Federalism and the Fourteenth Amendment: A Comment on *Democracy and Distrust*

EARL M. MALTZ*

"Constitutions should have their provisions so plain that it will be unnecessary for courts to give construction to them; they should be so plain that the common mind can understand them." From the congressional debates on the proposed fourteenth amendment[1]

Democracy and Distrust[2] is a most impressive contribution to the understanding of the nature of judicial review. With it, John Hart Ely reaffirms that he is among the most creative and articulate of modern constitutional scholars. He shines most brilliantly in his criticism of other contemporary theories of the proper role of the federal courts in adjudicating matters under the Constitution. If, after reading Ely's arguments[3] and the equally cogent analysis of Robert Bork,[4] one remains convinced of the propriety of judicial intervention in cases such as *Roe v. Wade*,[5] nothing that can be added in a brief comment such as this is likely to persuade him to the contrary. Similarly, Ely's attacks on classical interpretivism[6] also are skillfully deployed for maximum effect.[7]

However, Ely falters slightly in the construction of his representation-

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* B.A., Northwestern 1972; J.D., Harvard 1975. Assistant Professor of Law, Rutgers (Camden). The author gratefully acknowledges the assistance of Ed Chase and Jay Feinman, who read earlier drafts of this comment and made a number of helpful suggestions. Of course, the author retains full responsibility for any errors that remain.

1. A. AVINS, THE RECONSTRUCTION AMENDMENTS DEBATES 160 (1967) (remarks of Rep. Hotchkiss).
2. J. ELY, DEMOCRACY AND DISTRUST (1980) [hereinafter cited as ELY].
3. ELY, *supra* note 2, at 43–72.
4. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 1–20 (1971).
5. 410 U.S. 113 (1973).
6. ELY, *supra* note 2, at 11–41.
7. Some of Ely's arguments on this point are less than convincing, however. The ninth amendment, for example, is relatively easy to deal with from an interpretivist perspective. On its face, the language of the amendment does not create any rights; it simply states that the Constitution *by its own terms* does not take away any rights that citizens might already have. Nothing in the amendment addresses the question of whether Congress or the states can abridge these rights.

The equal protection clause poses greater problems for interpretivists; as Ely points out, one is constantly faced with the point that if the framers had intended that the effect of the clause be limited to matters of race, then they could simply have said that in the text of the amendment. The courts, however, are often faced with analogous problems in interpreting vague statutes, and resolve the difficulties by reference to legislative history. And while the legislative history of the equal protection clause is replete with references to discrimination on the basis of race and national origin—not, as suggested by Ely, *supra* note 2, at 149, limited to discrimination against blacks, *see* A. AVINS, THE RECONSTRUCTION AMENDMENTS DEBATES 223–25 (1967) (discrimination against Chinese)—to my knowledge no one has found any references in the debates to specific nonracial discrimination that would be prohibited by the equal protection clause. This suggests that one does not stray far from the intent of the framers in limiting the reach of the clause to matters of racial discrimination.

Ely's arguments on the privileges and immunities clause, however, seem unanswerable. Like "equal protection of the laws," the concept of "privileges and immunities" admits to no clear meaning on its face. But unlike the equal protection clause, the legislative history of the privileges and immunities clause is so muddled that one can find support for virtually any position. *Compare* ELY, *supra* note 2, at 22–30, *with* R. BERGER, GOVERNMENT BY JUDICIARY 208–11 (1977). Thus, interpretivists are placed in an insoluble dilemma.

reinforcement model of judicial review. For in considering the appropriate role of the federal courts in the American governmental structure, he ignores one of the most important aspects of that structure—the concept of dual sovereignty inherent in constitutional federalism. Part I of this comment will briefly examine the structural approach to constitutional adjudication, and conclude that it is basically an acceptable methodology for giving content to unclear constitutional language. Part II will demonstrate the importance of issues of federalism to the application of the structural approach. Part III will discuss the relationship between problems of federalism and the representation-reinforcement model developed in *Democracy and Distrust*.

I. THE INTENT OF THE FRAMERS AND THE STRUCTURAL APPROACH

Ely's attitude toward the relevance of the intention of the framers suffers from a kind of mild schizophrenia. At the outset he suggests that a "clause-bound interpretivism"—a mode of analysis focusing solely on the words and specifically expressed intention of the framers—would, if feasible, be the most efficacious mode of constitutional interpretation. But, once Ely concludes that adherence to pure interpretivism is impossible due to both the open-ended language of certain clauses and the lack of clarity of the relevant legislative history, discussion of the intent of the framers virtually disappears from his arguments.

