THE LEGITIMATE COURT:

IN SEARCH OF APPROPRIATE JUDICIAL BEHAVIOR

By

MATTHEW ALBERT HESKETH

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Approved by:

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Dr. Chad Westerland
Department of Political Science

Statement of Relevance

As with many aspects of civil society, judicial behavior has long been a source of debate for social scientists and philosophers. In Anglo-Saxon common law tradition, judges are assumed to interpret the law based on impartial norms of proper judicial conduct such as *stare decisis* and *sua sponte.* According to this belief, justices are motivated by formalism and a process of legal deduction to follow precedent and positive case law in deciding court disputes, thus having little ability or incentive to implement their personal opinions and policy preferences in their decisions. However, while this scenario may be appealing in theorizing the proper role of a judge, social scientists have questioned its practical application in explaining the actual choices justices make.

During the twentieth century, judicial scholars reevaluated the canonical depiction of judges as mechanical decision makers who honor impartial doctrine and abide by previously decided cases. The rise of legal realism, under the scholarship of prominent theorists such as Oliver Wendell Holmes and Jerome Frank, directly challenged the common law tradition.[1] It asserted that the law is what justices make it, and that justices are not legally obligated to decide cases in one way or another. By maintaining that judges are not bound by the law to make particular decisions, realists argued that judges are endowed with strong judicial discretion through which they can formulate their own conception of the law, especially in hard cases lacking a clear constitutional or common law answer.[2]

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[1] O. W. Holmes Jr., "The Path of the Law," in *Philosophy of Law, Eighth Edition*, ed. Joel Feinberg and Jules Coleman, (Belmont, CA.: Thomas Wadsworth, 2004), 120-125. Jerome Frank, "Legal Realism," in *Philosophy of Law, Eighth Edition*, ed. Joel Feinberg and Jules Coleman, (Belmont, CA.: Thomas Wadsworth, 2004), 117-119.

[2] Charles Gardner Geyh, *When Courts & Congress Collide*, (Ann Arbor: The University of Michigan Press, 2006), 20. See also: Alexander Bickel, *The Least Dangerous Branch*, (Indianapolis, New York: The Bobbs-

Citing the influence justice ideology has played in determining court decisions, many modern political scientists have accepted a realist account of judicial behavior. While maintaining the central tenets of realism, scholars such as Jeffry Segal and Harold Spaeth have advanced another theory, the attitudinal model.[3] This account of judicial behavior contends that justices are primarily policy seekers concerned with seeing their most preferred policy preferences become law. In essence, this segment of the academic community came to view judges as human decision makers who cannot completely ignore political issues or public opinions while making sophisticated rational choices to act intentionally or optimally toward a specific objective.[4]

While the attitudinal model received popular acceptance by judicial scholars as a realistic account of how justices actually reach their decisions, it was not acknowledged by the legal community. The assessment triggered passionate rebuttals from lawyers, jurists and legal academics who maintained that the realist scholarship was misguided or unfounded and that judges must make legally and logically valid decisions based on jurisprudence. According to this group, decisions based on ideology and personal policy preferences would not be accepted by the legal community and a judge's concern with maintaining his credibility and legal reputation would outweigh his desire to invent law or legislate from the bench.[5]

Nonetheless, a more cynical view of judicial behavior built on the realist framework of the attitudinal model and rejected the legal academics' defense of judicial impartiality. This account maintains that judges not only enter the judiciary as political

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Merrill Company, Inc., 1962), 75-84; John Hart Ely, *Democracy and Distrust*, (Cambridge, Massachusetts: Harvard University Press, 1980), 44-48.
[3] Geyh, *When Courts & Congress Collide*, 14-15.
[4] Geyh, *When Courts & Congress Collide*, 14-17.
[5] Geyh, *When Courts & Congress Collide*, 17-18.

actors primarily concerned with interpreting the law according to personal policy preferences, but knowingly and willingly deceive the public "as a means to placate the underclass and perpetuate its subjugation or as juristic libertines whose decisions disregard the law and serve only to satisfy the judges' political desires."[6]

Though troubling in its own right, the cynical view is particularly poignant when examined in concert with studies describing the growth in judicial independence. Scholars such as Alexander Bickel and Charles Geyh have noted the judiciary's acquirement of a high degree of institutional credit through which it can maintain and enforce its decisions thanks to widespread acceptance of its authority and legitimacy.[7] This independence has been the result of reciprocal deferential behavior between the courts and the representative branches of government. For the courts, the use of conflict avoidance mechanisms, described by Bickel as the "passive virtues," has helped the judiciary overcome challenges to its institutional authority by indulging the interests of the other branches regarding sensitive issues and receiving deferential treatment in return.[8] Thus, the appeasing measures of the courts have corresponded with a decline in congressional and executive attempts to control the judicial branch through draconian means, such as restricting jurisdiction, overruling decisions and impeaching judges. This process, which Geyh describes as "the entrenchment of independence norms," has helped the judicial branch solidify its prominent role in directing governmental action.[9]

