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Our Perfect Constitution

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Professor Monaghan takes issue with "due substance" theorists, who view the Constitution as protecting rights and values generated by current conceptions of political morality. In this Article, he examines and criticizes the theories advanced to justify looking to those current conceptions as an acceptable mode of reasoning about constitutional meaning. Professor Monaghan's own view is that the proper mode of ascertaining constitutional meaning is one that looks to original intent and precedent, a view that acknowledges the Constitution does not guarantee perfect government.

Our great and sacred Constitution, serene and inviolable, stretches its beneficent powers over our land... like the outstretched arm of God himself... the people of the United States... ordained and established one Supreme Court—the most rational, considerate, discerning, veracious, impersonal power—the most candid, unaffected, conscientious, incorruptible power... O Marvelous Constitution! Magic Parchment! Transforming word! Maker, Monitor, Guardian of Mankind!1

Every tribe needs its totem and its fetish, and the Constitution is ours.2

Indeed, Mr. Editor, the great fault of the present times is, in considering the constitution as perfect.3

I

THE PERFECTIONIST CULTURE THEME

Some lawyers, many judges, and perhaps most academic commentators view the constitution as authorizing courts to nullify the results of the political process on the basis of general principles of political morality not derived from the constitutional text or the structure it creates. The supreme court is plainly committed to such an endeavor in the sex-marriage-children area, where some fifty written opinions order these relationships ostensibly in the name of securing due process and equal protection.4 Indeed, the court seems well on its way to "constitutionalizing" the entire subject of family law, which two short decades ago was bereft of constitutional restraints.5

2Lerner, Constitution and Court as Symbols, 46 Yale L.J. 1290, 1294 (1937).
5 For an elaborate and approving summary of this development, see Developments in the Law—The Constitution and the Family, 93 Harv. L. Rev. 1156, 1161-97, 1248-1383 (1980).
The court's efforts at developing a constitutional *lex non scripta* are modest when compared with those of its admiring academic commentators. For well over twenty years these commentators have been industriously formulating substantive limits on the political process in the name of equal protection of the laws. More recently, these commentators have been "taking rights seriously"—so seriously in fact that they outdo one another in urging the imposition of constitutional constraints on the basis of "rights" whose origins cannot be traced to either the constitutional text or the structure it creates. The current academic emphasis on rights, rather than equality, has two sources: the general perception that concerns over political morality are not exhausted by, and cannot be reduced to, concepts of equality; and a more focused concern for according protection to those specified areas of individual autonomy that are most highly esteemed by the commentators. Thus, the commentators eagerly defend limitations on government based upon the rights of "personhood," "intimate association," and "personal lifestyles." Quite plainly, the old fear of substantive due process is dead; it has been succeeded by a confidence that "good" and "bad" varieties of substantive due process can be distinguished.

Some commentators would go still further. Mixing concepts of rights and equality, they would hold government to an affirmative constitutional duty to satisfy the "just wants" of its citizens. In their view, government is constitutionally obliged to provide "adequate"

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6 These limitations developed initially under the rubric of equal protection because egalitarian intuitions, however confused, underlay much of the Warren court's thinking about political morality. Moreover, a general stench had enveloped the concept of substantive due process. See Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 417 (1977) [hereinafter Monaghan, Of "Liberty"]: Stone, Equal Protection And The Search for Justice, 22 Ariz. L. Rev. 1, 5-8 (1980); Stone, Justice in the Slough of Equality, 29 Hastings L.J. 995, 1008-18 (1978).

7 Karst, Intimate Association, supra note 4, at 629-52 ("freedom of intimate association").

8 L. Tribe, American Constitutional Law ch. 15 (1978) ("rights of privacy and personhood").

9 Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563, 611-25 (1977) ("constitutional lifestyle right").

10 Apparently this belief is shared by the court. See Moore v. City of E. Cleveland, 431 U.S. 494, 502-06 (1977) (plurality opinion); note 175 infra.

11 Professor Michelman originally advanced this idea under the concept of equal protection, while suggesting that substantive due process would have been a more appropriate vehicle. Michelman, The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 11-13, 16-18 (1969) [hereinafter Michelman, Protecting the Poor].
levels of food, housing, education, and whatever other "goods" the commentators deem necessary to a decent existence.  

Academic commentary of this character is more than simply intriguing. It vividly highlights a core issue in modern constitutional theory—the legitimacy of judicial review under (in the characterization of a former student) the "due substance clauses": substantive due process and substantive equal protection. Most commentators welcome "due substance" review in some form, proclaim that it is "here to stay," and admonish that further resistance is "unwise" and "hopeless." The fun, for them, begins in seeking to domesticate their creations. Since the meaning of the constitution is not to be found in its history or in judicial precedent, but in current social consensus—or, as now seems the fashion, in Kant, Rawls, or Nozick—the commentator's initial task is the selection of a preferred source from which to extract concepts of equality and justice. Next, the substance of political activity is expressed and weighed in scales, or even calibrated on charts. Finally, the commentator concludes, usually after the most meticulous and detailed comparison of the "interests at stake," that certain political outcomes are simply prohibited. No matter how "fair" or "open" the underlying political process, these outcomes must be set aside because they conflict with some ideal normative pattern "out there" that circumscribes the permissible distribution of governmental benefits or burdens.

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14 Karst, Intimate Association, supra note 4, at 665.
19 For an astounding effort to apply this mode of analysis to a whole complex area of law, see Developments in the Law—The Constitution and the Family, 83 Harv. L. Rev. 1155, 1193-97 (1980) (“flexible balancing”).
"Due substance" methodology is profoundly different from one premised on a view that (in general) the constitution legitimately sanctions inquiry only into the openness and fairness of the political process. Professor Ely's process-oriented Democracy and Distrust is, I think, the classic affirmation in our time for those recalcitrants who, like me, oppose any further extension of an approach that tests political outcomes for their consistency with some external, ideal pattern of distributive justice. And since we recalcitrants are, as yet, unwilling to yield the battlefield, one can expect that this controversy will occupy the center of constitutional debate for some time to come.

My concern here is with an aspect of the controversy that in this context has escaped notice. Virtually every adherent to the "due substance" school of judicial review shares in whole or in large part a critical culture theme, to borrow a phrase from cultural anthropology: that of "Our perfect Constitution."

The practice of "constitution worship" has been quite solidly ingrained in our political culture from the beginning of our constitutional history. Initially, the constitution symbolized the unity of the new nation. With the advent of national prosperity, "the exultation over the new America was converted into the tradition of a perfect constitution." Not surprisingly, the Civil War placed considerable strain on the perfection theme; but with the resurgence of nationalism at the war's conclusion, perfectionism took firm hold again.

A counterculture has always existed, of course. Before the Civil War, for example, many abolitionists denounced the constitution for

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\[\text{Notes:}\]

20 J. Ely, Democracy and Distrust (1980). As will be apparent, however, Professor Ely's approach shares premises with those of his opponents, particularly his general adherence to the "two-clause theory." See note 61 infra.

21 I used the term "distributive justice" to include claims to "autonomy" as well as "equality." Like equality, autonomy is a value which the political order claims the power to regulate to meet current social needs.

22 The commentary on Professor Ely's book is already voluminous. See Estreicher, Review Essay, 56 N.Y.U.L. Rev. 547, 547 n.4 (citing 12 works in addition to an entire symposium).

23 See 1 H. Holst, Constitutional and Political History of the United States ch. 2 (J. Lalor & A. Masun trans. 1889) ("The Worship of the Constitution and Its Real Character").

24 Lerner, supra note 2, at 1295.

25 Id. at 1297; see Schechter, The Early History of the Tradition of the Constitution, 9 Am. Pol. Sci. Rev. 707, 716-34 (1915). But see R. Gabriel, supra note 1, at 19 (arguing that there was no constitution worship before Sumter fell).


27 See Lerner, supra note 2, at 1303. Lerner noted that worship of the constitution was frequently accompanied by adulation of the supreme court. Id. at 1308-10. Mr. Estabrook's comment in the epigraph to this article is an illustration. The classic constitutional canonization is former Solicitor General James Beck's The Constitution of the United States (1924). See C. Miller, The Supreme Court and the Uses of History 182 n.41 (1969).
its recognition of slavery. The most salient modern challenge to the perfect constitution came from progressive historians who attacked the constitution (and the court) as an impediment to social change.28 In essence, they saw the constitution as the American Thermidor to the democracy of the Declaration of Independence.29 J. Allen Smith's influential text, Spirit of American Government,30 epitomized this view. Smith described his purpose as "call[ing] attention to the spirit of the Constitution, its inherent opposition to democracy, the obstacles which it has placed in the way of majority rule . . . ."31 and he entitled a chapter "The Constitution As A Reactionary Document."32 But when the court began to sustain New Deal legislation, one consequence was to eliminate as a working theme of political and social theory any concept of the constitution as a fundamentally undemocratic, let alone a thoroughly reactionary, document.33 This, in turn, tended to deflect attention from any inadequacies in the document, thereby indirectly reinforcing the culturally dominant symbolism of the constitution as the embodiment of political justice as well as national unity.34

"Due substance" theorists would, of course, insist that they are aware of this history, and that they neither worship the constitution nor view it as perfect. Perhaps indignantly, they would observe that they recognize that issues such as international peace, poverty, inflation, and crime control are not amenable to resolution simply by

28 Vernon Louis Parrington wrote that the "chief contribution of the Progressive movement to American political thought was its discovery of the essentially undemocratic nature of the federal constitution." Parrington, Introduction to J. Smith, Growth and Decadence of Constitutional Government xi (1930), quoted in R. Hofstadter, The Progressive Historians 193 (1965). Hofstadter provides an elaborate discussion and evaluation of the views of progressive historians on the antidemocratic nature of the constitution. The discussion is centered on, but not confined to, the best known of these historians, Charles A. Beard. Id. at 167-345.

31 Id. at vii.
32 Id. at 27-39.
33 The sole modern exceptions, perhaps, are those who approach constitutional law from a neo-Marxist perspective.
34 The fact that political scientists, e.g., A. Bentley, The Process of Government (1905), and legal realists, e.g., Llewellyn, The Constitution as an Institution, 34 Colum. L. Rev. 1 (1934), argued that there was a wide discrepancy between the constitution on paper and the constitution in practice does not in the least alter the fact that the constitution stood as the symbol of political justice. See Lerner, supra note 2, at 1292-94 & n.17; cf. Adamany, Legitimacy, Realigning Elections, and the Supreme Court, 1973 Wis. L. Rev. 790, 798-807, 843 (symbolic qualities of supreme court adjudication, first espoused by legal realists as a stratagem in an assault on the "old Court," later used by constitutional scholars as a legitimizing device); Monaghan, Book Review, 94 Harv. L. Rev. 296, 307-08 (1980) (discussing the court's symbolic role in legitimating action by other governmental organs).
invoking the premises contained in our "perfect constitution." All this is certainly true, but I think at one important level their disclaimers would be misleading. One cannot read the works of Professors Tribe, Karst, Michelman, and a whole host of other due substance theorists without a profound feeling that, however much they might otherwise disagree, for them the constitution is essentially perfect in one central respect: properly construed, the constitution guarantees against the political order most equality and autonomy values which the commentators think a twentieth century Western liberal democratic government ought to guarantee to its citizens. For these commentators, the constitution is not Perfect with a capital "P"; it is, however, perfect in the more limited sense that a necessary link is asserted between the constitution and currently "valid" notions of rights, equality and distributive justice. The constitution is, in sum, "perfect" with a small "p."

Of course, I overstate my point. Few due substance commentators hold a "perfection" premise fully. Nevertheless, each commentator can be fairly described as "perfectionist." Each asserts that there is a clear and substantial connection between the constitution and current conceptions of political morality, a linkage not exhausted by any assumed constitutional guarantee of a fair political process. To be sure, the commentators display important differences among themselves in terms of the relative weight each places upon historical tradition, current sociological formulations, and political philosophy in defining the content of political morality. But the important fact is that they share a distinctive and controversial underlying premise: the "outputs" of even a fairly structured political process must satisfy some core substantive notions of political morality.