The mere fact that the text and legislative history of the fourteenth amendment are ambiguous does not, however, necessarily vitiate the importance of the search for the intent of the framers. When faced with an ambiguous statute, courts do not simply abandon the search for legislative intent and give the law an interpretation that the judges believe will further the common good. Instead, the statute is interpreted in accord with the judges' best estimate of the legislative intent—even though that estimate may not be entirely reliable. Nor is any perceived need to look outside the text and history of the Constitution itself in interpreting the fourteenth amendment inconsistent with the search for legislative intent. Even accepting that the framers intended that there be reference to nontextual ideas, they would have had some preference among natural law, conventional morality, representation-reinforcement values, and the other myriad concepts that have been suggested as appropriate sources for constitutional values.

Thus, in theory one could base his approach to constitutional adjudication on a search for the intent of the framers, even in the face of the ambiguity of some of the relevant provisions. As Ely demonstrates, however, in practice the object of the search is likely to be very elusive, if not impossible to identify. One reaction to this difficulty is simply to deny the relevance of the original intention, arguing that constitutional adjudication is so fundamentally different from other forms of judicial action as to be governed by entirely different rules. But if intent is irrelevant and the text ambiguous, courts are left with no constitutional source that defines the limits of their authority. Nor

is there any clear social or political consensus upon which judges can rely in defining the judicial role.[8] Thus, under this theory, in choosing from among the various conceptions of judicial power that arguably are consistent with the American governmental structure, judges would be forced to rely on their subjective values. The model ultimately selected may lead the courts to apply some more or less objective standard to the interpretation of the relevant constitutional provision; but, if text and intent yield no answer, then there is no objective standard to guide the choice of the model itself.

To take this position is equivalent to asserting that the Supreme Court derives its right to strike down actions of the other branches of government not from the specific substantive provisions of the Constitution, but rather from a more generalized authority to act as a kind of moral watchdog to "protect fundamental values and the integrity of democratic processes."[9] Metaphysical questions of legitimacy aside, one cannot objectively demonstrate that such a structure is a "bad" form of government. One can only note the inconsistency of this structure with the illusion—carefully fostered by the courts—that judges are in fact enforcing specific constitutional provisions and point out, as Ely does, the institutional unsuitability of the courts to perform the function assigned to them by commentators who deny or downplay the relevance of the intention of the framers. If one is to escape these problems, then intent must be the touchstone of constitutional analysis.

On its face, the Ely model seems to have little connection to the intent of the framers. One might argue that the representation-reinforcement concept simply urges judges to adopt and enforce those philosophical ideals that are consistent with Ely's particular vision of representative democracy.[10] But in fact, the process by which he develops his model closely resembles standard techniques of statutory interpretation. When faced with an unclear provision in a statute, courts are admonished to interpret the particular section in light of "the provisions of the whole law, and . . . its object and policy."[11] The mode of constitutional adjudication adopted by Ely operates in much the same fashion; faced with ambiguous constitutional provisions, Ely attempts to give content to those provisions by reference to the structure of the document as a whole.

The structural approach can therefore be defended on a theory of imputed intent. While the substantive results reached by application of struc-

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8. *Compare* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 8 (1971) (courts should enforce only those rights which can be found in constitutional text and history) *with* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 237 (1980) (text and original history neither necessary nor sufficient condition for constitutional decision-making).

9. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 234–38 (1980).

10. *See generally* Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L. J. 1037 (1980).

11. United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 121 (1850). *See* Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); Richards v. United States, 369 U.S. 1, 11 (1962).

tural analysis may not conform precisely to the subjective intentions of the framers, the drafters of the relevant constitutional provisions are chargeable with knowledge that such an approach might be employed to resolve ambiguities. By leaving various provisions unclear in the face of such knowledge, the framers must be viewed as accepting at least the possibility that structural analysis would be applied to give content to those provisions. Thus, even accepting the relevance of original intention, Ely's basic approach is an acceptable (though not inevitable[12]) response to the problem of interpreting ambiguous constitutional provisions.

To accept the basic idea of a structural approach is not necessarily to accept Ely's ultimate conclusions, however. To correctly apply a structural model, one must consider all of the important elements of the American constitutional scheme. As part II of this comment will demonstrate, the representation-reinforcement concept is defective in its failure to take into account a critical aspect of the constitutional system—the concept of federalism.

II. THE IMPORTANCE OF FEDERALISM

Ely clearly views the main structural problem in constitutional adjudication to be the allocation of authority between the political branches of government and the courts. He describes the task of the constitutional theorist in the words of the late Alexander Bickel:[13]

> The search must be for a function . . . which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a society that generally shares Judge Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.