However, the other branches have not totally resigned to the power of the courts. As Geyh and political scientists point out, to help promote a measure of judicial

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[6] Geyh, *When Courts & Congress Collide*, 20.
[7] Bickel, *The Least Dangerous Branch,* 129-130; Geyh, *When Courts & Congress Collide*, 6-10, 19-21, 110-111, 258-264.
[8] Bickel, *The Least Dangerous Branch,* 69-72. Also see generally, Chapter 4.
[9] Geyh, *When Courts & Congress Collide*, ???

accountability, Congress and the Executive have turned to the nomination and appointment process to influence and control the future decisions of justices. Thus, they take a greater interest in personal political ideology while considering potential judges in an attempt to bring future judicial doctrine in line with political party preferences. Though this scholarship does not endorse or specifically sponsor the cynical view, it helps emphasize the political nature of judicial decisions and the greater role ideology has played in evaluating and discussing judicial conduct.[10]

In addition to scholarly debate over the behavior and practical decision making processes of judges, theories regarding the functions of the judiciary and proper adjudication philosophies have also developed and come into conflict. The framers of the Constitution accepted the conventional view that judges should decide cases through a formulistic interpretation of the law based on fixed and absolute principles and impartial norms. In *Marbury v. Madison*, the Supreme Court argued that the Constitution envisions or implies the role of the judiciary to be one of interpreting and implementing the rule of law and declaring void all unconstitutional legislation and executive acts.[11] To this end, the courts have traditionally served two functions: protecting the provisions of the Constitution from infringements by the legislative and executive branches, and protecting minority groups and personal rights and liberties from possible encroachments of the popular will or oppression created by a majoritarian system of government.

However, the general acceptance of the traditional role of the judiciary has not resulted in a unified and uncontroversial theory describing how justices should go about performing their duties. Some scholars and jurists have argued that in order to avoid

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[10] Geyh, *When Courts & Congress Collide*, Chapter 4.
[11] Bickel, *The Least Dangerous Branch,* 73-75, 84-98.

creating law, or imparting their policy preferences in their decisions, judges should rule through self restraint by basing decisions on legislative intent or the original semantic meaning of the laws and Constitution. Others have been more willing to accept a certain degree of flexibility in judicial conduct and have advocated a theory of interpretation which can account for changes in moral norms and different understandings of statutes and provisions. Some theorists, such as former Supreme Court Justice Thurgood Marshall, have even discredited the importance of rigid or stagnant sources of law, such as the Constitution, and advanced the idea that justices should interpret the law in consideration of changes in morality and political policy.[12] This conflict has also taken on ideological and political overtones as more conservative justices and commentators have advocated the restraintist approach, and criticized other theories as activist. Ultimately, there has been disagreement over the means judges should employ in dealing with gaps in the law, difficult cases or changes in legal and moral perceptions.

Moreover, other purposes for the courts have also been advanced to account for judicial behavior regarding difficult cases lacking a clear legal answer or concerning the inconsistency between the proper application of morality and the understanding of the law. As a democracy, the United States is often thought to be founded on principle. Values such as liberty, freedom, fairness and equality are incorporated into a political morality or national ethos which embodies the liberal ideals of toleration and justice as well as the classical republican values of a shared communal identity and a representative

[12] Justice Marshall opines, "Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today." Justice Thurgood Marshall, "The Constitution: A Living Document," in *Judges on Judging: Views From Behind the Bench*, ed. David M. O'Brien, (Washington, D.C.: C.Q. Press, 2004) 178-182.

government. The importance of such elements can be inferred from their prominence in the Declaration of Independence and their basic significance in the daily lives of Americans. Nonetheless, not all of these values are explicitly incorporated into the positive rule of law that directs judicial action. Additionally, the principles themselves are often in conflict as the classical republican ideal of self-sacrifice for the greater good and the preservation of the communal well-being is often contradicted by the classical liberal ideal of individual freedom, liberty and rights.

Some legal scholars assert that as judges decide cases, they must reconcile differences or gaps in principle and help develop a coherent and cohesive legal framework through which the values of republicanism and liberalism are maintained and individual liberty and rights are protected. To help facilitate this task, these scholars have advocated the idea that judges should help guide the democratic process through their decisions, and thereby establish the principles as a part of the rule of law. Such a function casts the courts as teachers that help point government policy in the right direction without necessarily advocating specific policy preferences or ideological values. Thus, through the medium of the courts, some scholars have argued that democratic regimes can help avoid morally unacceptable government policy based on expediency or misguided perceptions of ethical acceptability.[13]

Ultimately, society must decide what role judges should play as governmental actors, how judges should behave and decide cases in order to carry out the duties of the courts, and finally whether the current judicial system is performing correctly. The answers to these questions are important since the direction of public policy hangs in the balance.