For example, in "an avowed effort to construct a more just constitutional order," Professor Tribe elaborates a wide range of equality and autonomy claims. His colleague Professor Michelman

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35 I do not intend the term "perfectionist" in any pejorative sense; it is simply descriptive.

36 A connection between the constitution and political justice exists at the political level, of course. The political branches possess power to promote current notions of political justice. See text accompanying notes 214-16 infra. What seems probable to me is that the Framers of the 1798 document and of the fourteenth amendment assumed that the states possessed such an authority. Whether, given nineteenth century conceptions of "negative government," the Framers assumed that the states would actually exercise this authority is another matter. In any event, it has of course turned out that the national government, and not the states, has taken the dominant role in shaping and implementing current societal conceptions of equality and justice. See Monaghan, The Burger Court And "Our Federalism," 43 Law & Contemp. Probs. 39, 40-42 (1980) [hereinafter Monaghan, Our Federalism].


38 E.g., id. chs. 15-17.
has devoted much of his academic career to cementing a union between the distributional patterns of the modern welfare state and the federal constitution. Professor Karst would guarantee a whole range of nontextually based rights against government to ensure "the dignity of full membership in society," which, he asserts, inheres in the "right of equal citizenship." Professor Fiss argues that the courts should give "concrete meaning and application" to those values that "give our society an identity and inner coherence [and] its distinctive public morality." Professor Dworkin charges the courts with enforcing our "constitutional morality," namely, the moral principles "presupposed by the law and institutions of the community." Professor Perry sees the court as having a "prophetic" role in developing moral standards in a "dialectical relationship" with congress, from which he sees emerging a "more mature" political morality. Professor Richards urges that the court apply the contractarian moral theory of Professor Rawls' *A Theory of Justice* to constitutional questions. Professor Alfange tells us that the court should "translate... the national will into constitutional terms." Professor White's urging that the courts invoke "reasons that appeal to deeply embedded cultural values" is echoed in Professor Lupu's invitation that the court protect those "fundamental values" that have a solid underpinning in our historical traditions. Dean Sandalow describes constitutional law as "the means by which we express the values that we hold to be fundamental in the operations of government." Professor Brest summarizes the view of many when he states that "constitutional

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39 See notes 12-13 supra.
42 R. Dworkin, Taking Rights Seriously 126 (1977). Professor Dworkin argues "for a fusion of constitutional law and moral theory," a connection, he asserts, "that, incredibly, has yet to take place." Id. at 149.
45 Alfange, Letter to the Editor, N.Y. Times, June 1, 1959, § 4, at 20, col. 4.
adjudication should enforce those . . . values which are fundamental to our society." So doing, Professor Brest states, will "contribute to the well being of our society—or more narrowly, to the ends of constitutional government." So it goes. For all these commentators, the constitution "has to some extent been assigned the function of defining the American way of life, both descriptively and prescriptively."

All of these formulations view the constitution as positively forbidding "wrongs"—distribution of burdens and benefits by the political process that offend some current conception of political morality. Emphasis must be placed on "current," because no pretense is made that these conceptions were viewed as constitutional limitations on the political branches in either the eighteenth or nineteenth centuries.

In this article I analyze the general structure of the arguments advanced by the commentators to support their marriage of the constitution with external concepts of political morality, and then examine the principal consequences of this union for the various modes of constitutional interpretation. I write from the perhaps "puerile" bias that original intent is the proper mode of ascertaining constitutional meaning, although important concessions must now be made to the claims of stare decisis. From my perspective, these interpretational premises are wholly incompatible with the perfectionist culture theme.

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49 Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 227 (1980) [hereinafter Brest, Misconceived Quest].
50 Id. at 226.
51 For an additional, partly overlapping list, see J. Choper, Judicial Review and the National Political Process 74 (1980). See also J. Ely, supra note 20, at 43-72.
53 Miller, Book Review, 32 Fla. L. Rev. 369, 370 (1980). I also reject as a working premise any proposition that the work of the supreme court is best understood as "politics in another forum," with the court's role being to protect various interest groups, Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1363 n.3 (1973), or, as some would now have it, to protect its own institutional position, see Michelman, Constitutions, Statutes, and the Theory of Efficient Adjudication, 9 J. Legal Stud. 431, 441-42 (1980). Similarly, I reject any thesis that treats constitutional doctrine as simply an epiphenomenal manifestation of some deeper determinant, such as the economic organization of society. See Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 19-20 (1979) [hereinafter Monaghan, Court Opinions].
54 See Monaghan, Court Opinions, supra note 53, at 7-12; text accompanying notes 170-76 infra. For a splendid description of original intent theory, see Perry, Interpretivism, Freedom of Expression, and Equal Protection, 42 Ohio St. L.J. 261, 278-301 (1981) [hereinafter Perry, Interpretivism].
II

THE JUSTIFICATIONS FOR PERFECTIONISM

Most commentators agree that analyses grounded either in the constitutional text or in the structure it creates constitute valid modes of reasoning about constitutional "meaning." But what justifies looking outward to current or emerging conceptions of political morality as an acceptable interpretive mode? This section explores the dominant theories that have emerged to justify such a mode of reasoning.

A. The Two-Clause Theory

The two-clause theory—or, to be more precise, the "two types of clauses" theory—has provided and continues to provide the most commonly invoked general justification for imposing "due substance" review on the workings of the political process. Professor Corwin expresses the theory in these terms:

[It will be generally found that words [in the Constitution] which refer to governing institutions, like "jury," "legislature," "election" have been given their strictly historical meaning [by the Supreme Court], while words defining the subject-matter of power or of rights like "commerce," "liberty," "property," have been deliberately moulded to the views of contemporary society.]

This theory possesses considerable power. It provides at least a general account of what the supreme court has been doing, although discovery of constitutional provisions whose content is now controlled by a "strictly historical meaning" is becoming increasingly difficult.

55 The extent to which constitutional meaning is appropriately grounded on judicial precedent presents a separate question. See section III(B) infra.
56 There are undoubtedly others, but the general justificatory theories discussed in the text seem to me the most important.
58 The modulating definitions of the "liberty" and "property" protected by the due process clause are cases in point. Compare the historical intendment of liberty as noted in Monaghan, Of "Liberty," supra note 6, at 411-14, with the expansive notions held in Roe v. Wade, 410 U.S. 113, 152-54 (1973); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). For contemporary restrictive interpretations, see Bishop v. Wood, 426 U.S. 341, 347-50 (1976); Paul v. Davis, 424 U.S. 693, 710-13 (1976). The real bases for these oscillating definitions lie in contemporary needs: they are intended to close the federal trial courts to certain kinds of claims that are deemed to place excessive strains on "Our Federalism." See Monaghan, Our Federalism, supra note 36, at 47-49.
59 "Jury," for example, no longer possesses a strictly historical meaning, but instead depends "upon the function served by the jury in contemporary society." Apodaca v. Oregon, 406 U.S.
this qualification does not impeach the general validity of the two-clause theory. Its central premise is that at least some constitutional clauses were intended to be “moulded to the views of contemporary society.” This view has won considerable judicial and academic acceptance. If sound, it quite plainly offers considerable promise for linking the constitution with current conceptions of political morality.

The two-clause theory is, however, fundamentally unhelpful for the perfectionist. The root difficulty is that it must be advanced as a theory of the original intention of the Framers. So understood, it is far too fragile to support the weight of perfectionist concerns for distributive justice. Specifically, it will not support elaboration in the name of the constitution of a strong set of nontextually based privacy, autonomy, and economic equality rights.

I begin with the observation that no convincing evidence exists that the Framers intended a constitution with two sets of provisions, some of which are controlled by a “strictly historical meaning” and some of which are “deliberately moulded to the views of contemporary society.” At the risk of considerable oversimplification, I sug-


60 Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (“liberty” and “property” among concepts “purposely left to gather meaning from experience”) (citing National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)). See the classic exposition in United States v. Lovett, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring):

Broadly speaking, two types of constitutional claims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution. . . . Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from very specific provisions of the Constitution. . . . Their meaning was so settled by history that definition was superfluous.

61 E.g., Karst, Equal Citizenship, supra note 40, at 17 (authors of fourteenth amendment saw “principle of equal citizenship” capable of growth), adopting the theory of Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 63 (1955); see J. Ely, supra note 20, at 22-41 (ninth amendment, equal protection, and privileges or immunities clauses). Ely, however, is a two-clausist of a different ilk. Asserting that certain constitutional provisions were intended as a “delegation to future constitutional decision-makers to protect certain rights that the document [does not list],” id. at 28, Ely nevertheless denies that those provisions are meet for interpretation according to contemporary social values. They should instead, he asserts, be given a content that advances representation-reinforcing rights. Id. chs. 4-6; see note 156 infra.

62 Mr. Justice Gray once insisted that “all questions of constitutional construction” are, at base, “largely a historical question.” Sparf v. United States, 156 U.S. 51, 169 (1895) (Gray, J., dissenting).

gest that the constitutional clauses range from the most particularized, bright-line demarcations to a set of provisions characterized by the need for ongoing interpretation and application not to the "views of contemporary society," but to the contemporary manifestations of problems identified by the Framers. Limitation of the presidency to persons of age thirty-five or more \(^6\) is an easy illustration of a particularized provision. Although the Framers' general concern may well have been for maturity and experience in the chief executive, their choice of a bright-line standard evinces a clear intention to avoid the uncertainty (and the risk of corrupt decisions) that a judicial determination of a candidate's "maturity" would surely entail. At the other end are the power-conferring grants of article 1, section 8, and at least some of the limiting provisions of the bill of rights. These provisions are rightly applied to "the sorts of evils against which the provisions were directed and to . . . their contemporary counterparts." \(^6^5\) The first amendment, for example, encompasses subjects presumably out of the Framers' specific contemplation but within their general purpose. \(^6^6\) But I do not understand this to be the equivalent of saying that the amendment can rightly be molded to the views of contemporary society, irrespective of the sorts of evils that concerned the Framers. \(^6^7\)

The heart of the difficulty for perfectionists, however, lies elsewhere. Even if one assumes that some constitutional provisions were intended to be molded to contemporary needs, these provisions are plainly bounded by their language. The establishment clause, \(^6^5\) for instance, manifests concern with the evils flowing from certain relationships between secular and religious institutions. It would, I submit, violate the rules of our constitutional grammar to abstract the clause to a level so general that it will encompass all relationships in

\(^6^4\) U.S. Const. art. II, § 1, cl. 5.

\(^6^5\) J. Ely, supra note 20, at 13; cf. Weens v. United States, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."). Professor Ely suggests a distinction between the first and eighth amendments here, the latter calling for a more avowedly contemporary approach. J. Ely, supra, at 13-14. The distinction seems to me more asserted than demonstrated, and I reject it.

\(^6^6\) See Kurland, The Irrelevance of the Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses, 29 Drake L. Rev. 1, 1, 12 (1979) (virtually every recent first amendment decision beyond the original intention of the Framers).

\(^6^7\) To some extent this position depends upon the coherence and intelligibility of a line much favored by lawyers but frequently criticized: the distinction between meaning and application. See Monaghan, The Constitution at Harvard, supra note 13, at 124 n.39.

\(^6^3\) U.S. Const. amend. I.
which government seeks to provide aid to centers of concentrated, highly influential private power, such as the Chrysler Corporation.

The linguistic boundaries of the specific guarantees do not deter the two-clause perfectionists. To fill in the open spaces, these theorists historically have relied most heavily upon the assertedly “open texture” of the due process and equal protection clauses, investing them with a sponge-like quality capable of absorbing any subject matter analytically outside the boundaries of other constitutional limitations. But any such absorptive quality in these clauses is not in their design. It is, rather, a post-ratification invention first employed by conservative lawyers and judges to stave off the evils of socialism, and subsequently borrowed by liberal commentators to protect a different set of values. Viewed in terms of original intent, the due process clauses are appropriately bounded by a concern for fair adjudicatory procedures, even if the concept of fairness, in that context, is capable of growth. These clauses cannot fairly be relied upon by perfectionists in their quest for an original intent for fashioning open-ended substantive principles of distributive justice.

