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## Wisdom, Constitutionality, and Nuclear Weapons Policy

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## Abstract

In a well-known passage in his famous dissent in the flag-salute case of 1943, Justice Felix Frankfurter wrote:

Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focussing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. . . . Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law.

**KEYWORDS:** nuclear, weapons, wisdom

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Arthur Miller does not subscribe to any such notion. For him, the principal function of courts of law is precisely to vindicate the most precious interests of civilization. In his view, the Constitution is not a finite set of narrow commands that establish a framework within which policy is to be determined. Rather, it is an expansive body of rules which, at any given time, require the adoption of the specific policy choices that would then best serve to achieve “the avowed goal of meeting current problems.”<sup>2</sup> What wisdom dictates to be the most desirable way of attaining important social goals is what the Constitution demands. When applied to the issue of nuclear weapons, that approach yields the conclusion that since “the ultimate purpose of law [including constitutional law] is human survival under conditions that allow human dignity to be maximized”<sup>3</sup> and since wisdom (indeed, common sense) tells

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1. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 670-71 (1943) (Frankfurter, J., dissenting).

2. Miller, *Nuclear Weapons and Constitutional Law*, 7 *NOVA L.J.* 21, 27 (1982).

3. *Id.* at 26.

us that the continued manufacture and deployment of nuclear weapons involves the increasing risk that eventually, by design or error, they will be employed and that their use would threaten the complete destruction of human civilization, the Constitution must forbid the government of the United States from following a policy that perpetuates the possibility of such a catastrophe. In addition, the Constitution must impose a "duty [upon the government] to take action designed to eliminate the nuclear threat throughout the world."<sup>4</sup>

Professor Miller is, of course, well aware that, despite its substantial appeal (particularly to those like me who agree as to the danger posed by the continued existence of nuclear weapons and the urgent need to eliminate the threat), such a conclusion is at odds with traditional approaches to constitutional interpretation. He recognizes that adoption of any of his points "would require creativity or innovation by a constitutional decision-maker,"<sup>5</sup> and concedes it is unreasonable to expect that they would be accepted by the Supreme Court.<sup>6</sup> Indeed, the novelty of his arguments is obvious. To Congress is delegated the power to declare war, to raise and support armies, and to provide and maintain a navy. No language in the Constitution nor any judicial decision known to me suggests that those powers do not carry with them the power to select the weapons with which the armies and the navy are to be equipped. And, however much we may pray that no President would ever again make the choice to employ atomic or nuclear weapons in war, surely, according to the accepted understanding of the Constitution, the authority of the Commander-in-Chief includes the power to decide which of the weapons provided by Congress are to be employed once hostilities have commenced.<sup>7</sup> Moreover, much more precedent can be marshalled against, rather than for, the proposition that the Constitution obligates the three branches of the national government to ob-

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4. *Id.* at 24.

5. *Id.* at 29.

6. *Id.* at 23.

7. The power delegated to Congress to declare war obviously limits the authority of the President to employ weapons *before* hostilities have commenced. *See* L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 80-81 (1972). But that limitation goes to the use of *any* weapons; it has no special significance with respect to nuclear weapons, even though it may apply with greater moral force where nuclear weapons are concerned.

serve and enforce norms of international law even where these are contrary to national law or national policy.<sup>8</sup>

The fact that a constitutional lawyer would be strongly tempted to employ constitutional argument to shape public policy on so vital an issue is certainly understandable.<sup>9</sup> But Professor Miller faces a serious dilemma in that his argument is likely to be persuasive only to those who already agree with his policy position. Those who hold opposing views on the policy question are many and influential. They sincerely believe, however misguided, that the maintenance of a nuclear arsenal and the willingness to employ it where necessary are absolutely essential to the cause of peace and the security of our nation and its allies, and can readily dismiss Miller's argument with the accurate observation that settled constitutional law is to the contrary. Even those whose minds are not yet made up are unlikely to be won over by a constitutional contention that can be rebutted so effectively by arguments with impeccable traditional credentials.

If Professor Miller's purpose is simply to reinforce the resolve and commitment of those who already agree with him on the policy question by telling them that their views are not only supported by good sense, ultimate morality, and perhaps the norms of international law, but also reflect authentic constitutional commands, he may well be successful. But if his purpose is to change public opinion through constitutional argument, he must be able to convince his audience of the authoritativeness of that argument, and the authoritativeness of a legal argument can be demonstrated in only two ways: consensual agreement

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8. See *id.* at 460-61 n.61. Professor Henkin flatly states that "the Constitution does not forbid the President (or the Congress) to violate international law and the courts will give effect to acts within the constitutional powers of the political branches without regard to international law." *Id.* at 221-22. See Feinrider, *International Law as the Law of the Land*, 7 NOVA L. J. 103 (1982) for opposing view.

