They are not to be subjected to the give and take of the democratic process. Each of us is justified in demanding that the rest of us honor our obligation not to infringe them through government. Certainly our legislatures, state and national, ought to try to define what those rights are and refrain from depriving anyone of them. There may be reasons for believing that judges are ill-equipped for making such determinations—reasons grounded in legal philosophy or the realities of legal behavior as a political scientist would describe them. But in light of our constitutional heritage, I do not think a compelling argument can be made that democracy is so much more central to our tradition than judicial review that judges should be constrained to enforce laws they believe violate the rights implicit in those open-ended provisions.

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62. ELY, *supra* note 6, at 6–7.

63. *Id.* at 13, 14.