Nor can the equal protection clause. The historical evidence is overwhelming that the core concern of this clause and of its companion, the fifteenth amendment, was the protection of blacks from at least some forms of discriminatory political decisions. Taken together, these amendments extended the principle of political equality to blacks. Perhaps the general language of the equal protection clause must be taken to include discriminations closely analogous to racial discrimination as well. So viewed, the clause would demand some

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69 E.g., Coppage v. Kansas, 236 U.S. 1, 10-14, 21-23 (1915); Lochner v. New York, 198 U.S. 45, 64 (1905). On the influential role of the bar in this respect, see B. Twiss, Lawyers and the Constitution 18-173 (1942).
70 See notes 37-52 supra.
71 Curtis, Review and Majority Rule, in Supreme Court and Supreme Law 177 (E. Cahn ed. 1954):

Take the phrase “due process of law” [in the fifth amendment]. It is perhaps the prime example of a large generality in our Constitution which has gathered meaning from experience. But who made it a large generality? Not they. We did. When they put it into the Fifth Amendment, its meaning was as fixed and definite as the common law could make a phrase. . . . It meant a procedural process, which could be easily ascertained from almost any lawbook. We turned the legal phrase into common speech and raised its meaning into the similitude of justice itself.
73 U.S. Const. amend. XIV, § 1.
75 J. Ely, supra note 20, at 149.
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general judicial concern with the integrity of the political process to assure that it takes account of the interests of all citizens. This, in turn, would call for careful review of certain types of discriminatory political outcomes, not because those outcomes transgress unwritten substantive norms, but because they do not usually occur unless there has been a violation of the process norm of political equality. There is, however, no warrant in the historical origins of the equal protection clause for invalidating the outcomes of a fairly structured political process simply because those outcomes violate some ideal substantive “antidiscrimination” norms.

As a constitutional concept, equality demands no more than the inclusion of groups into the political process. What is at stake in the perfectionist quest is quite different: it is the measuring of political outcomes against norms of distributive justice—the kinds of problems which now usually surface under the label of substantive due process. My objection is thus the same as before. How do “two-clause” perfectionists justify the use of any clause to permit general judicial concern with the outputs of a fair political process?

For some commentators the ninth amendment and the privileges or immunities clause accomplish just that. These commentators argue that the ninth amendment was intended to create a broad range of nontextual rights against the national government, and that the

76 Id. at 148-70.
77 Id. at 153-57.
78 In discussing the segregation cases, Judge Linde calls our attention to the “reverse incorporation” phenomenon by which equal protection notions are read back into the due process clause of the fifth amendment. See Linde, Judges, Critics, and the Realist Tradition, 82 Yale L.J. 227, 233-34 (1972). He denies that it is “unthinkable” that the constitution could place the states under constitutional constraints with respect to equality, particularly race discrimination, but provide no basis for a similar restriction upon the national government. Id. Professor Ely responds by pointing to the ninth amendment, “that old constitutional jester,” as an appropriate textual source for such a limitation on the national government. See J. Ely, supra note 20, at 33. This argument is troublesome. The ninth amendment coexisted with slavery and its intellectual underpinnings of black inferiority, and accordingly, any invocation of that amendment to bar federally imposed segregation needs a showing that the amendment’s content was not irrecoverably fixed as of 1791. See Monaghan, The Constitution at Harvard, supra note 13, at 126-27. Of course, if the ninth amendment is viewed as concerned with process-reinforcing values generally and on an ongoing basis, the initial exclusion of blacks from that concern may fairly be said to have fallen with the addition of the Civil War amendments.
80 U.S. Const. amend. XIV, § 1.
81 See J. Ely, supra note 20, at 33 (“In fact, the conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the constitution is the only conclusion its language seems comfortably able to support.”). Professor Ely stands alone in insisting the ninth amendment is a source of process-reinforcing,
"debates in Congress on the [fourteenth] amendment leave one in little doubt of the intention of its framers to nationalize civil liberty in the United States" through the privileges or immunities clause. For these commentators, ascribing a substantive content to due process and equal protection is defensible. While one can regret the technically unsatisfying use of the "wrong" clauses, little of substance turns on the fact that the due process and equal protection clauses, rather than the ninth amendment and the privileges or immunities clause, are employed to ensure "due substance." 8

The foregoing argument has force. However, I would emphasize that any invocation of either the ninth amendment or the privileges or immunities clause by two-clause perfectionists necessarily rests upon several troublesome premises. The initial assumption is that the content of the two clauses is identical. But this is hardly self-evident. Indeed, like the guaranty clause, the ninth amendment seems to me entirely empty, supplying no ascertainable direction to the courts. 8


8"E. Corwin, Liberty Against Government 118 (1948).

8See Monaghan, Of "Liberty," supra note 6, at 416. But see J. Ely, supra note 20, at 18-19 (use of wrong clause "may matter, because of the negative feedback effect the notion of substantive due process seems to be having on the proper function of the Due Process Clause").

84U.S. Const. art. IV, § 4.

85I recognize that the privileges or immunities clause is less vulnerable on this score. Its content could be restricted to the rights enumerated in the 1866 Civil Rights Act, see R. Berger, Government by Judiciary 20-50 (1977), and perhaps also to the bill of rights, see Curtis, the Bill of Rights as Limitations on State Authority 45 (1980).
process. But even if both amendments are appropriate repositories for an external schedule of rights, a showing is necessary that this was not understood to be a list closed as of 1791 or 1868. No relevant evidence on the ninth amendment and very little with respect to the privileges or immunities clause supports an inference that either was intended to have a dynamic character. If I am correct in that view, neither clause, viewed through the lens of original intent, provides support for the scope of judicial due substance review as it now exists in the sex-children-family area, to say nothing of the scope of due substance review advocated by the perfectionists.

B. The Two Constitutions Theory

The intellectually troublesome character of the two-clause theory has led to bolder efforts to reconcile conceptions of political justice with the “constitution.” Some modern commentators have undertaken an effort to refocus our view of constitutional law so that it embraces, in addition to the written text carried around by Justice Black, the authentic tradition developed to accompany it. To some degree, this restates a concept quite familiar to political scientists, who have long emphasized the difference between the constitution on paper and the way government actually operates, and to the legal

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56 The scant legislative history of the ninth amendment indicates that it was intended to counter an objection to the bill of rights: that “by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration.” 1 Annals of Cong. 439 (1789) (remarks of J. Madison). The failure to give content to those rights left a vacuum without textual standards for adjudication. Consider, for example, the argument of Dean Redlich that “the textual standard should be the entire Constitution” and its “image of a free and open society.” Redlich, supra note 81, at 810. By way of illustration, Dean Redlich argued that the right to contract for conditions of employment “hardly fits into the scheme of rights set forth in our Constitution”—a rather remarkable conclusion, since the obligations of contract clause is at least in the neighborhood—whereas the right of “intimacy of [the] marital relationship” does “fit into the pattern of [freedom] from unreasonable searches and seizures.” Id. at 811. Just why the “intimacy of the marital relationship” fits the constitutional plan, whereas the freedom of contract does not, seems to me to depend more on the inclinations of Dean Redlich than the United States constitution. See Commentary, 56 N.Y.U.L. Rev. 525, 532 (1981) (remarks of Prof. Ely). The wide variety of rights that has seemed to commentators so plainly protected by the ninth amendment—starting with the right of privacy and ending with rights under international law, see note 81 supra—suggests that the amendments contours are too indefinite for the development of substantive rights.

57 See Dunbar, James Madison and the Ninth Amendment, 42 Va. L. Rev. 627, 641 (1956) (“ninth amendment is associated with a certain class of rights both historically and by documentary location”) (emphasis added); Monaghan, The Constitution at Harvard, supra note 13, at 128-27.

realists, particularly Professor Karl Llewellyn, who elaborated upon that difference in great detail in 1934 in a provocative and seminal article. The original writers on this theme frequently focused on questions of structure and design. When they considered questions of distributive justice, they decried the symbolic use of the constitution to preserve American capitalism against the onslaught of regulation and social welfare legislation.

Professor Paul Brest invokes a part of the realist tradition. Professor Brest is centrally concerned with normative matters, and he urges as a normative proposition that resort to tradition is properly made in order to validate the body of unwritten civil liberties that has developed in the supreme court in the name of equality and liberty. For him, "the practice of supplementing and derogating from the text and original understanding" possesses at least as strong a claim to legitimacy as reliance upon original intent. Professor Brest's views are discussed in detail below. Suffice it to say here that this approach has the virtue of recognizing that the text itself is far from perfect, and in no realistic sense can be made so by "interpretation." Professor Levinson supports a two constitutions view with an analogy to the Roman Catholic Church, in which both the biblical text and the apostolic tradition constitute the relevant "constitutional" doctrine. But the analogy is unconvincing. In Roman Catholic theology these twin sources never conflict. Professor Brest, however, posits that conflict as a salient characteristic of our constitutional law, a

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69 Lerner, supra note 2, at 1316-19.
70 The realists counted among their number some who were cynics—authors of the doctrine that law is what the judge ate for breakfast—and some who were highly moral persons moved to advance the law in directions they saw fit. See Hart, American Jurisprudence through English Eyes: The Nightmare and the Noble Dream, 11 Ga. L. Rev. 969, 977 (1977). It is the moral strand of the realist tradition that Professor Brest invokes.
71 Brest, Misconceived Quest, supra note 49, at 225-26. For convenience, I have characterized this as a "two constitution" theory. Professor Brest himself apparently uses the word "constitution" to refer to the text only, and views "tradition" as having independent authoritative stature.
72 Id. at 225.
73 Id. at 225-26 & n.80. Professor Brest argues that the "[f]act of this tradition undermines the exclusivity of the written document," and that the oath "to support this Constitution . . . must be understood in the context of two centuries of Constitutional decisionmaking." Id.
74 See text accompanying notes 161-99 infra.
75 "The constitution reflects a pragmatic and not always principled compromise among a variety of regional, economic and political interests." Brest, Misconceived Quest, supra note 49, at 239.
77 Brest, Misconceived Quest, supra note 49, at 224.
recognition that forms the basis of his effort to establish tradition as an authoritative source for judicial reasoning.

Other variations of the two constitutions theory have surfaced. For example, in his article in this Symposium, Professor Perry advocates a version of the two constitutions theory in which the court is to make recourse to both the constitutional text and the value judgments of the Justices themselves when no explicit constitutional provision is controlling. Professor Dworkin advances still another two constitutions theory. In a fine book, Robert Cover has explored the dilemma of conscience faced by pre-Civil War judges who, though morally opposed to slavery, felt compelled by their offices to enforce constitutional and statutory provisions that recognized and protected slavery. No such dilemma existed, Professor Dworkin responded. In any "hard case," judges could simply have disregarded the constitutional and statutory provisions because the relevant "law of the community" includes its underlying "general principles of justice and fairness." The most extreme two constitutions theory, however, is advanced by Professor Murphy. In his effort to impress a "perfect quality" upon the constitution, Professor Murphy advances the astonishing view that courts are free to reject constitutional amendments that do not "fit" the constitutional order. Apparently, a mere constitutional provision cannot be allowed to interfere with a political-legal result mandated by proper conceptions of political morality.