9. The insightful observation of Felix Cohen seems squarely on point here: Clearly, for the sanitary engineer, the existence of untreated swamps is the cause of malaria. For the king's attendant with the palm-leaf fans, the bite of the mosquito is the only relevant cause. For the pathologist, the effect of the malaria virus upon red blood corpuscles is the cause. In each case the cause is the point at which effort can be usefully applied. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 255 (1950). For Professor Miller, as constitutional lawyer, the relevant cause of the nuclear weapons crisis must be the failure to recognize and apply proper principles of constitutional law.

among a substantial majority of those generally recognized as knowledgeable in the field or acceptance by a court—preferably an appellate court and most preferably the Supreme Court. Quite plainly, Professor Miller is in a position to make neither demonstration. Novel constitutional arguments designed to win the day for the adherents of one side of a controversial policy issue will, by their nature, be unable to command broad acceptance, and, as noted, Professor Miller concedes that his argument will be unlikely to find judicial favor. Even a favorable judicial ruling may, of course, be insufficient to resolve a disputed constitutional issue, as long ago demonstrated by the categorical rejection by the North of the Dred Scott decision of 1857,<sup>10</sup> and as may clearly be seen today in the ongoing debates over such questions as abortion policy,<sup>11</sup> the exclusionary rule,<sup>12</sup> and school bussing for the achievement of racial desegregation.<sup>13</sup> But the instances in which public opinion and public policy have been changed by constitutional reasoning<sup>14</sup> have necessarily involved judicial pronouncements which have given moral force to debatable constitutional arguments by converting them into rules of law. Without such legitimation,<sup>15</sup> mere argument, no matter how cogent and thoughtful, lacks the authority necessary to lead persons of differing views to abandon their prior positions on policy questions.

Professor Miller is surely right in his observation that “[i]t would be naive to expect the Supreme Court to intervene”<sup>16</sup> on the issue of nuclear weapons policy. But is this merely because, as he suggests, “judges are timorous officers of government . . . [who] look upon requests to go beyond the familiar and the expected as frightful occa-

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10. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). For a description and discussion of the political reaction engendered by this decision, see D. FEHRENBACHER, *THE DRED SCOTT CASE* 417-567 (1978).

11. See, e.g., F. JAFFE, B. LINDHEIM & P. LEE, *ABORTION POLITICS* (1981); E. RUBIN, *ABORTION, POLITICS, AND THE COURTS* 87-161 (1982).

12. See, e.g., S. SCHLESINGER, *EXCLUSIONARY INJUSTICE* (1977).

13. See, e.g., the antijudicial diatribe of L. GRAGLIA, *DISASTER BY DECREE* (1976).

14. The paradigm case is, of course, the effect of *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) in ending de jure racial segregation.

15. The classic discussion of the legitimating function of the Supreme Court is in C. BLACK, *THE PEOPLE AND THE COURT* 56-86 (1960).

16. Miller, *supra* note 2, at 36.

sions"?<sup>17</sup> Is the problem really only one of judicial timidity? It does seem severe to label as timorous a federal judiciary which has, in recent years, recognized abortion as a constitutional right,<sup>18</sup> ordered the President of the United States to relinquish evidence that would incriminate him with regard to the commission of impeachable offenses,<sup>19</sup> drastically curtailed the imposition of the death penalty,<sup>20</sup> required unwilling school boards to implement sweeping remedial plans for bringing about the desegregation of public schools,<sup>21</sup> and taken over the administration of particular prisons or of entire prison systems in some 24 states.<sup>22</sup> It is thus a good deal less likely that the anticipated judicial reluctance to intervene in nuclear weapons policy is to be attributed to the inherent timorousness of judges than to their probable views on the proper role of courts in the governmental process and on the relationship between the wisdom of a policy and its constitutionality.

This leads to the inevitable question: what *is* the proper relationship between the wisdom of a policy and its constitutionality? Or, to put the same question somewhat more directly, when should judges insist, as a matter of constitutional law, upon the adoption of a policy they deem wise or the rejection of a policy they deem unwise? When should they be prepared to remove a policy issue from the political forum, where numbers count, in order to decide it in the judicial forum, where numbers can be ignored? These issues have been exercising constitutional scholars a great deal in recent years, yielding a wide variety of answers across a spectrum that finds Arthur Miller perhaps closest to one end<sup>23</sup> and Raoul Berger closest to the other.<sup>24</sup> The answers at

17. *Id.*

18. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

19. *United States v. Nixon*, 418 U.S. 683 (1974).

20. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976). A listing of cases in which the Supreme Court invalidated the imposition of death sentences between 1976 and May, 1980, may be found in the concurring opinion of Justice Marshall in *Godfrey v. Georgia*, 446 U.S. 420, 438 n.5 (1980).

21. *See the discussion in Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458-61 (1979).

22. For a comprehensive list of states in which courts had taken over the administration of prisons as of 1981 and of the decisions which brought these results about, see the concurring opinion of Justice Brennan in *Rhodes v. Chapman*, 452 U.S. 337, 353-54 n.1 (1981).

23. *See A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM* (1982); Miller,

the very extremes of the spectrum are “never” and “whenever they want,” but both of these are unacceptable. To answer “never” is to oblige the judiciary to treat as constitutional such policies and practices as “separate but equal” racial segregation, gross legislative malapportionment, and the maintenance of prison systems in which inmates are confined in conditions of ghastly and barbaric inhumanity.<sup>25</sup> To cite the wise counsel of Justice Harlan Fiske Stone, refraining in all cases “from passing upon the legislative judgment ‘as long as the remedial channels of the democratic process remain open and unobstructed’ . . . seems . . . no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will.”<sup>26</sup>

On the other hand, to answer “whenever they want” is to maintain that judges, rather than the branches of government responsive to the electorate, should have the ultimate authority to decide the content of government policy — an authority which they would exercise by invoking the Constitution whenever they disagreed with the manner in which Congress or the President proposed to deal with a national problem. It is clear that Professor Miller does not find that answer unattractive, nor its consequences undesirable.<sup>27</sup> Unlike Learned Hand, he would have no misgivings about being “ruled by a bevy of Platonic Guardians,”<sup>28</sup> for he would have no doubt that Platonic Guardians could be counted on to do better in insuring “human survival under conditions

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*The Case for Judicial Activism*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 167 (S. Halpern & C. Lamb eds. 1982).

24. R. BERGER, *GOVERNMENT BY JUDICIARY* (1977). Berger’s view is that judicial policymaking is never legitimate, and that the only proper function of courts in constitutional adjudication is to ascertain and faithfully (slavishly) to apply the original intention of those who framed and ratified the constitutional provision at issue. I have elsewhere criticized Berger’s position at some length. See Alfange, *Another Look at the “Original Intent” Theory of Constitutional*, 5 *HASTINGS CONST. L.Q.* 603 (1978).

25. For a lengthy and disturbing, but not exhaustive, list of the policies and practices that would have to be constitutionally tolerated if the answer to this question were “never,” see Grey, *Do We Have An Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 710-14 (1975).

26. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 605-06 (1940) (Stone, J., dissenting).

27. See the works cited *supra* note 23.

28. L. HAND, *THE BILL OF RIGHTS* 73 (1958).



that allow human dignity to be maximized<sup>29</sup> than would individuals whose continuation in office depends on their attentiveness to the pressures of interest-group politics. Perhaps he is right. Nevertheless, that answer has implications that are profoundly troubling.

It is likely that Platonic Guardians would be fallible; it is certain that judges are.<sup>30</sup> There is no abstract reason for believing that the policies judges might choose, after considering the arguments of lawyers on behalf of their clients, will in fact be wiser than the policies enacted into law by Congress after considering the representations of interest-group spokesmen on behalf of their constituents, or than the policies adopted by the President after considering the counsel of his advisers. But the argument that judges should assume authority to invalidate laws or policies they deem unwise is rarely, if ever, based on abstract considerations. There is no mystery as to who may be expected to advocate or oppose that argument. Those who suspect that the democratic political process will yield policies with which they disagree, and that, if courts were allowed to decide, more favorable policies would be adopted, will argue for the equation of wisdom and constitutionality and for judges to protect us all from the folly of majoritarianism. Those who believe that the policies the political branches are likely to adopt will be reasonably sound, and that judicial involvement will probably result in actions that are retrogressive and unenlightened, will argue for the strict separation of wisdom and constitutionality and for judges to refrain from deciding constitutional questions on the basis of their own views of wise public policy. It is thus no coincidence that in the period from the 1880s to the New Deal, when judicial review was perceived as a major obstacle to the cause of social and economic reform, liberal opinion was united in its criticism of the courts for their failure to respect the distinction between wisdom and constitutionality.<sup>31</sup> Similarly, the enthusiasm of liberals for judicial intervention in

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29. See *supra* note 3 and accompanying text.