Ely's description of the problem would be appropriate if he were concerned with the interpretation of written constitutions generally; however, it is fatally deficient as a description of the task of the courts in the specific

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12. By applying other equally conventional modes of statutory analysis to the problem of constitutional interpretation, one might generate results quite different from those reached through structural analysis. For example, noting that constitutional constraints are the exception rather than the rule (at least with respect to state governmental action), one might argue that, like statutes in derogation of the common law, constitutional limitations should be construed narrowly. *Cf.* Thompson v. Thompson, 218 U.S. 611, 618 (1910) (stating rule with respect to statutes in derogation of common law).

While entirely plausible on its face, this approach would command few modern adherents. The legislative history of the fourteenth amendment expresses only one intention clearly and consistently: that states should not discriminate on the basis of race or national origin. If the narrow construction theory were applied, the amendment would be interpreted only to prohibit such discrimination. Thus, cases resting on incorporation of the first amendment—among others—would have to be abandoned. Further, since the legislative history of the equal protection clause suggests that no prohibition on the use of "separate but equal" facilities was intended, *see* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955), even Brown v. Board of Educ., 347 U.S. 483 (1954), would be threatened. Few would be willing to embrace a doctrine with such extreme consequences. *But see* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

13. A. BICKEL, THE LEAST DANGEROUS BRANCH 24 (1962).

context of a national constitution. From a structural perspective, this distinction makes little difference in cases involving judicial review of federal action; these cases can appropriately be conceptualized in terms of allocation of authority between the political and judicial branches. The American concept of dual sovereignty, however, complicates the analysis of judicial review of state governmental action.

WMCA, Inc. v. Lomenzo[14]—one of the group of reapportionment cases decided on the same day as *Reynolds v. Sims*[15]—is an instructive example. Applying the rule of *Reynolds,* the Court in *Lomenzo* held that the New York state legislature was required to be apportioned on the basis of the one person, one vote standard. Since the apportionment scheme established by the state constitution did not meet this standard, the relevant provisions were found to violate the equal protection clause.

Ely's defense of cases such as *Lomenzo* is based upon the proposition that legislators cannot be trusted to supervise the conditions of their own elections.[16] Even prior to the decision in *Lomenzo,* however, New York lawmakers were not free to control the means by which seats in the legislature were apportioned; the state constitution prescribed detailed rules for determining the make-up of the State Assembly and Senate.[17] Further, as in the federal system, the state courts, rather than the legislature, had the final word in interpreting the New York constitution; and in exercising the function of judicial review under the state constitutional provisions dealing with apportionment, the state courts had been extremely active, closely supervising the legislature in the implementation of these provisions.[18] Thus, while prior to *Lomenzo* the New York legislature was organized under criteria that deviated significantly from the one person, one vote standard, the legislators were hardly in a position to "chok[e] off the channels of political change to insure that they will stay in and the outs will stay out";[19] they had no more freedom in this regard prior to *Lomenzo* than after that case was decided. The main effect of *Lomenzo* was to replace constraints based on local standards implemented by state court judges with other constraints devised by federal judges using national standards.[20]

Lomenzo plainly demonstrates that when a state constitutional provision is invalidated, federal judicial intervention cannot appropriately be described

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14. 377 U.S. 633 (1964).

15. 377 U.S. 533 (1964).

16. ELY, *supra* note 2, at 103, 120.

17. For a detailed discussion of these rules, *see* Silva, *Apportionment in New York,* 30 FORDHAM L. REV. 581 (1962).

18. *See In re* Fay, 291 N.Y. 198, 52 N.E.2d 97, 43 N.Y.S.2d 787 (1943); *In re* Dowling, 219 N.Y. 44, 113 N.E. 545, 160 N.Y.S. 362 (1916).

19. *See* ELY, *supra* note 2, at 103.

20. *Lomenzo* was by no means unique in this regard; three of the other apportionment cases decided the same day struck down state constitutional provisions. Lucas v. Gen. Assembly of Colorado, 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964).

in terms of a transfer of decision-making authority from the political branches to the judicial branch of government. Indeed, this description is not entirely accurate even when a state statute, rather than a constitutional provision, is the subject of federal constitutional attack. *O'Brien v. Skinner*[21] illustrates this point. *O'Brien* involved New York's denial of absentee ballots to certain persons detained while awaiting trial or pursuant to misdemeanor convictions. This denial was challenged in state court under both the New York and federal constitutions.[22] The New York Court of Appeals rejected the challenge,[23] but the Supreme Court reversed, holding that the state law violated the equal protection clause of the fourteenth amendment.[24]

Unlike *Lomenzo, O'Brien* invalidated standards that were legislatively created, and thus can appropriately be viewed as adding to the constraints on legislative discretion. But *O'Brien* also effectively neutralized the state judicial decision that the statute at issue was within the bounds prescribed by the local constitution. Of course, since the Supreme Court passes only on federal questions, the decision of the New York court on this point remained formally intact. The holding in *O'Brien,* however, rendered the local standards on the issue entirely irrelevant; all courts—state and federal—are required to apply the more stringent national standard.[25] Thus, *O'Brien* in effect limited an important power of state courts—the power to determine the relationship between the courts and the legislature on a particular issue.