C. The Social Good Model

The insistence by several commentators that all legislation is invalid unless it is for the "general welfare" or "the common good" provides the basis for some commentators' efforts at developing a plausible rational-basis standard of review. In the hands of perfect-
tionists, however, this insistence reflects yet another effort to develop a strong set of unwritten civil liberties. The line of argument is clear enough: if some public good limitation is to be taken seriously by the courts, it must be elaborated by a judicial balancing of interests. In balancing those interests, the argument concludes, one is forced to acknowledge some form of due substance review. And the product of such a review would be, of course, a schedule of autonomy, privacy, and equality claims assertable against the political branches of government.\footnote{See L. Tribe, American Constitutional Law § 8-7, at 451-53 (1978); Perry, Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process, 23 U.C.L.A. L. Rev. 689, 693-94 (1976).}

The argument appears to draw strength from our conception of the ordinary workings of the courts. We expect courts to interpret statutes, at least in their marginal applications, on the premise that the legislature seeks to promote the public good and to resolve common law controversies in accordance with such a standard. But to interpret a statute or fashion common law in light of some conception of the common good is one thing; to invalidate a statute on such a basis is quite another. Even if concepts such as the general welfare or common good are assumed valid grounds of decision in the statutory and common law areas (where the courts of necessity must provide some basis for decision), they are far too indeterminate in content for generating a strong set of judicially enforceable autonomy and equality claims to control the contrary determinations of the political process.\footnote{See the classic attack on the indeterminacy of the public good concept in J. Schumpeter, Communism, Capitalism and Democracy, 250-52 (1947). See also J. Ely, supra note 20, at 48-70.} Moreover, capacity aside, the question of legitimacy remains. The fact that other branches of government besides the courts have authority to make law raises legitimacy questions for judicial lawmaking in these circumstances. Surely the fact that the courts can make law when the political organs are silent (the common law context) does not legitimate a similar authority when the political organs have spoken (the constitutional context). Any such premise seems to me plainly illegitimate, given the basic constitutional design of representative government.

Stripped of any support from the workings of courts in the nonconstitutional context, the intellectual underpinnings of the social good model are not evident. To be sure, several constitutional provisions plainly presuppose some substantive review in the name of the common good: the federal spending power\footnote{U.S. Const. art. I, § 8, cl. 1.} is conditioned upon
some minimal satisfaction of the "general Welfare," and the taking clause requires that any taking be for a "public use." That pretty much exhausts the list, however (unless, that is, the Preamble is judicially enforceable). There is no convincing textual reason why the general outputs of the political process need satisfy any judicially formulated conception of the public good.

It is, indeed, attractive to take interest group theory seriously and insist that legislative resolution of interest group clashes should be conclusive on the courts, at least so long as the political process is "fairly" structured. But even if one disagrees and concludes that all political conduct must pass muster against some conception of the public good, the bottom line remains the same. Stated as a criterion for judicial review, the standard is necessarily a weak one, as the spending and taking cases illustrate. Courts lack the institutional capacity to second-guess political determinations of the public good unless those determinations are beyond reason, something that seldom occurs in the real world. It is a tour de force, therefore, to suggest that the courts can elaborate a strong set of fundamental rights against which to test the outcomes of the fair political process in the name of such amorphous concepts as ensuring the common good or a "just constitutional order." Any such freewheeling judicial lawmaking...

108 U.S. Const. amend. V.


110 Rice, Rationality Analysis in Constitutional Law, 65 Minn. L. Rev. 1, 17-21, 53-58 (1950), gives insufficient attention to this point. Of course, the lack of an identifiable conception of the public good might, in particular instances, generate an inference of an unfairly structured political process.

111 For a fascinating recent decision, see United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 189-93 (1980) (Brennan, J., dissenting) (urging that the political process was not fairly structured because it had simply ratified an industry-labor bargain in which respondent's interests were not represented). See generally J. Ellul, The Political Illusion 35-42, 174-84 (1967) (emphasizing the impact of interest groups and "experts" on statutory enactment); H. Merry, Five Branch Government 24-28, 36-60, 81-86 (1950) (interest groups in the context of a governmental bureaucracy of specialized regulation).

112 One can make a convincing case that the Framers of the constitution expected that all political action would reflect a concern for the common good. See B. Bailyn, D. Davis, D. Donald, J. Thomas, R. Wiebe & C. Wood, The Great Republic 338 (1977).

113 On the spending power, see Buckley v. Valeo, 424 U.S. 1, 90 (1976) ("It is for Congress to decide which expenditures will promote the general welfare"); Steward Mach. Co. v. Davis, 301 U.S. 548, 533-95 (1937); Monaghan, Our Federalism, supra note 36, at 41-42. On the taking power, see Berman v. Parker, 348 U.S. 26, 33-36 (1954).

is inconsistent with "[t]he policy-making power of representative institutions, born of the electoral process [which] is the distinguishing characteristic of the [constitutional] system."115

D. Substantive Entitlements From Process Values

A fourth and final justificatory theory has recently emerged in the work of Professor Michelman, one of the most persistent and articulate commentators seeking to import notions of distributive justice into the constitution. Michelman's earlier writings elaborate the general structural arguments of Professor John Rawls' *A Theory of Justice*116 in an effort to connect them with the distributional patterns of the modern welfare state and, more importantly, to fasten that connection to the constitution of the United States.117 Responding to criticism that no such constitutional link could be justified,118 Professor Michelman has lately attempted to justify this view by invoking the process-oriented approach of Professor Ely.119

Professor Michelman assumes the general validity of Ely's view, and for the purposes of this argument so do I. Professor Michelman argues that substantive entitlements to minimum levels of basic goods and services can be inferred from the constitutional goal of reinforcing and protecting the process of political representation. These distributional minima are necessary to protect the capacity to seek and obtain political access and to protect "against stigmatizing discriminations in treatment that reflect, reinforce, or facilitate systematic bias against one's group."120 If this is a logical and persuasive extrapolation of Professor Ely's argument, then Ely's theory is in need of reconsideration.121 Exploration of this issue is, however, not the aim of this article. Let me just say that I do not think it possible to infer much, if

117 Michelman, One View of Rawls, supra note 13, at 997-1018; Michelman, Protecting the Poor, supra note 12, at 9-19.
120 Id. at 674-79.
121 It does not, however, seem accurate to me. Ely rather explicitly argues that the constitution cannot be interpreted as requiring some "appropriate" distributional pattern against which allocations of benefits could be tested—a so-called "ends-test." J. Ely, supra note 20, at 135-36. That seems precisely where Professor Michelman's theory is destined to lead. Ely himself regards the distributional pattern as *evidence* of the fairness of the political process. Id. at 136.
anything, by way of specific welfare entitlements from a process-oriented approach, and that the lines of argument against Professor Michelman are readily discernible. The point of political access is to secure political equality—a right to have one's interests fairly considered by the political organs of government. The relationship between political equality and other sorts of equality should not mislead us. The fact that some measure of other kinds of equality—social or economic—may be useful to secure "reasonable" political equality does not demonstrate that those other equalities can be derived in any concrete way from the concept of political equality. Moreover, Professor Michelman makes no empirical demonstration that the minimum quantum of social and economic goods necessary to secure political equality would be lacking in our society even in the absence of the current distributional patterns generated by the welfare state.

Like the two-clause and two constitutions theorists, Professor Michelman seeks liberation from the constitutional text. From process premises he attempts to generate, and ultimately to impose on the political process, substantive welfare norms which cannot be directly ascribed to either the text of the constitution or the structure it creates. Of course, even were Professor Michelman's general thesis sound, it would provide no basis for judicial creation of the privacy and autonomy rights so dear to the heart of perfectionist commentators.

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For me, therefore, the entire concept of due substance review poses one of the most unsettling problems in constitutional theory. It is not that "substantive" due process is linguistically self-contradictory.

124 Id. at 67 (no simple linear development between socioeconomic and political development).

I do not overlook the fact that numerous writers, Locke and Rousseau among them, have been concerned with whether political democracy is compatible with wide inequalities in economic and social status. Their concern, however, was tempered by a belief in the capacity of legislative systems to ensure that each person's political equality is protected despite social and economic disparity. See J. Locke, An Essay Concerning the True Origin, Extent and End of Civil Government § 54, in Two Treatises of Government (P. Laslett ed. 1960) (London 1690O); J. Rousseau, The Social Contract 46-47 (C. Frankel trans. 1947) (Paris 1762) ("It is precisely because the force of circumstances tends always to destroy equality that the force of legislation must always tend to maintain it."). Eighteenth century conceptions of political equality plainly did not connect the idea of political equality with some level of social security. See T. Marshall, Class, Citizenship and Social Development 71-83 (1964).
125 This point Michelman himself admits. Michelman, Welfare Rights, supra note 13, at 676-77.
It is not any longer, if one accepts the teachings of ordinary language philosophy that "meaning is use."\textsuperscript{125} The core problem is one of constitutional theory, not of language: can the framers of a constitution embody their policy choices in a "permanent" document, so as to prevent overruling those policy choices in light of perceived contemporary needs? English constitutional theorists speculate about this issue in the context of "entrenching" a bill of rights so as to insulate it from the reach of subsequent legislative majorities.\textsuperscript{126} For us, the problem is how to insulate the Framers' policy choices from being overridden by a subsequent majority of the supreme court.

III

PERFECTIONISM AND THE MODES OF CONSTITUTIONAL INTERPRETATION

The perfectionist culture theme reflects itself in the modes of constitutional interpretation as well as in explicit efforts at linking political morality with the constitution. Not surprisingly, perfectionists display no appreciable interest in interpretative modes rooted in either original intent or stare decisis. Instead, their preference is to analogize constitutional interpretation to the evolutionary, open-ended, case-by-case approach characteristic of the common law method of adjudication.\textsuperscript{127} This mode draws freely upon such sources as custom, conventional morality, and economic, social, and philosophic theory.

A. Original Intent

1. In General

A distinction is sometimes posited between textual analysis and original intent inquiry such that only the constitutional text and not "parol evidence" can be examined to ascertain constitutional meaning.\textsuperscript{128} But any such distinction seems to be entirely wrong. All law,


\textsuperscript{126} See H. Wade, Constitutional Fundamentals 22-40 (1980). For an assertion that English judges should have far-reaching power to annul anything which they find "repugnant to reason or to fundamentals," see the remarks of Lord Denning in The Times (London), Nov. 21, 1980, at 4, col. 5.

\textsuperscript{127} See Brest, Misconceived Quest, supra note 49, at 205-13. See also Schauer, An Essay on Constitutional Language, 29 U.C.L.A. L. Rev. ______ (1982) (forthcoming) ("It is unfortunately common for commentators to conflate textual and historical approaches to constitutional interpretation.").

\textsuperscript{128} See text accompanying notes 194, 218-22 infra.
the constitution not excepted, is a purposive ordering of norms. Textual language embodies one or more purposes, and the text may be understood and usefully applied only if its purposes are understood. No convincing reason appears why purpose may not be ascertained from any relevant source, including its "legislative history." Thus the central issue is the role of original intent in constitutional interpretation.

I begin the inquiry with an assumption. I think it would be an intuitive, widely shared premise that the supreme court in 1800 should have accorded interpretative primacy to original intent in ascertaining the "meaning" of the constitution. This interpretational premise is implicitly conceded by commentators otherwise hostile to original intent theory, who would recognize the primacy of "recent" constitutional amendments. Judicial opinions at least purport to take original intent seriously, apparently reflecting the belief that the original intent mode is not simply a matter of expository style in opinion writing. It is, rather, a way of thinking about constitutional "meaning" that follows from the basic concepts that legitimate judicial review itself. The root premise is that the su-

129 See Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 661-69 (1958); Nonet, The Legitimation of Purposive Decisions, 65 Calif. L. Rev. 263, 266-73 (1978). Since law involves a purposive or normative use of language, insights derived from the study of the use of language in other contexts seem to me of limited utility. But see Schauer, supra note 128, at (forthcoming) (advocating greater stress on the philosophy of language and asserting, among other things, a "close parallel between constitutional interpretation and some theories of literary criticism.").

130 See J. Ely, supra note 20, at 13-16. Although the intention of the ratifiers, not the Framers, is in principle decisive, the difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it. Id. at 17-18; Monaghan, The Constitution at Harvard, supra note 13, at 126. Of course, original intent theory is not concerned with the hidden intent of the Framers. The text, as normally understood, is our "most important datum," J. Ely, supra note 20, at 16. As Chief Justice Marshall put it, the Framers and ratifiers "must be presumed to have intended what they said." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824).