30. The classic statement of this proposition is that of Justice Jackson: "We [the Supreme Court] are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

31. As Robert Jackson noted shortly after the end of this period, the "long-smouldering intellectual revolt against the philosophy of many of the Supreme Court's decisions [equating wisdom and constitutionality] . . . was led by outspoken and

policy matters that blossomed during the era of the Warren Court can hardly be unrelated to their preference for the policies that present-day judges can sometimes be persuaded to adopt.<sup>32</sup> Conversely, conservatives, who once looked upon courts as a bastion for the protection of property rights against legislative policies they abhorred,<sup>33</sup> have come to see the virtue of distinguishing wisdom from constitutionality now that they perceive that policies favored by the courts may be less to their liking than those of the legislature.<sup>34</sup> Over the years, the argument that courts should ignore the distinction between wisdom and constitutionality by substituting their own policy choices for those of the political branches has been made and opposed on behalf of causes both noble and not so noble.

The belief that judges can reliably be counted on to share one's own conception of wise public policy may be both rational and accurate with regard to specific issues at specific times. It is a more dubious basis, however, for a defense of judicial policymaking on all public questions in all periods. Given the fact that there is no *a priori* reason to assume that the policy choices of courts will be objectively better than those of the legislature, or that judges, who vary widely in philosophy and perspective, will consistently share one's values on public mat-

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respected members of the Court itself . . . [and was joined by] those in our universities distinguished for disinterested legal scholarship . . . many thoughtful conservatives and practically all liberals and labor leadership." R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY v* (1941).

32. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* iv-v (1978).

33. The clearest statement of this view was perhaps that of Justice Brewer:

I am firmly persuaded that the salvation of the nation, the permanence of government of and by the people, rests upon the independence and vigor of the judiciary. To stay the waves of popular feeling, to restrain the greedy hand of the many from filching from the few that which they have honestly acquired, and to protect in every man's possession and enjoyment, be he rich or poor, that which he hath, demands a tribunal as strong as is consistent with the freedom of human action and as free from all influences and suggestions other than is compassed in the thought of justice, as can be created out of the infirmities of human nature. To that end courts exist . . . .

Brewer, *The Nation's Safeguard*, *PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION* 37, 47 (1893).

34. See, e.g., Graglia, *In Defense of Judicial Restraint*, in *SUPREME COURT ACTIVISM AND RESTRAINT*, *supra* note 23, at 135-37.

ters, it would seem difficult to argue for a broad judicial policymaking role in all areas. Certainly even the most optimistic judicial activist today can feel no assurance that courts, given freedom to make their own policy choices "whenever they want," will no longer use that power to block legislative efforts at social, political, or economic reform.<sup>35</sup> To invite judges to equate their own notions of wise policy with the requirements of the Constitution, and to do so on their own terms, is to run the risk of opening a Pandora's Box of unforeseeable content.

If an understandable basis for advocating judicial activism in all areas of policy is difficult to perceive, it is easy to see a principled justification for an across-the-board opposition to judicial policymaking—it seems squarely inconsistent with democratic theory. As Terrance Sandalow has written: "Reducing the influence of politics upon governmental policy is, in short, a means of reducing the influence on policy of those whose lives are affected by it."<sup>36</sup> The observation that judicial policymaking is antidemocratic is, of course, not new,<sup>37</sup> nor has it gone unchallenged.<sup>38</sup> The basis of the challenge, as it is most commonly made, is that democracy, at least in its pure form, was not the form of government chosen by the framers of the Constitution, who, through such means as the electoral college, the imposition of constitutional re-

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35. For recent examples of transparent exercises of judicial policymaking in which legislative efforts at social, economic, or political reform were thwarted, *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (declaring invalid, on first amendment grounds, the critical expenditure-limitation provisions of the Federal Election Campaign Act Amendments of 1974 through which the Congress had sought to protect the integrity of the federal election process against the kinds of abuses that came to light as a result of the Watergate scandals); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (striking down, apparently on tenth amendment grounds, the extension by Congress of the coverage of the Fair Labor Standards Act of 1938, as amended, to the employees of state and local governments); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (striking down, on first amendment grounds, a Massachusetts law intended to control the impact of corporate spending on referendum elections); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (striking down, on contract clause grounds, a Minnesota law intended to protect the pension benefits of employees against the risk of plant shutdowns prior to the establishment of their pension eligibility).

36. Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446, 459 (1981).

37. *See, e.g.*, the discussion in A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (1962).