In short, one cannot fully and accurately describe and evaluate the institutional effects of federal judicial review in terms of the allocation of authority between the political branches and the courts. The selection of certain rights and groups for special constitutional protection also has significant consequences for the division of power between the state and national governments generally. Necessarily, any process that affects this division of power raises important issues of federalism.

If, like Ely, one seeks to derive the appropriate limits on the power of the Supreme Court from an examination of the structure of American government, issues of federalism should play a prominent role in the analysis. As Ely himself points out, the Constitution as originally enacted was largely concerned with defining the respective spheres of authority of the state and national governments.[26] The powers of the executive and legislative branches

21. 414 U.S. 524 (1974).

22. The state law claims were apparently based on explicit guarantees of the right to vote contained in the New York Constitution. *See* O'Brien v. Skinner, 31 N.Y.2d 317, 321, 291 N.E.2d 134, 137, 338 N.Y.S.2d 890, 894 (1972) (Fuld, C. J., dissenting), *citing* N.Y. CONST. art. II, §§ 1, 4, 5, *rev'd on other grounds,* 414 U.S. 524 (1974).

23. O'Brien v. Skinner, 31 N.Y.2d 317, 291 N.E.2d 134, 338 N.Y.S.2d 890, (1972), *rev'd,* 414 U.S. 524 (1974).

24. O'Brien v. Skinner, 414 U.S. 524 (1974).

25. The *O'Brien* Court never identified the precise standard of review that the Court was applying to the New York law; the majority suggested that the law would not survive even the most deferential standard. *See* 414 U.S. at 530 (statute "wholly arbitrary"). Whatever standard the Court applied was, however, plainly more stringent than that employed by the New York court; given the lack of any factual dispute, there is no other explanation for the reversal of the state court.

26. *See* ELY, *supra* note 2, at 90.

of the national government were specifically and relatively narrowly defined;[27] by contrast, state power was left almost unlimited, with very few substantive constraints.[28] The overall picture is one in which each state is left largely sovereign, with primary responsibility for providing for the governance and well-being of its local citizenry. If any doubt remained from the original text of the Constitution, that doubt was removed by the tenth amendment, which reaffirmed both the limited nature of national governmental power and the general authority of the states over most matters.

Of course, the Civil War amendments had some effect on American federalism. Certainly they must be viewed as meaning something, and whatever that "something" is will restrict the actions of state governments as well as providing a rich new source of congressional power.[29] For example, in the face of the history of the fourteenth amendment it would be difficult to maintain that states retain general power to discriminate against blacks.[30] At the same time, it seems inappropriate to construe the amendments in a manner

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27. *See* U.S. CONST. art. I, § 8 (powers of Congress); U.S. CONST. art. II, § 2 (powers of President); U.S. CONST. art. III, § 2 (powers of courts). *See generally* THE FEDERALIST No. 45 at 329 (J. Madison) (Wright ed. 1961) (juxtaposition of powers of state and federal governments).

The concept that the federal government is sharply limited in its authority admittedly has become somewhat anachronistic. While initially the commerce clause was interpreted as granting Congress a relatively narrow range of authority, *see, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (Congress may not prohibit interstate shipment of goods produced by workers being paid less than minimum wage); United States v. E. C. Knight Co., 156 U.S. 1 (1895) (commerce clause does not give Congress authority to regulate manufacturing), in more modern times the clause has been construed to grant Congress authority over a broad range of subjects. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (commerce clause gives Congress authority over loansharking); Katzenbach v. McClung, 379 U.S. 294 (1964) (commerce clause gives Congress authority over practices of businesses which sell goods which have moved in interstate commerce). *But see* National League of Cities v. Usery, 426 U.S. 833 (1976) (Congress may not force states to pay minimum wage to government employees). Section five of the fourteenth amendment has also been construed to grant Congress substantial new powers. *See, e.g.*, City of Rome v. United States, 100 S. Ct. 1548 (1980); Katzenbach v. Morgan, 384 U.S. 641 (1966).