131 See Brest, Misconceived Quest, supra note 49, at 229, n.94; note 103 supra; text accompanying notes 182-86 infra.

132 Reliance upon original intent occurs even in opinions whose actual holdings seem wholly at variance with original intent. See, e.g., Williams v. Florida, 399 U.S. 78, 92-93 (1970) ("history" shows jury trial provision was to be understood functionally; held twelve jurors, the historical number, not required); Bell v. Maryland, 378 U.S. 276, 288-312 (1964) (Goldberg, J., concurring) (arguing in purported reliance on original intent that the fourteenth amendment prohibits privately owned restaurants from discriminating on grounds of race, despite abundant historical evidence to the contrary); C. Miller, supra note 27, at 149-69; Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 706 (1975) ("[I]f judges resort to bad interpretation in preference to honest exposition of deeply held but unwritten ideals, it must be because they perceive the latter mode of decisionmaking to be of suspect legitimacy."). cited in J. Ely, supra note 20, at 186 n.9.

The Supreme Court, like other branches of government, is constrained by the written constitution. Our legal grundnorm has been that the body politic can at a specific point in time definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment. Thus in 1789 the body politic determined that a president must be at least thirty-five years of age, and that determination remains operative.

Nonetheless, any current gravitational pull of original intent theory seems largely confined to members of the court. Original intent theory in the academy is quite another matter. This fact is amply illustrated by the controversy surrounding the appearance of Raoul Berger's *Government by Judiciary*. One can, and some do, quarrel with his view that the sole purpose of the fourteenth amendment was to adopt and "constitutionalize" the 1866 Civil Rights Act. But the acerbic and inflamed nature of most of the responses suggests that we are witnessing more than a "mere" historical debate. I think the reason is not hard to find. Perfectionists recognize that if Berger is correct, much of the supreme court's protection of civil liberties is at variance with the original intent of the adopters of the amendment. More importantly, they perceive this to be a serious and unsettling charge. Perfectionists therefore feel compelled to deal with original intent, one way or another.

Their responses vary. Some perfectionists, including most "two-clause" theorists, genuinely believe that original intent is on their side; any quarrel is, in the end, "only" over what the history shows.

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134 "[C]ourts, as well as other departments, are bound by that instrument," Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803). It is "of the essence of constitutionalism," Professor Kurland writes, "that all government—not excepting the courts—is to be constrained by established principles." P. Kurland, Politics, the Constitution, and the Warren Court 8 (1970).

135 The Federalist No. 78, at 494 (A. Hamilton) (B. Wright ed. 1961) ("Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually"). See generally, R. Berger, supra note 63, at 363-72. Of course, the currently binding quality of past constitutional arrangements cannot be proved simply by asserting that the Framers intended it so. See note 177 infra. For an illuminating exploration of this issue, see Kay, Preconstitutional Rules, 42 Ohio St. L.J. 187, 194-203 (1981).

136 U.S. Const. art. II, § 1, cl. 5.

137 R. Berger, supra note 63.

138 Id. at 20-68, 134-221; see, e.g., J. Ely, supra note 20, at 28-30, 198-201 nn.64, 66 & 70; Curtis, The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger, 16 Wake Forest L. Rev. 45 (1980).

139 For a review of the criticism and a sympathetic defense of Berger, see Bridwell, the Scope of Judicial Review: A Dirge for the Theorists of Majority Rule, 31 S.C.L. Rev. 617, 631-56 (1980).

140 A. Bickel, The Least Dangerous Branch 193-10 (1962); Karst, Equal Citizenship, supra note 40, at 11-17; Grey, supra note 132, at 715-17; Perry, Abortion, the Public Morals, and the
Others openly despair about the possibility of any meaningful recon-
struction of original intent, and contend that the effort at understand-
ing the past all too frequently masks a deeper effort at finding a
"useable past." By postulating intractable methodological difficul-
ties, criticism of this order seeks to establish a strong separation be-
tween "intention" and "meaning," and it insists that the former con-
cept becomes increasingly empty with the passage of time.

Although the difficulties of establishing original intent are formi-
dable, they are by no means intractable. Significant difficulty in
historical reconstruction is not present with respect to some constitu-
tional provisions, and with respect to others it is at least partially
ameliorated by the extensive body of precedent accumulated over the
years by courts nearer in time to the origins of the relevant provi-
sion. Most importantly, the language of the constitution itself
remains. Whatever the difficulties, that language constitutes the best
evidence of original intention. In any event, the core question
remains: do the basic postulates of the constitutional order require
that the court undertake the task of ascertaining original intent, as
best it can?

My impression is that few of the present generation of constitu-
tional theorists are concerned with what the relevant history "really"
shows with respect to original intent, or with the difficulty of any undertaking along that line. They simply do not care. This is the direct result of the current dominance of law professors in constitutional law scholarship. Until the 1940's constitutional law was a subject of importance to both political scientists and historians, and they—Lowell,147 Beard,148 Corwin,149 Willoughby,150 McLaughlin151—made substantial contributions to our understanding of this subject. Political scientists have, however, become increasingly concerned with the study of political sociology,152 a shift which necessarily diminished their interest in the doctrinal work of the supreme court. Law professors now occupy this field virtually alone, and few if any of them have either an interest in or the background for meticulous historical scholarship. Moreover, law professors are problem solvers by training. Their eyes are on the present, not the past. By disposition, therefore, they are unsympathetic to being bound by the chains of the past.

Until recently, academic lawyers seldom argued that original intent simply cannot be ascertained. Rather, they have sought to sterilize the concept, most typically by conceptualizing original intent at a level of abstraction that, in effect, removes it as an interpretational constraint.153 This technique is, of course, at the root of the two-clause theory, and seems to me to permeate entirely the work of

147 J. Lowell, Political Essays 140-49 (1888).
148 C. Beard, An Economic Interpretation of the Constitution of the United States (1925); C. Beard, The Supreme Court and the Constitution (1912).
149 See E. Corwin, The Constitution and What It Means Today (1920) and subsequent editions. Of course, Corwin was at times skeptical about whether one could divine the original intention and about what value it should have. See Corwin, The Dissolving Structure of Our Constitutional Law, 20 Wash. L. Rev. 185, 193 (1945) (it is "obviously impossible in this year of grace to know what was intended 'by the Constitution,' or by the Framers or the ratifiers thereof, with regard to matters which did not exist in 1787"). See also Corwin's rejection of "speculative ideas about what the framers of the constitution or the generation which adopted it intended it should mean." Such ideas, Corwin added, "have no application to the main business of constitutional interpretation, which is to keep the constitution adjusted to the advancing needs of time." Corwin, Constitution v. Constitutional Theory, 19 Am. Pol. Sci. Rev. 290, 303 (1925).
150 W. Willoughby, Principles of the Constitutional Law of the United States, §§ 28-31, 39-41 (2d ed. 1930). Professor Willoughby cautioned that "resort to the 'spirit' or 'theory' of the Constitution for interpretative purposes is an unwise policy . . . since it stands in essential opposition to other rules . . . for determining the power granted to or limitations imposed on the Federal Government by the Constitution." Id. § 30. See also W. Willoughby, The American Constitutional System (1919); W. Willoughby, The Supreme Court of the United States (1890).
151 A. McLaughlin, The Constitutional History of the United States (1835); A. McLaughlin, The Foundations of American Constitutionalism (1852); A. McLaughlin, The Courts, the Constitution, and Parties chs. 1, 4-5 (1912).
Professors Tribe and Karst. Currently the most fashionable formula is that the constitutional language is best understood simply as an open-ended delegation to future interpreters to resolve problems in accordance with the Framers' "concepts," but not their specific "conceptions." Given the evolutionary nature of language, the avail-

154 For example, Professor Karst writes:

It need not be argued that this history demonstrates that the framers of the fourteenth amendment sought to write the principle of equal citizenship, with all its modern implications, into the Constitution. It is enough to show that they saw themselves as adopting a principle of equal citizenship, and that the principle was "capable of growth."


It is somewhat unconvincing to assert that the Framers of the fourteenth amendment sought to write a principle of equal citizenship as Professor Karst uses the term. The Civil Rights Act of 1866 was clearly not intended to safeguard the rights of sufrage or jury service, two indisispensable incidents of equal citizenship. Biekel, supra, at 56. It is hardly certain that the fourteenth amendment was intended to do more in this respect. The working draft of the amendment, submitted to the Joint Committee on Reconstruction by Senator Stewart of Nevada, included a prospective suffrage provision prohibiting discrimination as to the right to vote after July 4, 1876. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction 83-84 (1914), reprinted in Bickel, supra, at 41. Resistance to any form of enfranchisement led to an abandonment of that provision in favor of language reducing representation in Congress to the extent the franchise was denied. Stevens himself, in enumerating the rights protected by the proposed amendment, included several protected by the Civil Rights Act of 1866, but omitted the franchise. Cong. Globe, 39th Cong., 1st Sess. 2459 (1865). John Bingham of Ohio stated explicitly that "[t]he amendment does not give, as the second section shows, the power to Congress of regulating suffrage." Id. at 2542-43; see R. Berger, supra note 63, at 52-56; Berger, Ely's "Theory of Judicial Review," 42 Ohio St. L.J. 87, 87-96 (1981). One wonders whether it is meaningful to assert that the amendment's authors had any principle of "equal citizenship"—in Professor Karst's sense—in mind. If so, it was a citizenship that lacked essential elements of citizenship.

It is, moreover, even more attenuated to assert that the Framers viewed the principle as "capable of growth." That conclusion of Alexander Bickel relies for support on the inference that John Bingham, the author of § 1, desired a compromise permitting "the appearance of a careful enumeration of rights" while "[deferring] the question of giving greater protection than was extended by the Civil Rights Act." Bickel, supra, at 62-63. That is a speculative conclusion, not history. See R. Berger, Government By Judiciary 99-116 (1977). At best, moreover, it proves only that Congress hoped to enact further legislation, not that the judiciary in the absence of such legislation was to broaden the amendment's scope; and it purports at best to be the view of a minority only. But see J. Ely, supra note 20, at 200 n.69 ("Obtaining ratification of open-ended language in the expectation that it will be given an open-ended interpretation is not playing a trick. Trickery would inhere in gaining ratification of facially specific language and then giving it a latitudinarian construction, or . . . in gaining ratification of open-ended language and then forever limiting its reach . . . ").

155 R. Dworkin, Taking Rights Seriously 132-37 (1978) (adopting a distinction employed by J. Rawls, A Theory of Justice 5-6 (1971)). "Dworkin offers absolutely no evidence whatsoever in support of the proposition [that the Framers intended to constitutionalize broad 'concepts' rather than particular 'conceptions']." Perry, Interpretivism, supra note 54, at 295. For criticism of this distinction on the ground that "a large number of different overarching theories would be consistent with the moral or political principles specified in the text," see Schauer, supra note 128, at ______ (forthcoming).
ability of apparently open-ended provisions, and the self-validating quality of judicial elaboration of a constitutional phrase, the delegation theory, at least when stated in this strong form, cannot responsibly be taken very far. In positing that a strong, open-ended delegation was intended, the theory assumes its central conclusion. Moreover, it surely cannot be used to reach a result contrary to the Framers' specific and known intent, which, Berger contends, is precisely the way in which it has been used.

The delegation theory, at least for many commentators, is simply a mask for eliminating entirely the constraints of original intent. Professor Cover is among those who would drop that mask:

If the Supreme Court ought to labor under the constraint of the framers' specific intentions it is because we and our progeny will find it useful that the justices be constrained in that way. In other words this reading of the Constitution must stand or fall not upon the Constitution's self-evident meaning, nor upon the intentions of 1787 or 1866 framers. It constitutes a judgment about our own political present and future and about alternative theories of judicial activity which will best serve it. The ultimate and only justification for the constitutional government we have is that it will secure to us and our posterity the blessings of liberty—not that it was intended by the framers to bind us.