38. *See, e.g.*, C. BLACK, *supra* note 15, at 179-81; Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099 (1977).

straints on certain types of majority action, and the creation of an appointed and life-tenured judiciary, sought to guarantee that the will of the people would be held within tolerable bounds.<sup>39</sup> Judicial review, the argument goes, although not specifically mentioned in the Constitution, is simply another of the checks in the constitutional framework. Moreover, since its exercise has been warmly accepted by the people, it must be seen as having been approved by democratic choice, and thus cannot be said to be undemocratic.<sup>40</sup> In addition, it is claimed that the whole argument that courts should defer to the policy judgments of the political branches in order to respect the will of the majority is misconceived because, even if it could be assumed that there is such a thing as the majority will and that it is possible to ascertain in practice what that will actually is, the political branches (particularly Congress) are selected and organized in such a way as to insure its frustration, not its effectuation.<sup>41</sup>

These challenges to the claim that judicial policymaking is antidemocratic have been answered meticulously and effectively by Jesse Choper,<sup>42</sup> whose argument cannot even be summarized here. Suffice it to say that, while one must concede the existence of myriad ways in which the political branches can function undemocratically and escape public accountability, Congress and the President remain vastly more responsive to public opinion than the federal courts. And, while the American people clearly favor judicial review and expect the courts to hold the other branches of government within constitutional limits, it requires an enormous jump to conclude from that observation that the public would approve the courts' use of that power to invalidate presidential or congressional action in any case in which the judges deemed the policy underlying that action to be mistaken.<sup>43</sup> While the framers

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39. *See id.* at 1104-08.

40. C. BLACK, *supra* note 15, at 178-79, 210-12.

41. The best, and perhaps now the classic, statement of this argument is in M. SHAPIRO, *FREEDOM OF SPEECH* 17-25 (1966).

42. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 29-59 (1980).

43. There is more than a little merit in the observation of Robert Bork: The Supreme Court regularly insists that its results, and most particularly its controversial results, do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by a proper understand-

undoubtedly were uneasy about some of the possible ramifications of majority rule and sought to guard against its potential excesses, they did so, as Gordon Wood describes it, "without repudiating the republicanism and the popular basis of government that nearly all devoutly believed in."<sup>44</sup> That the action of the people's representatives may need to be checked from time to time and in particular ways does not render unlimited judicial policymaking legitimate. If judges may freely substitute their own policy preferences for those of the legislature, we should no longer claim to be a democracy, and should seek to find a new name and a new theory for the governmental system which has evolved.

If judicial policymaking—the equation of wisdom with constitutionality—is sometimes imperative but not always permissible, just when is it proper and defensible? My own choice for the proper starting place in the search for the answer is Justice Stone's justly celebrated *Carolene Products* footnote of 1938.<sup>45</sup> There Stone suggested that the political process was the proper area for the resolution of policy questions<sup>46</sup> except where effective access to it is wholly or partially closed off to the persons affected by the policy at issue or where "prejudice against discrete and insular minorities"<sup>47</sup> seems likely to have been the motivation for its adoption or enforcement. In those cases, courts may legitimately view with skepticism the results arrived at through the political process and undertake to assess for themselves

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ing of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises tells you what it thinks its customers demand.

Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 3-4 (1971).

44. Wood, *Democracy and the Constitution*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 1, 16 (R. Goldwin & W. Schambra eds. 1980).

45. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). It is precisely because it uses the *Carolene Products* footnote as the starting place in the search for the answer that I find J. ELY, *DEMOCRACY AND DISTRUST* (1980) to be the most pregnant and insightful of the recent writings on the legitimate role of judicial review in a democratic society. Professor Miller is, of course, not of the same opinion. See Miller, *Book Review*, 32 *U. FLA. L. REV.* 369 (1980).

46. Stone's view of the proper locus of policymaking authority in the ordinary case was forcefully expressed in his dissenting opinion in *United States v. Butler*, 297 U.S. 1, 78-88 (1936).

47. The term comes from the third paragraph of the *Carolene Products* footnote, 304 U.S. at 153 n.4.

the desirability of the policy outcome.<sup>48</sup> The thrust of Stone's *Carolene Products* approach (at least the approach described in the second and third paragraphs of the footnote)<sup>49</sup> may be characterized as resting upon a "legislative failure" theory<sup>50</sup>—that is, the theory that judicial resolution of the policy questions inherent in constitutional adjudication becomes permissible when the political process (most commonly the legislative process) fails adequately to perform its function of attaining a just and fair compromise among competing interests because of imperfect access or prejudice.

It may be that a legislative failure theory alone is insufficient to cover all of the circumstances in which the policy judgments of the legislature may be judicially disregarded. Institutional considerations may undoubtedly justify a greater role for courts in the evaluation of procedural, as opposed to substantive, rules,<sup>51</sup> and there should be some

48. As Stone was to write two years after *Carolene Products*:

History teaches us that there have been but few infringements of personal liberty by the state which have not been justified . . . in the name of righteousness and the public good, and few which have not been directed . . . at politically helpless minorities.