But the expansion of congressional authority has not vitiated the importance of issues of federalism in the consideration of the appropriate function of the Supreme Court. First, even under modern conceptions of federal power, decisions affecting the basic structure of state government remain, at least to a large extent, outside the ambit of federal control. *See* National League of Cities v. Usery, 426 U.S. 833 (1976); Oregon v. Mitchell, 400 U.S. 112 (1970) (fourteenth amendment does not give Congress authority to change voting age in state elections). *But cf.* City of Rome v. United States, 100 S. Ct. 1548 (1980) (Congress may exercise some control over structure of state governments to remedy violations of fifteenth amendment); Katzenbach v. Morgan, 384 U.S. 641 (1966) (to effectuate guarantees of fourteenth amendment, Congress may outlaw use of literacy tests as qualification for voting). Second, the interests of the states as sovereign entities are well protected by the structure of Congress; members of Congress are elected to represent states (or parts of states) and can therefore be expected to give careful consideration to the principles of local autonomy in determining whether to federalize any given area of law. *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176–79 (1980). By contrast, if the Court can be viewed as having any constituency at all, that constituency is national in nature. *See* Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1042–49 (1979). This difference might lead one to defer to the national legislature when it overrules a state on a matter traditionally viewed as being of peculiarly local concern, while at the same time denying the courts the power to impose national constitutional standards for dealing with the same matter.

In short, even accepting the legitimacy of the vast expansion of Congressional power that has taken place in the past half-century—a topic beyond the scope of this comment—one must still cope with important problems of federalism in defining the role of the Supreme Court in the American constitutional system.

28. The primary restrictions on the powers of the states can be found at U.S. CONST. art. I, § 10.

29. *See, e.g.*, City of Rome v. United States, 100 S. Ct. 1548, 1562–64 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

30. *But cf.* R. BERGER, GOVERNMENT BY JUDICIARY (1977) (fourteenth amendment does not ban all discrimination against blacks).

inconsistent with the basic concepts of American federalism. Even given the premise that one cannot ascertain the precise nature of the rights that the framers intended to protect through the fourteenth amendment, one can be fairly certain that if Congress had intended to make fundamental alterations in the states' status as quasi-sovereign entities, the amendment would have been couched in terms other than equal protection, due process, and privileges and immunities. Indeed, the supporters of the amendment consistently denied any intention to alter the basic incidents of state sovereignty.[31] Thus, whatever one's theory of the nature of fundamental rights and protected classes, it should be consistent with the basic concept of dual sovereignty that undergirds the constitutional system.

Ely—like most other commentators dealing with the problem of defining fundamental rights[32]—nonetheless does not address problems of federalism in constructing his model of judicial review. The next logical question is whether proper concern for considerations of federalism would have changed Ely's conclusions. The response to this question will vary depending upon precisely which conclusion one is addressing. Part III of the comment will examine some of the issues raised by problems of federalism.

III. FEDERALISM AND REPRESENTATION-REINFORCEMENT

A. *Classification Problems*

In general, problems of federalism will have little bearing on the issue of which groups should receive special judicial protection under the Constituion. At the core of the fourteenth amendment is the concept that denial of the right to discriminate against a particular group—blacks—is not inconsistent with the notion of state sovereignty inherent in the American governmental scheme. Once this principle is established, the addition of a small number of groups to the protected list will typically not be inconsistent with the basic idea of state autonomy; while the expansion of the constitutional prohibitions to include, for example, discrimination against women, will clearly impose national restrictions on the freedom of action of local authorities, the addition of these restrictions will not significantly alter the basic structure of federal-

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31. *See* A. AVINS, THE RECONSTRUCTION AMENDMENT DEBATES 156–57 (1967) (remarks of Rep. Woodbridge); *id.* at 217 (remarks of Rep. Bingham).

32. When other commentators on fundamental rights have addressed issues of federalism, they have spoken in terms of "experimental" federalism—"the conviction that worthwhile reform will more likely take place when individual states are allowed to experiment . . . than when the Supreme Court binds them to national standards of its own making." Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 963 (1975). *See also* Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 279. This formulation suggests that the main value in preserving state autonomy lies in efficiency; that given a common conception of "the good," allowing the states flexibility will result in a more efficient pursuit of that conception. It ignores a more basic value inherent in state sovereignty—the value of pluralism. Rather than focusing on a common notion of efficiency, the concept of pluralism is based on the idea that local groups should generally be permitted to effectuate their own choices of basic values, even if such values differ from those of the nation as a whole. *See* Williams v. Florida, 399 U.S. 78, 133 (1970) (Harlan, J., dissenting).

state relations.[33] Further, if one accepts Ely's theory that the language of the equal protection clause itself suggests a prohibition of some nonracial discriminations,[34] then the only real issue is which other groups will be protected. And plainly, a choice to protect one group generally involves no greater intrusion on state sovereignty than a similar choice to protect any other group.