Stated in these terms, Professor Cover's argument is incomplete. No explanation at all is provided for the binding quality of any constitutional provision, including the requirement that the president be

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156 For a milder version of the delegation theory, see J. Ely, supra note 20, ch. 2. Ely argues that the privileges or immunities clause and the ninth amendment are "delegation[s] to future constitutional decision-makers to protect certain rights that the document [does not list]." Id. at 28, 38. I say that Ely's version is "milder" because he would confine these rights to those that are "representation-reinforcing," and because he attributes that open-ended character to those clauses which at least linguistically bear the construction. See note 61 supra.

157 R. Berger, supra note 63, at 117-56; see Monaghan, The Constitution at Harvard, supra note 13, at 121-22. Professor Brest, however, is unwilling to concede even this. See Brest, Misconceived Quest, supra note 49, at 216 ("The adopters may have understood that, even as to instances to which they believe the clause ought or ought not to apply, further thought by themselves or others committed to its underlying principle might lead them to change their minds.")

158 See Miller, The Elusive Search for Values in Constitutional Interpretation, 6 Hastings Const. L.Q. 487, 490, 496-98 (1979) ("bootless and usually fruitless quest for the intentions of those who drafted the document"); C. Curtis, Lions Under the Throne 3 (1947) (the Framers "may sit in at our councils. There is no reason why we should eavesdrop on theirs"), cited in Wofford, supra note 125, at 509.

thirty-five years old. Presumably, any provision can be disregarded if it "will [not] secure to us and our posterity the blessings of liberty." And who is empowered to make such a determination? The supreme court, or the political branches of government? Statements such as that of Professor Cover fail to provide a satisfactory general account of constitutional law and, more specifically, of the institution of judicial review itself. Nor are such statements in the slightest way helpful with respect to specific issues, such as those raised by the abortion cases. They imply deeper theories about the nature of constitutional law, but they do not openly avow them.

2. Professor Brest

Professor Brest stands virtually alone among current commentators in attempting to provide a complete theory for disregarding original intent. His general argument is that constitutional theory should accord authoritative status to tradition that "supplements or derogates from the text." In developing this argument, Professor Brest advances both descriptive and normative challenges to any theory assigning interpretative primacy to original intent (or to the text itself, if one thinks that different).

Professor Brest argues first that, however formulated, original intent theory requires rejection of much of the corpus of modern constitutional law, including the decisions fastening the bill of rights on the states, Griswold, Roe v. Wade, and other judicial land-


161 Brest, Misconceived Quest, supra note 49, at 225; see text accompanying notes 91-95 supra. That tradition evolves from what Brest calls "(mere) adjudication," id. at 224, the common law method of deriving "legal principles from custom, social practices, conventional morality, and precedent," id. at 228-29. See generally Sandalow, supra note 48, at 1041-55 (summarizing decisions shaping constitutional law to contemporary values).

162 Brest, Misconceived Quest, supra note 49, at 205-24 (originalist interpretation based on text, intentions, or structure).


165 410 U.S. 113 (1973). I do not charge Brest with a defense of this decision.
No theory can be sound, Professor Brest argues, that fails to account for so much of the data that it is called upon to explain. Nor can it be sound if it implies the massive destabilization that would occur from overruling an important part of our constitutional jurisprudence.\(^{167}\)

I accept as a premise that the illustrations cited are not consistent with original intent. Professor Brest's initial position is thus formidable. The expectations so long generated by this body of constitutional law render unacceptable a full return to original intent theory in any pure, unalloyed form. While original intent may constitute the starting point for constitutional interpretation, it cannot now be recognized as the only legitimate mode of constitutional reasoning. To my mind, some theory of stare decisis is necessary to confine its reach.\(^ {168}\)

Of course, this is to accord an authoritative status to tradition in "supplementing or derogating from" the constitutional text, at least if that "tradition" has worked its way into judicial opinions.\(^{169}\) But a stare decisis theory has its limits, at least for those who take original intent seriously. Stare decisis would, perhaps, perpetuate the core of the court's nontextually based holdings: the privacy-autonomy-equality holdings in the sex-marriage-children area.\(^{170}\) But this concession to reality would not be taken to entail, also in the name of reality, the further concession that our constitutional law now sanctions the general, nontextual mode of constitutional analysis advocated by Professor Brest, one which in other hands will protect "personal life styles," "personhood," the "right of intimate association," or what have you.\(^{171}\) One cannot squeeze that much out of the existing precedents. Professor Tribe is surely wrong in asserting that "[i]f the decisional cornerstones of the past are to be preserved, does not principled adjudication force also a preservation of the open-ended modes of interpretation that such decisions inescapably embodied?"\(^ {172}\)

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166 See Brest, Misconceived Quest, supra note 49, at 223-24. See also Grey, supra note 132, at 710-12; R. Berger, supra note 63, at 411-12.

167 Brest, Misconceived Quest, supra note 49, at 231. Brest also argues that original intent theory is always somewhat unstable because "settled constitutional understanding is in perpetual jeopardy of being overturned by new light on the adopters' intent." Id.

168 On the need for and the difficulty of formulating such a theory, see Monaghan, Court Opinions, supra note 53, at 7-12.

169 Professor Brest addresses this "qualified version of originalism" that accords respect to stare decisis in a single, obscure footnote. Brest, Misconceived Quest, supra note 49, at 232 n.108.

170 See text accompanying notes 4-5 supra.

171 See notes 7-9 supra.

from the now discredited *Lochner* line of cases, how many decisions openly avow "open-ended modes of interpretation"? In virtually every instance, the court has made an effort—often strained, to be sure—to find an acceptable textual home for its results, and thereby to disclaim any such general authority. The court is, no doubt, now becoming bolder. But in the face of the current explicit challenges to the court's authority to proceed in such an "open-ended" fashion, commentators surely cannot yet invoke stare decisis as having established the propriety of the very authority the court has so persistently denied.

Professor Brest does not rely solely upon the failure of original intent theory to account descriptively for much modern constitutional law. He advances other, even sharper challenges to the asserted primacy of original intent. Why, he asks, should the constitutional text be authoritative at all for successor generations? It is, I recognize, logically possible to maintain some ground other than the written constitution as the first principle in constitutional theorizing; but I simply find this argument to be a barren one. The authoritative status of the written constitution is a legitimate matter of debate for political theorists interested in the nature of political obligation. That status is, however, an incontestable first principle for theorizing about American constitutional law. That I cannot otherwise "prove" the constitutional text to be the first principle is a necessary outcome of my first principle itself. As Aristotle long ago said:

Some thinkers demand a demonstration even of this principle but they do so because they lack education; for it is a lack of education

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175 See Moore v. City of E. Cleveland, 431 U.S. 494, 502-06 (1977) (substantive due process defended, and an effort made to distinguish between "good" and "bad" varieties).


177 Brest, Misconceived Quest, supra note 49, at 225. ("We did not adopt the Constitution, and those who did are dead and gone."). This point is made even with respect to officials who take oaths to support the constitution. Id. at 225 n.60; see note 94 supra. It is, of course, a bootstrap argument to respond, as does Raoul Berger, that the Framers (or eminent commentators) believed that the original intent mode is required. See R. Berger, supra note 63, at 353-72; note 135 supra.

to know of what things one could seek a demonstration and of what he should not. For, as a whole, a demonstration of everything is impossible; for the process would go on to infinity, so that even in this manner there would be no demonstration.\footnote{Aristotle, Metaphysics 1006a(5)-(10) (Apostle trans. 1966). Aristotle goes on to argue that at this level of inquiry one can only demonstrate by refutation. Id. 1006a(12)-(29). See also Id. 1061(b) ((34) 1062b(11)).}


Moreover, Professor Brest’s attack on the authoritative character of the constitutional text is, even on its own terms, weakened by a laconically made but important footnote conceding that “recent” constitutional amendments can overturn principles derived from tradition.\footnote{Brest, Misconceived Quest, supra note 49, at 229 n.94.} Such a concession is necessary, Brest says, “[b]ecause of the centrality of the democratic ideal and the importance of external checks on judicial decisionmaking.”\footnote{Id. at 226.} The second reason, the need for external checks on judicial control, seems to me to be entirely dependent upon the first, namely, “the centrality of the democratic ideal.” But, of course, the new amendment itself is subject to corrosion by time—by Brest’s tradition. Why, then, at any given point—some undefined period following an amendment—are the people deemed more qualified than the judges to heed Professor Brest’s central criterion of constitutional legitimacy: “does the practice contribute to the well-being of our society—or more narrowly to the ends of constitutional government”?\footnote{Id. at 226.} Why, specifically, should the people for some limited period of time enjoy a numerical override of judicial decisions protecting “individual rights,”\footnote{Id.} one of Brest’s constitutional “ends”? Brest is, in fact, able to subordinate judicial protection of individual liberties to the weight of numbers only because he postulates several “ends of (ours? or any?) constitutional government”
and in such an indefinite way that they do not admit of any ordering principle.\textsuperscript{186} Even were the attack on the authoritative character of the constitutional text more persuasive, the question remains whether Brest has established his affirmative case for treating tradition as authoritatively superior to the document. With characteristic modesty, he backs away from such a stark submission, stating simply that the claims of "[mere] adjudication"\textsuperscript{187} are as plausible as those of original intent theory.\textsuperscript{188} But support for his view is, I think, lacking. One of two arguments is available. First, one could argue that tradition has achieved a sort of popular ratification through the ongoing public acceptance of "anti-originalist" doctrine. Second, one could abandon popular consent as a legitimizing device altogether in favor of some other source of legitimacy.

The force of the first position seems to me substantially diminished by the court's purported reliance on original intent.\textsuperscript{189} Professor Brest, therefore, asserts a second, more audacious proposition: "actual consent is not . . . a practicable measure of the legitimacy of any system of government, and a fortiori not of a particular practice or particular institution."\textsuperscript{190} To abandon popular consent as the foundation of the practice of major governmental institutions is most troublesome.\textsuperscript{191} But my major concern here is with its replacement. Brest offers the following five "designedly vague" criteria as the touchstone for constitutional decisionmaking:

\begin{quote}
Among other things, the [decision] should (1) foster democratic government; (2) protect individuals against arbitrary, unfair, and intrusive official action; (3) conduce to a political order that is
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item See text accompanying notes 191-94 infra.
\item Brest, Misconceived Quest, supra note 49, at 224; see note 161 supra.
\item Id. at 224, 228 n.92.
\item See text accompanying note 132-34 supra.
\item Brest, Misconceived Quest, supra note 49, at 226; see Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063, 1101-02 (1981). Professor Brest acknowledges that institutional competence alone might validate an institution's claim of authority. See Fiss, The Supreme Court, 1979 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 38 (1980). This argument is not appealing with respect to the role played by the major organs of governmental authority.
\item Absolute refutation of Professor Brest's position is of course impossible, since first premises are open to selection. All I can offer is a different starting point: given a basic premise that the constitutional text is authoritative, the existence of some extraconstitutional tradition cannot be treated as self-validating. In the end we are presented with the problem currently faced by English constitutional theorists: short of an actual revolution, how does one shift fundamental constitutional norms? See text accompanying note 126 supra. One might be inclined to say that in the American system such a shift can be accomplished only by constitutional amendment. But that position is not open to me given my belief that some decisions inconsistent with original intent are protected by stare decisis. See text accompanying notes 168-76 supra.
\end{enumerate}
\end{footnotesize}
relatively stable but which also responds to changing conditions, values, and needs; (4) not readily lend itself to arbitrary decisions or abuses; and (5) be acceptable to the populace.\footnote{Brest, Misconceived Quest, supra note 49, at 226.}

Now these desiderata simply cannot be the touchstone for constitutional decisionmaking. They are tossed together in a way that admits of no ordering of priorities among them. Moreover, taken individually they are inadequate. The first criterion is harmless enough; indeed, it is a recapitulation of Professor Ely's position. But the second criterion is an open-ended license to the court to proscribe all official conduct which the court intensely dislikes. The third criterion is empty of guidance. The fourth criterion mocks itself; like the second, it is so vague that it could not help but produce arbitrary decisions. And the fifth could not be less suited to the business of courts, which of all the institutions of governments are the least capable of divining what is acceptable to the populace.\footnote{The appeal to popular consensus makes especially little sense in the constitutional area. See J. Ely, supra note 20, at 67-68: An appeal to consensus . . . may make some sense in a "common law" context, where the court is either filling in the gaps left by the legislature . . . or, perhaps, responding to a broad legislative delegation of decision-making authority. Since they are "standing in" for the legislature, courts presumably should try to behave as (good) legislatures behave . . . . The problem is that the constitutional context is worlds away: the legislature has spoken, and the question is whether the court is to overrule it . . . .} The problem, it seems to me, is that the making of constitutional law simply ought not be like the making of common law.\footnote{See the more general attack on the common law method in the constitutional field in text accompanying notes 218-35 infra.} Professor Brest's standards may be Solomonic advice to common law courts, but in constitutional cases the federal courts are not common law courts. It is axiomatic that the federal power is a limited one, and what it is limited to has for two hundred years been something that passes as "interpretation" of the constitution. To abandon that jurisprudence for the sake of freeing us from the constraints of original intent is to kill a small bird with a rather large cannon.