*Minersville School Dist. v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting).

49. There is another paragraph — the first — which suggests that courts might be justified in not accepting the policy judgments of the political branches where the action being challenged appears to violate one of the specific prohibitions of the Constitution. This paragraph was not in Justice Stone's original version of the footnote but was added later at the urging of Chief Justice Hughes. See L. LUSKY, *BY WHAT RIGHT? 108-11* (1975). It is somewhat at odds with the portion of the footnote that Stone had conceived because it seeks to justify judicial rejection of legislative policy judgments, not on the basis of any reason to believe that the legislative process may not have functioned fairly, but solely on the text of the Constitution. See *id.* at 111-12. Since the text is usually not self-defining, ascribing meaning to its provisions is an act of policymaking. If, as Stone believed, courts should defer to the policy judgments of the political branches in the ordinary case, why not in these cases as well? That is, as long as there is no ground for suspicion that the political branches may be unjustly disfavoring those without an effective voice in the political process or those toward whom majoritarian prejudice may be directed.

50. It has, in fact, been so characterized by Owen Fiss. See Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6-11 (1979). Professor Fiss is extremely critical of the *Carolene Products* approach because he rejects its "general presumption in favor of majoritarianism." *Id.* at 6.

51. Even Justice Frankfurter, who saw no room for judicial reexamination of the substantive policy choices of the legislature as long as these choices could be said to be

room for judicial invalidation of statutes touching on individual rights where these cannot be said to serve any legitimate public purpose<sup>52</sup> or where, in the classic formulation of Justice Oliver Wendell Holmes, “a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”<sup>53</sup> But surely the protection of the powerless and the unrepresented from a hostile or unsympathetic majority is manifestly the great and vital function of judicial review. It is the fulfillment of that function that amply justifies judicial policymaking in certain situations: defending the right to hold and to express beliefs that the majority may regard as abhorrent,<sup>54</sup> eliminating gross legislative malapportionment<sup>55</sup> or discriminatory gerrymandering,<sup>56</sup> abolishing all vestiges of racial discrimination that stigmatizes its victims,<sup>57</sup> taking whatever affirmative action may be required to insure

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rationally related to the achievement of a proper public purpose, *see, e.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting), conceded the propriety of “the exercise of judgment” by courts in the evaluation of procedures employed in criminal trials “to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples.” *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

52. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), invalidating Connecticut’s anti-contraception law. *Cf.* Justice Harlan’s statement in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion), that due process forbids “all substantial arbitrary impositions and purposeless restraints.” The abortion cases, *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 197 (1973), cannot be said to involve purposeless restraints and thus present a far more difficult issue than *Griswold*. *See, e.g.*, Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUPREME COURT REVIEW 157.

53. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

54. That is, the kind of protection that the Supreme Court, to its discredit, did not provide in the years following both World Wars. *See, e.g.*, *Schenck v. United States*, 249 U.S. 47 (1919); *Dennis v. United States*, 341 U.S. 494 (1951). *Cf.* *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

55. *See Reynolds v. Sims*, 377 U.S. 533 (1964).

56. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

57. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Race-conscious legislation that does not stigmatize those who may be adversely affected is another matter. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 373-76 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.). As Laurence Tribe has noted: “When the group in control of the political process adopts classifications which protect or benefit a minority and burden itself, the reasons are absent for regarding the govern-

that public school authorities meet their constitutional responsibility to establish and maintain school systems "in which racial discrimination would be eliminated root and branch;"<sup>58</sup> and guaranteeing that conditions of confinement in state prisons are not so inhumane and barbaric as to constitute cruel and unusual punishment.<sup>59</sup> At the same time, recognition that legislative failure to protect the rights of those who have suffered from prejudice or inadequate representation provides the fundamental justification for judicial policymaking would spare us judicial interference with the policy decisions of the political branches in cases where those who seek judicial protection from the effects of those policies are themselves in command of substantial political resources and cannot reasonably be looked upon as the targets of irrational majority hostility.<sup>60</sup>

But under almost any theory that recognizes some limitations on judicial discretion, it is difficult to understand how the issue of nuclear weapons policy could be said to fall within the range of questions that may be deemed appropriate for judicial, as opposed to political, resolution. I am not disposed to deny that the issue is one on which human survival may ultimately depend, or that the policy of increasing our stockpiles of missiles and warheads (while seeking to negotiate for their overall limitation) and of maintaining a first-strike capability is one that carries with it the terrible risk of the eradication of civilization.