There is, however, a problem concerning discrimination against aliens—a class to whose claims Ely would grant special constitutional solicitude.[35] At the outset, it is far from clear that such discrimination should be viewed as presenting a fourteenth amendment problem at all. In focusing on aliens as an undifferentiated group, Ely fails to distinguish between aliens who have been lawfully admitted to the country and those whose very presence is illegal. Both groups share those characteristics that, under Ely's model, should lead to special judicial protection for their interests. Yet unless one is willing to argue that the Constitution requires that the government must generally grant all those benefits to *illegal* aliens that are granted to citizens—a dubious proposition at best[36]—then an additional factor becomes critical: the decision of the political branches of the national government to grant an alien the status of a lawful resident. Given that Congress can freely choose to admit or not admit any given alien,[37] there seems no good reason why an admission could not be conditioned upon the renunciation of a nonfundamental privilege of residency[38]—for example, the right to receive welfare benefits from either the state or federal government.[39] Thus, the question of the legality of a given discrimination against a resident alien whose presence is

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33. Of course, if one were to interpret the equal protection clause to impose important constraints on many different types of classifications, *see, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317–27 (1976) (Marshall, J. dissenting) (advocating generalized balancing test), then the freedom of action of the states might be so significantly restricted as to raise important issues of federalism.

34. *But see* note 7 *supra*.

35. *See* ELY, *supra* note 2, at 161–62.

36. *Cf.* DeCanas v. Bica, 424 U.S. 351 (1976) (state restriction on employment of illegal aliens does not violate supremacy clause). *But see* Doe v. Plyler, 458 F. Supp. 569 (E. D. Tex. 1978) (illegal aliens may not be excluded from public schools); Kane & Velarde-Munoz, *Undocumented Aliens and the Constitution: Limitations on State Action Denying Undocumented Children Access to Public Education*, 5 HASTINGS. CONST. L. Q. 461, 484–88 (1978) (arguing that illegal aliens should be considered a suspect class).

The fact that illegal aliens are "persons" and thus within the ambit of the equal protection clause does not necessarily imply that they should receive special constitutional protection. The key question is not whether the equal protection clause covers illegal aliens, but rather what degree of protection that coverage implies. For example, optometrists are persons, but discrimination against optometrists need only survive the rational basis test. *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

37. Congressional authority to determine which aliens may be admitted to the country is almost entirely unfettered by the Constitution. *See* Fiallo v. Bell, 430 U.S. 787, 792–96 (1977).

The Court has indicated that even when fundamental rights such as free speech are involved, it will generally defer to the decision of Congress in matters involving immigration. Fiallo v. Bell, 430 U.S. 787, 794–95 (1977). This position is not without its critics. *See id.* at 808–09 (Marshall, J., dissenting).

38. *See* note 37 *supra*.

39. *Compare* Mathews v. Diaz, 426 U.S. 67 (1976) (federal government may restrict aliens' access to social security benefits) *with* Graham v. Richardson, 403 U.S. 365 (1971) (states may not restrict aliens' access to welfare benefits).

For an argument that the Constitution should be viewed as significantly limiting the authority of the federal government to discriminate against lawfully resident aliens, *see* Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275. *Compare* Maltz, *The Burger Court and Alienage Classifications*, 31 OKLA. L. REV. 671, 688–89 n.150 (1978) (attempted refutation of Rosberg argument).

illegal arguably should turn on the issue of whether Congress intended to grant lawfully resident aliens the claimed right, rather than on interpretation of the strictures of the fourteenth amendment.[40]

But regardless of whether such cases are appropriately analyzed in terms of congressional intent or equal protection, considerations of federalism suggest limits beyond which the federal courts should not go in limiting the ability of the states to discriminate against aliens. One prime aspect of sovereignty is the right to have governing decisions made by those whose loyalty lies with the sovereign. Almost by definition, an alien's primary commitment lies not with the state in which he resides, but rather with the nation of which he is a citizen. Thus, any requirement that the states allow aliens to vote or hold policy-making positions is inconsistent with this concept of autonomy. Accordingly, the assertion by the Court that the Constitution does not impose such a requirement[41] seems eminently defensible—even accepting the proposition that the equal protection clause generally prohibits discrimination against aliens.[42]

B. *Fundamental Rights*

In some respects, the representation-reinforcement conception of fundamental rights is less intrusive on the prerogatives of the states than other noninterpretivist approaches to constitutional adjudication. Almost by definition, the degree of sovereignty retained by the states is inversely proportional to the extent to which their freedom of action is constrained by national standards. Ely would leave the state governments great latitude in setting substantive policies; by contrast, many other contemporary theorists would view the Constitution as imposing more significant constraints on local autonomy.[43]

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40. *See* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060–65 (1979). The idea of analyzing problems of discrimination against aliens in terms of federal power made a brief appearance as an alternate ground of decision in Graham v. Richardson, 403 U.S. 365, 377–83 (1971). However, such analysis has been most noticeable by its absence in recent cases.

41. *See* Foley v. Connelie, 435 U.S. 291, 296 (1978); Sugarman v. Dougall, 413 U.S. 634, 647–49 (1973).