From my perspective, Professor Brest has not provided a satisfactory foundation for treating tradition as possessing an authority superior to the text.\footnote{I myself do not abandon the jurisprudence of original intent by acknowledging that some decisions inconsistent with original intent are protected by stare decisis. See text accompanying notes 168-76 supra. There are material differences between these decisions and an extraconstitutional tradition that has not worked its way into judicial opinions. Courts are entrusted with the function of defining the meaning of the constitution, and their "mistakes" in interpreting original intent might be said to be an inherent risk of our constitutional structure. Moreover, these
tradition refer to the content of the extraconstitutional norms or only to their existence? In other words, assuming that tradition establishes that extraconstitutional norms should be employed, what is their source? That the source should be the actual traditions of the American people is a position difficult to defend after the severe methodological and normative attacks advanced by Ely. Can one discard that tradition and instead reason about "what it means to be a person" and the denial of "a meaningful opportunity to realize [one's] humanity," as Professor Tribe contends? It is hard to believe that such indefinite concepts could be legitimately used by courts to constrain the political process.

Professor Brest's trouble with original intent theory rests on a familiar foundation. If one took seriously original intent as a constraining influence on constitutional interpretation, the document's imperfect quality is readily apparent, as Professor Brest recognizes. Original intent theory, taken seriously, undermines the objectives of the perfectionist.

B. Stare Decisis

That stare decisis is a moribund mode of constitutional interpretation is no secret to court watchers. The perfectionist theory, however, is not the sole (or even principal) explanation for the waning mistakes are acted upon by all other organs of government, and have, at least in bulk, enough clarity so that some measure of popular acquiescence (if not consent) may be assumed. Brest's tradition is in fact removed from this; his is one asiduously denied by the court when it places emphasis on original intent. Moreover, every addition to Brest's tradition cuts against the core institutional structure created by our constitution—representative democracy. Given that structure, I do not see how one can maintain the existence of a general judicial license to depart from the constitutional text, "to supplement or derogate from it."

See J. Ely, supra note 20, ch. 2.


See R. Unger, Knowledge and Politics 241 (1975): [A]ll the many attempts to build a moral and political doctrine upon the conception of a universal human nature have failed. [The theorists] are repeatedly trapped in a dilemma. Either the allegedly universal ends are too few and abstract to give content to the idea of the good or they are too numerous and concrete to be truly universal.

Brest, Misconceived Quest, supra note 49, at 229 ("The Constitution reflects a pragmatic and not always principled compromise among a variety of regional, economic and political interests.").

See Maltz, Some Thoughts on the Death of Stare Decisis in Constitutional Law, 1950 Wis. L. Rev. 467, 494-98 (listing cases in which the supreme court overruled itself on constitutional issues from 1960 to 1979).
influence of stare decisis;\textsuperscript{201} the doctrine also carries very little real justificatory force even in the common law area that spawned it.\textsuperscript{202}

The general decay of stare decisis reflects more than the need of a rapidly changing society for new accommodating principles. It is the manifestation in legal thought of the marked, accelerating, and apparently irreversible decline in the belief of permanent ordering in any field of thought, a development that has been in "progress" since the seventeenth century.\textsuperscript{203} Thus, on any currently "important" issue the content of the common law will have to be "argued for";\textsuperscript{204} appeal to the justification of prior authority will count for very little. Indeed, in the common law area, stare decisis demands little more than "an expository style or technique,"\textsuperscript{205} one which "impels a court, so far as practicable, to place the situations they are judging within the generalized class of some existing decision."\textsuperscript{206}

The declining relevance of stare decisis is even more dramatic in constitutional cases. The court has repeatedly proclaimed that the common law doctrine's supposed constraints should have only "limited application in the field of constitutional law"\textsuperscript{207}—a euphemism

\textsuperscript{201} This is evidenced by the difficulty encountered by some original intent canonists in recognizing the claims of stare decisis. See R. Berger, supra note 63, at 415-14 ("It would, however, be utterly unrealistic and probably impossible to undo the past in the face of the expectations that the segregation decisions, for example, have aroused in our black citizenship. . . . That is more than the courts should undertake and more, I believe, than the American people would desire."). It is also evidenced by the efforts of some perfectionists to use the concept against their critics. See L. Tribe, American Constitutional Law 1-2 (Supp. 1979) (self-defeating nature of any insistence upon stare decisis).

\textsuperscript{202} See Monaghan, Court Opinions, supra note 53, at 5-7. I am of course speaking of the doctrine as it affects courts of last resort considering their own precedents, not inferior courts considering the precedents of hierarchically superior tribunals.

\textsuperscript{203} See F. Baumer, Modern European Thought: Continuity and Change in Ideas, 1600-1950 (1977).

\textsuperscript{204} See Summers, Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law, 92 Harv. L. Rev. 433, 441 (1978) (emphasis omitted) (citing L. Fuller, The Law in Quest of Itself 110-17 (1940)).

\textsuperscript{205} Monaghan, Court Opinions, supra note 53, at 6.

\textsuperscript{206} Id. (quoting Radin, Case Law and Stare Decisis: Concerning \textit{Prajudizienrecht in Amerika}, 33 Colum. L. Rev. 199, 212 (1933)). The doctrine, as currently understood, permits the nonprecedent court to rationalize the earlier precedents almost without limit. And what cannot be rerationalized is simply disregarded. Monaghan, Court Opinions, supra note 53, at 5-6.


[In cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.]}
for "no application" if the matter impresses the court as one that should be set right. The lack of concern for precedent in constitutional law is demonstrated by more than the ease with which constitutional decisions are overruled.\(^{208}\) It is evident in the fast and loose way in which the court all too frequently plays with its prior cases.\(^{203}\)

The reasons advanced for heavily discounting precedent as a constraining influence in constitutional adjudication are not satisfying.\(^{210}\) The most insistently pressed justification is that "correction through legislative action is practically impossible."\(^{211}\) The undifferentiating character of this "need" argument is readily apparent: it fails to make any distinction among constitutional provisions, some of which are plainly less important in a realistic sense than others;\(^{212}\) and in every case it sacrifices the long-run values of stability and predictability necessary for ordering our most fundamental affairs. Most importantly, its central factual assumption is patently false, at least regarding the decisions to which the commentators are most anxious to deny binding authority—those rejecting autonomy or equality claims.\(^{213}\)

Such decisions can be overruled by statute in almost every

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\(^{209}\) Monaghan, Court Opinions, supra note 53, at 2-3 & nn.4-5; Stone, The *Miranda Doctrine* in the Burger Court, 1977 Sup. Ct. Rev. 59, 169 ("In its unyielding determination to reach the desired result, the Court has too often resorted to distortion of the record, disregard of precedent, and an unwillingness honestly to explain or to justify its conclusion.").

\(^{210}\) The question-begging nature is clear in the assertion that the only correct rule of decision is "the Constitution itself and not what we [the Court] have said about it." Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring). Moreover, the same argument could be, but is not generally, applied to questions of statutory interpretation.

\(^{211}\) Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 n.18 (1980) (plurality opinion) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)); see Smith v. Allwright, 321 U.S. 649, 665 (1944) ("In constitutional questions, where correction depends upon amendment and not legislative action[,] this court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.").

\(^{212}\) Monaghan, Court Opinions, supra note 53, at 4 n.10 ("decisions construing the seventh amendment's right to trial by jury, as well as the many decisions interpreting the double jeopardy clause[,] lack the social importance necessary to justify a departure from *stare decisis*... .").

\(^{213}\) E.g., Parham v. J.L., 442 U.S. 584, 598-617 (1979) (formal adversary hearings not required when parents seek to commit their children to state mental institutions); Maher v. Roe, 432 U.S. 464, 470-80 (1977) (state's choice not to pay for nontherapeutic abortions does not violate constitution); Whalen v. Roe, 429 U.S. 589, 598-604 (1977) (upholding constitutionality of statute authorizing state to record in computer file names and addresses of patients obtaining prescriptions for certain dangerous but legitimate drugs).
instance. Were the court to sustain, as against the fourteenth amend-
ment attack, discrimination against women or illegitimates, nothing
prevents the states from passing corrective legislation to secure the
claimed rights. Congress possesses similar competence by virtue of its
regulatory authority under the commerce clause\textsuperscript{214} and the fourteenth
amendment,\textsuperscript{215} to say nothing of its power to compel adherence to
nationally formulated norms through conditions attached to national
grants.\textsuperscript{216} In fact, much civil rights law is statutory in character, and
the statutes impose norms that the constitution standing alone does
not require.

The rejection of stare decisis as a justificatory doctrine in constitu-
tional law is not complete, of course. Important and controversial
civil liberties cases are still decided on the basis of prior authority and,
perhaps, gain acceptance for the result on that basis.\textsuperscript{217} But that fact
further diminishes the appeal of decisions resting on stare decisis,
leaving the doctrine with the predictability of a lightning bolt: it will
strike on occasion, but when and where can only be known after the
fact.

I cannot proffer, even tentatively, a theory of stare decisis in
constitutional law. But my purpose in this article is satisfied by show-
ing that its currently disfavored status is strongly reinforced by the
fundamental premises of perfectionist theory. The perfectionists’ rec-
ognition of the constraining influence of stare decisis in constitutional
adjudication conjures up images of the dead hand of the past, not that
of a “living” or “relevant” constitution. Perfectionism requires the

\textsuperscript{214} U.S. Const. art. I, § 8, cl. 3; see Katzenbach v. McClung, 379 U.S. 294, 298-305 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241, 249-62 (1964) (upholding constitutio-

\textsuperscript{215} See Katzenbach v. Morgan, 384 U.S. 641, 649-56 (1966) (upholding § 4(e) of the Voting

\textsuperscript{216} See Fullilove v. Klutznick, 448 U.S. 448, 479-80 (1980) (10% of federal funds granted for

\textsuperscript{217} See, e.g., Harris v. McRae, 448 U.S. 297, 316-18 (1980) (holding, on basis of Maher v.

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continuous reformulation of the minimum ideal norms of the polity, and the continuous application of the norms to varying circumstances. Legislation may (and given the current explosion of civil rights enactments, frequently does) embody those norms. Yet, a current schedule of extraconstitutional norms is always “necessary” for a proper assessment and constraint of the workings of the political process. Otherwise, the constitution might begin to show the hallmarks of a less-than-perfect document.

C. The Common Law Mode of Adjudication

The perfectionists’ discomfort with interpretative modes grounded in original intent and precedent is offset by their enthusiasm for viewing constitutional law as similar in method and substance to the common law of torts.218 Thus, Professor Brest proposes to derive and elaborate constitutional principles from “custom, social practices, conventional morality, and precedents.”219 Other commentators rely more explicitly on insights derived from currently fashionable philosophical or economic concepts to generate both common law and constitutional principles.220 Application of common law approaches to the constitutional law area has important consequences for interpretation. First, it invites the extraction of quite general political principles from the specific constitutional guarantees.221 Second, and more important, the common law method encourages the elaboration of supplemental, nontextually grounded principles of political morality to fill in any gaps. So supplemented, the constitution manifests a unified, coherent conception of political justice, and not simply a series of separate and incompletely related provisions which, taken together, are insufficiently expressive of the substantive values of a twentieth-century liberal democracy.