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mental choice with suspicion, and therefore for strictly scrutinizing the results." L. TRIBE, *supra* note 32, at 1044.

58. *Green v. County School Bd.*, 391 U.S. 430, 438 (1968).

59. Prisoners clearly fall within the scope of both the second and third paragraphs of Justice Stone's *Carolene Products* footnote (*see supra* text accompanying note 47). They have no access to the political process and they are a "discrete and insular" minority. They are "voteless, politically unpopular, and socially threatening." *Rhodes v. Chapman*, 452 U.S. 337, 358 (1981) (Brennan, J., concurring).

60. Among the recent judicial excrescences that might have been avoided under a legislative failure theory are *Buckley v. Valeo*, 424 U.S. 1 (1976) (declaring invalid the expenditure limitations in the Federal Election Campaign Act Amendments of 1974, even as applied to the campaigns of the Republican and Democratic candidates for federal office — individuals who, as a group, are probably the least lacking in political efficacy of anyone in the country); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (declaring invalid the application of the Fair Labor Standards Act of 1938 to employees of state and local governments, in disregard of what Justice Brennan, in dissent, described as "the enormous impact of the States' political power" when exercised in the federal political process. *Id.* at 878 (Brennan, J., dissenting)).



But the urgency of the issue and the potentially frightful consequences of miscalculation are not what should determine whether the matter is one for the political or the judicial process. In fact, recalling the observation of Terrance Sandalow, one might reasonably conclude that the more urgent the issue, the more vital it is to avoid "reducing the influence on policy of those whose lives are affected by it."<sup>61</sup> Shifting the question to the judicial forum converts it into a dispute to which most of us become bystanders; leaving it in the political process can nurture a sense of public responsibility—such as is currently being manifested in the rapid growth of the grass-roots movement for a nuclear freeze. Moreover, raising the issue in the courts carries its own risks, which ought not to be minimized. As Charles Black has shown, judicial action can do much to legitimize governmental policy.<sup>62</sup> A ruling by the Supreme Court that the maintenance of a nuclear weapons arsenal is constitutional (which is the only ruling realistically to be expected should the question actually reach the Court and be decided on the merits) could, in light of the public tendency noted by Justice Frankfurter "to regard a law as all right if it is constitutional,"<sup>63</sup> seriously undermine the cause of opposition to nuclear weapons<sup>64</sup> by raising doubts in the minds of many persons about the point of continuing to object to a policy whose validity has been judicially affirmed.

Obviously, the issue of nuclear weapons policy is not one where access to the political process is in some way closed off to those whose interests are affected.<sup>65</sup> Nor is it one where the government's policy is

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61. See *supra* note 36 and accompanying text.

62. See *supra* note 15.

63. See *supra* note 1 and accompanying text.

64. The legitimating function of the Supreme Court has already dealt a blow to the opponents of nuclear power plants. Ignoring serious questions of standing in order to reach the merits of a suit brought by groups seeking to block plant construction, the Court gave advance validation to the Price-Anderson Act of 1957, which limits the total amount of a company's liability in the event of a nuclear accident. As long as the validity of the act was an open question, companies had a strong motivation for caution in entering the nuclear power industry. The legitimation of the act took away that need for caution and gave the companies concerned a significant stimulus to proceed. See *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59 (1978).

65. Of course, human survival is not a question about which only citizens of the United States have an interest. Every person in the world may well have a life-or-death interest in what the policy of the United States is with regard to nuclear weapons, but

aimed at, or may be expected to have its harshest effects upon, a disadvantaged minority. If nuclear war should come, the costs will be shared evenly by all, including the officials responsible for developing and supporting the policy that may have led to it. Judicial intervention thus cannot be justified on the basis of a theory of legislative failure. Indeed, the issue is not, in the traditional sense, one of individual liberties at all. For, despite the potential costs to us all, the government is not seeking to deprive anyone of life, liberty, or property; it is seeking—beyond a doubt, sincerely—to protect the nation, its people, and its allies from a possible external threat, and, presumably, to advance the cause of world peace through nuclear deterrence. In that regard, it cannot be said that the government's policy is unrelated to the attainment of a legitimate public purpose or that it is rationally insupportable. As strongly as I believe that a policy which accepts the risk of nuclear war is intolerable, and as easily as I may talk in private about "nuclear madness," I would find it impossible to assert that no rational and fair man could subscribe to the government's policy or could conscientiously accept its assumption that the surest way of avoiding nuclear war—a goal, I trust, that everyone shares—is to maintain a nuclear force of sufficient strength to deter the use of such weapons by anyone else.