42. Acceptance of the basic idea that principles of federalism limit the applicability of the equal protection clause in cases involving discrimination against aliens does not imply approval of the manner in which the Court has applied that concept. The identity of those effectuating local policies will have little impact on state autonomy, so long as the policies themselves are established by those whose allegiance is to the appropriate state. Thus, if one agrees that in general discrimination against aliens should be subject to close constitutional scrutiny, *compare* ELY, *supra* note 2, at 161–62, *with* Perry, *supra* note 40, at 1062–65, then cases such as Ambach v. Norwick, 441 U.S. 68 (1979), in which the Court declined to apply strict scrutiny to an exclusion of aliens from employment as public school teachers, must be viewed as wrongly decided.

43. *See, e.g.*, Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1040–41 (1979) (states forbidden to make choices which offend values given high priority by society both historically and contemporarily); Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689, 709 (1976) (states may not transgress "conventions of contemporary sociopolitical culture"); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L. J. 221, 280 (1973) (states limited by "conventional morality"). These models intrude most deeply on state autonomy when they dictate the constitutionalization of matters that have traditionally been viewed as being of peculiarly local concern. Perhaps the most prominent example of recent years has been the designation of the right to marry as fundamental. *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Lupu, *supra*, at 1023–26. Historically, the regulation of the conditions and incidents of marriage has been exclusively a matter of state concern; indeed, out of concern for local prerogatives, federal courts have traditionally declined to adjudicate domestic relations matters even when the requisite diversity of

On the other hand, the imposition of national standards in some of the areas that Ely designates as appropriate for judicial intervention generates particularly difficult problems of federalism. Imposition of stringent national standards on the structure of state government poses a uniquely severe threat to the concept of state sovereignty. The framers clearly recognized this problem; in *The Federalist*, Alexander Hamilton noted that a constitutional provision giving the federal government general authority over the electoral processes of the states would have been "both . . . an unwarrantable transposition of power and . . . a premeditated engine for the destruction of the [s]tate governments."[44] The source of the special dangers to state sovereignty inherent in regulation of governmental structure lies in the pervasiveness of the effect of such regulation. In most cases, intrusions on the decision-making authority of the states is self-limiting; for example, a federal statute preempting local regulation of the apple industry would leave unaffected all state governmental decisions not dealing with apples. By contrast, by determining which groups will wield political power, the structure of the government will profoundly affect state decisions in all areas of policy-making. Federal control of this structure thus is a far greater limitation on local autonomy than, for example, congressional determination of the wages to be paid to state employees[45] or the location of a state capital[46]—each of which has been found to be an unconstitutional intrusion on state sovereignty.

Of course, in the face of the guaranty of a republican form of government, it would be impossible to argue that the Constitution embodies no constraints on the structure of state governments. But as Ely himself recognizes, one cannot rely on the guaranty clause alone to establish the one person, one vote principle of *Reynolds v. Sims*.[47] Clearly, the framers viewed both the existing state governments and the new national government as republican in form,[48] notwithstanding their significant deviations from the one person, one vote principle.[49]

Ely nonetheless defends the *Reynolds* standard, arguing that amendments adopted subsequent to the drafting of the guaranty clause—specifically the equal protection clause and the various amendments extending the right to

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citizenship for federal jurisdiction was present. *See, e.g., In re* Burrus, 136 U.S. 586, 593–94 (1890); Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859). Yet cases such as *Zablocki* not only deeply involve the federal courts in issues of domestic relations, but apply a stringent national standard to a large number of the state regulations in this area of law.

44. *See* THE FEDERALIST No. 59 at 395 (A. Hamilton) (Wright ed. 1961).

45. National League of Cities v. Usery, 426 U.S. 833 (1976).

46. Coyle v. Oklahoma, 221 U.S. 559 (1911).

47. ELY, *supra* note 2, at 123.

48. *See* THE FEDERALIST No. 43 at 312 (J. Madison) (Wright ed. 1961) (state governments); *id.* No. 10 at 133–36 (J. Madison) (Wright ed. 1961) (national government).