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218 The description that follows draws from the intellectual history of American tort law as it has developed in this century. See G. White, Tort Law in America: An Intellectual History ch. 7 (1980).

219 Brest, Misconceived Quest, supra note 49, at 228-29; see note 161 supra.

220 E.g., B. Ackerman, Private Property and the Constitution 182-83 (1977) (“Ordinary observing” amenable to Rawlsian, Benthamite or pareto-optimal approaches to evaluation of legal rules); R. Dworkin, Taking Rights Seriously ch. 5 (building on Rawls’ concept-conception distinction); id. ch. 9 (building on Mill’s internal-external preference distinction) (1977); R. Posner, Economic Analysis of Law 491-551 (2d ed. 1977).

221 As Professor Posner observes, the mode of analysis “treats individual ... constitutional provisions much like individual cases in a field of common law: from a study of the provisions, as of cases, the judge extracts some ruling principle that can be used to decide a new, previously unforeseen case.” Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 Sup. Ct. Rev. 173, 196 n.63.
The common law approach is particularly congenial to professors of law, whose training and experience heavily emphasize this technique. The advantages of transplanting the common law method to the constitutional arena are obvious. The tedious labor associated with the historical search for original intent is eliminated. With the concerns of the past out of the way, attention may be focused exclusively on present realities. Armed with the insights of current social, political, and economic thinking, these commentators can “reason” about contemporary needs and the public good in much the same way that they would reason about tort problems— with interest balancing providing the solution to every constitutional problem, just as it purports to do for the creative common law judge. The constitutional values themselves become one set of interests—important ones to be sure, but in the end only interests—to be weighed against competing social values.

Our constitutional origins suggest a different perspective: the constitution as a superstatute. Like important statutes, the constitution emerged as a result of compromises struck after hard bargaining. In addition, its intellectual underpinnings invite a statutory perspective. The dominant conceptions of popular sovereignty and limited government realized by the device of a social compact suggest that the constitution be construed as a compact whose contents could not be altered by any organ of government. That is a great deal more like the way statutes are construed than the way common law is made. These origins make plausible, even if they do not compel, a conclusion that constitutional interpretation should be assimilated to the process of statutory interpretation. While I do not wish to overstate the differences between common law development and statutory interpretation, important interpretational consequences do flow from viewing the constitution as a statute (a super one, to be sure) rather than as declaration of common law. Statutory interpretation involves a blend of emphases upon original intention and historical

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222 Insights not held by all in equal esteem. See Kurland, Ruminations on the Quality of Equality, 1979 B.Y.U.L. Rev. 1, 5 (“those in [legal] academia . . . make claims to greater insights about the social condition than even the greatest of philosophers, economists, sociologists, and political theorists”).

223 For exploration of this view in a somewhat different framework, see Michelman, Constitutions, Statutes, and the Theory of Efficient Adjudication, 9 J. Legal Stud. 431, 443-53 (1980).


context, and a full recognition of the unprincipled, and imperfect, nature of an enactment produced by compromise.227 By contrast, the common law method, if applied to either a statute or a constitution, tends to obscure the compromise character of the enactment, and thus renders opaque its "imperfect" quality when measured against ideal norms.

Candor requires that one recognize that the common law approach, and not the statutory approach, best describes the development of constitutional law under the bill of rights.228 Substantive elaboration of the bill of rights has increasingly followed the incremental, case-by-case method employed by common law judges. Viewed retrospectively, this was perhaps inevitable.229 Courts have had to cope with the relative paucity and indeterminacy of the underlying historical materials, as well as the difficulty of relating ancient norms to a world radically different from that of the Framers. Not surprisingly, as the text got older and interpretative materials accumulated, "the focus of professional and judicial attention . . . [shifted] from the . . . text and history to the . . . norm[s] to be derived by analysis and synthesis of the judicial precedents."230 More importantly, adoption of the method of the common law, with its emphasis on precedent (albeit without the constraining influence of stare decisis) and analogical reasoning, brought with it a belief that the substance of the judicial task in each sphere is similar: balancing the interests at stake, with the constitutional guarantees assessed in functional, rather than historical, terms.231 At least in bill of rights

227 See J. Ely, supra note 20, at 3 (Were a judge interpreting a statute "to announce . . ., in the name of the statute in question, those fundamental values he believed America had always stood for, we . . . might even consider a call to the lunacy commission."); H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1144-47, 1410-17 (tent. ed. 1958).


229 Judge Learned Hand once argued that, viewed as an original matter, the bill of rights was too indeterminate in content to be judicially enforced as limitations on the political organs. L. Hand, The Bill of Rights 34, 55 (1958). The common law method fleshes out these provisions over time.


231 The perfectionist could insist that this is as it should be, for the hard bargaining related to the original document centered upon matters of structure and design, not the bill of rights. See M. Farrand, The Framing of the Constitution of the United States 91-112 (1913). Thus, no justification appears for taking the grudging, narrow approach to their meaning all too frequently characteristic of statutory construction, particularly given the plainly intractable nature of the problem of generally determining which constitutional provisions were bargained over
cases, therefore, there is considerable force in Professor Brest's observation that reliance upon original intent "has played a very small role compared to the elaboration of the Court's own precedents. It is rather like having a remote ancestor who came over on the Mayflower."232

Thus, the perfectionist has much on which to rely in drawing upon a common law approach to the development of civil liberties—but not nearly enough to justify the perfectionists' central need to legitimate the existence of a supplemental, nontextually based list of autonomy, privacy, and equality claims that are assertable against the political organs of government. One could, after all, argue that elaboration of the specific guarantees of the bill of rights exhibits characteristics of both common law and statutory interpretation: common law because their content is worked out in the manner of the analogical and precedential reasoning characteristic of the common law courts; statutory because, so far as is practicable, emphasis has been and still should be placed on historical setting and original intent. A supplemental list of nontextual rights lacks the latter characteristics by definition.

More importantly, the bill of rights should constitute the paradigmatic illustration of the American reluctance to reason from the equity of the statute.233 That the constitution specifically guarantees the enumerated freedoms of the bill of rights does not, stated alone, imply that it guarantees a list of unstated freedoms such as the rights of "intimate association" and "personhood." The validity of any such approach is entirely dependent upon a showing that constitutional

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232 Brest, Misconceived Quest, supra note 49, at 234. I have elsewhere suggested that the court not only could, but should, proceed as a common law court in the area of the textually enumerated civil liberties and develop a true common law of civil liberties, one wholly reversible by Congress. Monaghan, The Supreme Court, 1974 Term — Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 10-11, 44-45 (1975). But see Schrock & Welsh, Reconsidering the Constitutional Common Law, 91 Harv. L. Rev. 1117, 1133-35 (1978), criticizing this theory, inter alia, on original intent grounds.

233 There is, I recognize, a strong argument that the "equity of a statute," whatever its limits, can also provide an independent source for elaborating further common law principles. See Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213, 218-19 (1934); Schaefer, Precedent and Policy, 34 U. Chi. L. Rev. 3, 18-22 (1966); Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 12-14 (1936). But see Pound, Common Law and Legislation, 21 Harv. L. Rev. 383, 403-04 (1908). See also Traynor, Statutes Revolving in Common-Law Orbits, 17 Cath. U.L. Rev. 401 (1968). However, this argument is not applicable to the constitution. The development of common law is an inherent judicial power stemming from the necessity to provide a decision for the case at hand. It is, however, subordinate to and subject to the control of ordinary legislative enactments. See Landis, supra, at 233.
text authorizes it. Only the ninth amendment and the privileges or immunities clause of the fourteenth amendment could provide a basis for such guarantees, a contention that I have already indicated is arguable but unpersuasive.\textsuperscript{234} Perfectionist autonomy, privacy, and equality rights are different in kind from the process rights explicitly guaranteed by the constitutional text, as Professor Ely shows.\textsuperscript{235} Moreover, the substantive rights now asserted by the perfectionists, were wholly foreign to both eighteenth and nineteenth century constitutional jurisprudence. Perfectionists cannot point to a textual authorization for their views without demonstrating that the ninth amendment and the privileges or immunities clause were intended to possess a strong, dynamic component, one that would authorize courts to enlarge \textit{materially} over time the sphere insulated from the reach of the ordinary political process. Thus, even if both the form and the substance of common law method are properly utilized by the court in the development of “specific” constitutional guarantees, a \textit{general} judicial prerogative to constrain the outcomes of an open and fair political process cannot be supported.

\textbf{IV}

\textbf{OUR “IMPERFECT” CONSTITUTION}

The “antidemocratic” charge levelled against the constitution by progressivist historians\textsuperscript{236} has always struck me as unconvincing. Viewed in its historical setting, the original document was remarkably “democratic.”\textsuperscript{237} Moreover, the amendments—ignored by these critics—present in their entirety a consistently democratic theme, one that made the constitution “a far more democratic document than the one [we] inherited from [the Framers].”\textsuperscript{238} Both in origin and line of growth, therefore, the constitution of the United States deserves the appellation “democratic.” The constitution established a framework of government suitable to meet the middle distance needs of the nation at the end of the eighteenth century and, with the Civil War amendments, the nation’s needs at the turn of the twentieth century. Perhaps, although I am less sure, the governmental framework is even adequate to meet the general needs of our times. But the constitution

\textsuperscript{234} See text accompanying notes 80-88 supra.
\textsuperscript{236} See text accompanying notes 28-32 supra.
\textsuperscript{238} A. Grimes, Democracy and the Amendments to the Constitution xi (1978).
is not "perfect" in the sense we have been considering. If original intent be our guide, the constitution did not authorize judges to insulate from the political process most of the individual rights asserted in current conceptions of political morality.

This is not to say that our constitution sacrificed any concern for political justice. The important point is that the constitution is flexible enough to permit the political organs of the government to advance a large and expanding range of equality and autonomy claims. I part company, however, with those who believe the constitution mandates protection of such claims, including, for example, the "right" of vendors to sell contraceptives to minors.\(^2\)\(^3\) I simply do not understand how such judicial activism can be reconciled with the original intent of the Framers of either the 1789-1791 text or 1868-1870 amendments. To be sure, the constitution embodies an ideology, but it is a limited one. As Dean Casper observes, "there have been historical developments [in American society] to which the Constitution had very few ideas to contribute; for example, the revolutionary changes in the structure and regulation of the American economy."\(^2\)\(^4\) Similarly, the constitution has "very few ideas to contribute" to the social equality, privacy, and autonomy claims now pressed by perfectionist commentators. The ideology contained in the constitution is significantly less embracing in scope than the ideology of the American way of life at the end of the twentieth century. It is, therefore, fundamentally wrong to believe that one can ascertain the meaning of the constitution by asking: "Is this what America stands for?"\(^2\)\(^4\)\(^1\)

My review of the various efforts made by perfectionist commentators to overcome the discrepancy between the ideology fairly ascribable to the constitution and that dominant in our nearly twenty-first century, postindustrial liberal democracy leaves me with a conviction that those efforts are seriously flawed. The perfectionism of our constitution, if it has that quality, inheres in its guarantee of an open and fairly structured political process. Perhaps that is enough. Perhaps as "a charter of government a constitution must prescribe legitimate processes, not legitimate outcomes, if like ours (and unlike more ideological documents elsewhere) it is to serve many generations through changing times."\(^2\)\(^4\)\(^2\) In short, perhaps the constitution guarantees only representative democracy, not perfect government.

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\(^2\)\(^4\)\(^1\) It is, of course, a separate question whether such judicial activism is reconcilable with the premises of a political democracy. See Monaghan, Book Review, 94 Harv. L. Rev. 296, 308-11 (1980).