What is more, it is not clear what courts could do even if they undertook to call into question the validity of the government's policy. They could presumably hold that it is unconstitutional for the United States to maintain nuclear weapons, but what then? Professor Miller emphatically states that he is not advocating unilateral disarmament, but merely urging a recognition of the government's constitutional duty "to take action designed to eliminate the nuclear threat throughout the world"<sup>66</sup>—which means, I presume, a duty to negotiate with other nations to effect the abolition of nuclear weapons. Similarly, no court could be expected to order unilateral disarmament; the most it could do would be to order the government to enter into disarmament negotiations. But I fail to see how such an order would markedly alter the

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only United States citizens have direct access to the American political process. However, since the interest of all persons in survival is identical, the claims of nonresidents of the United States may be fully represented by their counterparts among United States citizens. This is a genuine class-action matter regardless of whether it is heard in the political process or the judicial process.

66. Miller, *supra* note 2, at 24.

existing situation. Nuclear weapons would continue to exist (and presumably, to be manufactured and deployed) during the course of whatever negotiations would be held. The negotiations themselves would be carried out by the President (for I doubt that even Professor Miller is yet prepared to urge that federal courts oust the President from the process and commence their own negotiations with foreign governments), and would in all likelihood go on pretty much as at present. Because any judicial declaration of the unconstitutionality of nuclear weapons would have no effect until the completion of successful negotiations, it could not be expected either to cause the government to negotiate differently than it otherwise would or to cause the public to put greater pressure on it to conclude an agreement. The President would be no more willing to sign a treaty except on terms that he would consider to be fully consistent with the security interests of the United States and the public would be no more prepared to insist that the government accept less than the most favorable possible agreement. Nuclear weapons are already generally perceived as abominable; yet, as long as they are possessed by other nations, considerations of national security make the abominable seem tolerable. It is extremely doubtful that a judicial declaration of unconstitutionality would do more to cancel out these national security concerns than abhorrence already does.

In sum, regardless of the magnitude of the stakes, what our nuclear weapons policy should be seems clearly to be a question of wisdom, not of constitutionality. The policy area is one where responsibility for decision making is squarely and unequivocally delegated to the political branches by the Constitution. The soundness of the policy raises questions about which reasonable men may differ. The hazards that the policy generates must be faced as fully by the policymakers themselves as by any inadequately represented or disadvantaged minority group. All of these factors point to the appropriateness of a political resolution, as courts undoubtedly would recognize should the issue somehow be brought before them.

It seems likely that the ultimate purpose of Professor Miller's breathtaking exercise in constitutional reasoning is not the futile and misdirected effort to involve the courts in the resolution of this ques-

tion,<sup>67</sup> but the generation of additional political pressure for a reversal of current governmental policy. If that is his purpose, I wish him well. But it is essential to remember that the horse must be kept in front of the cart. It may well be that in some saner future, if humanity does eventually manage to overcome the threat of nuclear devastation, it will be the common understanding that nuclear weapons are wholly unacceptable in a civilized world. That understanding may then come to be recognized as an integral part of our constitutional law. When that time is reached, Professor Miller's article may well be looked back upon as the first groundbreaking step leading us to the path of higher constitutional wisdom. But that higher constitutional wisdom will not be achieved unless we first become convinced of the absolute necessity of abolishing nuclear weapons as a matter of policy. Until the day has been won on the policy question, the argument for the unconstitutionality of nuclear weapons will remain a curiosity except to those who already share its underlying policy premises. It is indispensable, therefore, that current efforts to change national policy be directed at persuading those who do not yet agree that continued reliance on nuclear weapons is unwise rather than unconstitutional.

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67. It might be argued, with some merit, that the opponents of current nuclear weapons policy have little to lose by trying to raise the issue of the constitutional merits of that policy in the courts as well as in the political process. If they lose in the political process, they just might win in court; on the other hand, if they win in the political process, there is no danger that the courts would overturn that victory. It is certainly true that courts would not overturn such a political victory as long as the traditional limitations on judicial authority are respected. But, while fanciful, it is possible to imagine judges appointed by Ronald Reagan and holding the views on the scope of judicial power and the concept of affirmative constitutional duty espoused by Arthur Miller (see Miller, *Toward a Concept of Constitutional Duty*, 1968 SUPREME COURT REVIEW 199) who might assert that since the Constitution imposes upon the federal government the affirmative constitutional duty to protect human dignity, and since human dignity is only possible in a non-Communist society, the Constitution requires the United States to maintain and deploy an arsenal of nuclear weapons sufficient to guard against the possibility of successful Communist aggression. Why is it necessary to assume that the policy decisions of judges will be ones that we would embrace? That was certainly not the case prior to 1937. It is not always the case today. It need not be the case in the future.