49. The method of selection of the Senate is of course the most prominent deviation from the one person, one vote concept in the structure of the national government. At the time of the framing of the Constitution, among the state governments in which at least one house was apportioned on a basis other than population were South Carolina, where each parish or district had equal representation in the state senate, J. MAIN, THE UPPER HOUSE IN REVOLUTIONARY AMERICA 115 (1967), and Maryland, where the upper house was selected by electors who in turn were divided equally among the counties of the state, *id.* at 102.

vote to certain specified groups—suggest a "line of growth" which leads to the conclusion that one person, one vote is the appropriate standard.[50] Insofar as it relies on the fourteenth amendment, the argument is entirely conclusory; there is nothing in either the text or history of the amendment which, *a priori*, suggests that it should be interpreted to add to the strictures of the guaranty clause.[51] This leaves the amendments guaranteeing the right to vote to specific groups—blacks, women, persons unable to pay poll taxes, and eighteen-year-olds—as the source of the line of growth leading to the one person, one vote standard. Reliance on these provisions might be termed an argument of amendment by indirection; for unlike the fourteenth amendment, the intention of the framers of the fifteenth, nineteenth, twenty-fourth and twenty-sixth amendments, as expressed in the plainest possible language, was crystal clear—to extend the right to vote to specific, narrowly defined groups in American society. By their terms, the amendments would leave the states free to devise their own forms of government within the broad definition of "republican," subject only to rather minor restrictions. Yet Ely would tie these amendments together with the guaranty clause through the fourteenth amendment to turn the system almost precisely on its head. A *national* standard would govern the most basic, important decision in any political system—the allocation of political power—with the states left with responsibility only for relatively minor details. Such a radical change in the constitutional structure cannot be fairly inferred from the mere extension of the right to vote to specific groups.

Nor is the one person, one vote concept the only administrable standard that is consistent with the general principles enunciated by the guaranty clause.[52] For example, one might plausibly argue that the phrase "republican form of government" requires that one (but not necessarily both) houses of a bicameral legislature be apportioned by population. Of course, such a system would be inconsistent with the idea that representatives of a majority should be able to implement by legislation any policy that they deem appropriate. Given the numerous historical deviations from this principle at both the state and federal levels, however, strict majoritarianism can hardly be viewed as a basic tenet of the American system.

Indeed, there is a certain irony in Ely's advocacy of the rigid one person, one vote concept as a constitutional principle. His elaborate justification for

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50. ELY, *supra* note 2, at 123.

51. Indeed, it has been argued with considerable force that such a reading of the equal protection clause is totally inconsistent with the legislative history of the fourteenth amendment. *See* Reynolds v. Sims, 377 U.S. 533, 595–608 (1964) (Harlan, J., dissenting). *But see* ELY, *supra* note 2, at 118–19 n.*; Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

52. Ely presses the administrability argument only after arguing that the line of growth of the guaranty clause leads to the conclusion that the clause should be interpreted to require an apportionment scheme providing at least "rough equality" among the voting power of electors. But even rejecting the line of growth argument, adoption of the one person, one vote concept might be appropriate if no other readily administrable standard was consistent with the basic thrust of the guaranty clause.

extending special constitutional solicitude to groups other than racial minorities turns on his perception that some such groups need special protection because their claims will be consistently undervalued by the political process, largely because of the prejudice or hostility of the majority.[53] Yet the *Reynolds v. Sims* standard to which he adheres effectively prevents states from building such protection into the political process itself.

Consider, for example, a state in which city dwellers have historically been hostile to local farmers and have shown an insensitivity to their interests. If urban communities contain a substantial majority of the population and both houses of a state legislature are apportioned on the one person, one vote principle, then legislation will tend to reflect only the interests of the city dwellers. On the other hand, if one house is apportioned by geography—a basis liable to favor farm interests—urban lawmakers would be forced to consider and accommodate rural concerns to ensure the passage of legislation by both houses. The resulting laws thus would more likely reflect an appropriate balance among the interests of all citizens rather than simply reflecting those of the majority faction.

The foregoing is not intended to suggest that any particular form of government is the appropriate structure for any given state. Rather, it is meant to demonstrate that the undesirability of imposing a rigid national rule on apportionment is not based solely on the inconsistency of such a rule with the theory of state sovereignty; practical factors also suggest the desirability of leaving state authorities considerable flexibility in adapting their respective forms of government to local conditions. Thus, Ely's defense of *Reynolds v. Sims* remains ultimately unconvincing.

IV. CONCLUSION

Almost inevitably, viewing constitutional law solely in terms of the conflict between legislative and judicial competence will lead to an overly expansive reading of the fourteenth amendment. The problem is not that judicial competence is irrelevant; plainly, in interpreting ambiguous language, one would not wish to assign to judges tasks that they are institutionally incapable of performing.[54] To focus only on this issue, however, is to ignore the fact that local autonomy is a key concept in the American system, and that finding a value to be constitutionally protected erodes this concept by forcing national standards on both the political and judicial branches of state governments. Thus, while unlike Bickel's "wrong question," Ely's approach does beget an answer, the answer is one that suggests many conclusions inconsistent with the basic structure of American government.[55]

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53. *See* ELY, *supra* note 2, at 135–72.

54. *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1 (1973) (political question doctrine).

55. *Compare* ELY, *supra* note 2, at 43, 72, *quoting* A. BICKEL, THE LEAST DANGEROUS BRANCH 103 (1962).