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[13] Bickel, *The Least Dangerous Branch*, 65-72.

If legal academia has not been deceived by its own rhetoric and the legal system is performing correctly in the traditional sense, the overreactions of the realists and political scientists may possibly be discarded. Nonetheless, even assuming this view is correct, there remain questions concerning how judges should properly interpret vague or open-ended constitutional provisions and how they should divine principles from the law. In other words, even if there are fundamental principles to be discovered in the Constitution and even if judges simply "find the law and merely give voice to it and see to its automatic application," there would remain disagreement about what it all means, even among "properly trained," "legal experts" such as judges and lawyers.[14]

If the political scientist and skeptical account of judicial behavior is correct, judges have become extra-constitutional public actors, endowed with the power and authority to implement policy outside of the constitutional restraint imposed by the separation of powers and the system of checks and balances. The court's power to review the actions of the legislative and executive branches for constitutionality or for the violation of basic principles of justice was designed to prevent these branches from acting outside of a constitutional framework. When justices seek policy without regard for the constitution and basic principles of justice, they negate the purpose of judicial review.

Whatever the answer, and regardless of who is correct, the overall problem needs to be addressed in an honest and unadulterated dialogue. The confusion regarding what judges should do, are capable of doing, and actually do, is largely the result of a misleading discourse full of ambiguous terms that must be corrected and given an effective voice in order to improve communication. The goal of this paper is to help identify the problems with the current adjudication system and to improve the dialogue

[14] Bickel, *The Least Dangerous Branch*, 74.

relating to judicial action. In addition, it will identify the problems with some popular adjudication philosophies and offer some strategies for new ways to think about the courts in hope of creating a more appropriate role for judges.

Introduction: What Should Judges Do?

The hope of this essay is to offer new insights into what role judges should perform as unelected government agents in a representative democracy. The particular focus will be on describing ways in which judges can overcome the difficulties imposed by the vague or open-ended provisions of the Constitution. In addition, the essay will address how legal scholarship and constitutional debate can avoid the ambiguous and misleading dialogue which has hindered productive discussion of the problems involved with judicial behavior.

The essay is divided into four sections which build on each other to create a theoretical framework for discussing appropriate judicial behavior. The first section argues that the vague and abstract nature of the Constitution, in particular the Bill of Rights, has created unique problems for judges as they attempt to interpret and apply these provisions in cases. The second section examines the legal scholarship concerning judicial behavior, and evaluates the popular adjudication philosophies which have developed in response to the problems addressed in section one. After rejecting the effectiveness of the philosophies assessed in section two, the third section discusses the scholarship of John Hart Ely and his proffered role for the courts as protective agents of procedural due process. The fourth and final section offers strategies for moving beyond the practical limitations of Ely's theory and improving the discourse concerning judicial

behavior by asserting that judges should give content to the Constitution's open-ended passages by appealing to principles of American political morality as legitimate sources of law. The ultimate sentiment of the paper is that judicial behavior has become increasingly partisan, corresponding to the polarization of political elites. Such a trend is detrimental to the institutional legitimacy of the courts. This essay hopes that improving the dialogue relating to judicial conduct and responsibility will help the judiciary correct itself and defend its decisions through solid legal arguments backed by legitimate sources of law, instead of personal ideological and political preferences.

I) From the Beginning

> "This theoretical emptiness at its center makes law, particularly constitutional law, unstable, a ship with a great deal of sail but a very shallow keel, vulnerable to the winds of intellectual or moral fashion, which it then validates as the commands of our most basic compact." – Robert H. Bork

The legal culture of the United States is distinctively guided by tradition and custom due to its constitutional framework and common law heritage. As a result, debate regarding how judges should behave and decide cases is dominated by dialogue about precedent and constitutional provisions. Consequently, the most obvious place to begin an inquiry into the proper role of the judiciary is with a discussion of the original conception of what judges should be doing. Here, two sources weigh heavily in guiding that discussion. The first is Article III of the Constitution which delineates and defines the procedures of the judiciary. The second is the culmination of the framers' thoughts, expectations, and intents when drafting the Constitution. Though it would be impossible to provide a complete and precise account of these details, the Federalist Papers can be

relied on to provide philosophical and historical context, as they are often considered to be an accurate reflection and representation of the framers' general ideas and sentiments.

Article III is the most concise section regarding one of the three federal branches, and it is the only section to contain constitutional directives regulating judicial procedure and practice. Most of its provisions relate to the jurisdiction of the Supreme Court and the defining of federal crimes. In addition, the colonial court experience of the framers led them to believe that the most important threats to judicial independence would come from attempts to bribe or subvert justices through attempts to remove them from office or affect their pay. As a result, the framers also designed the article to protect judges from the manipulation or domination of the other branches by isolating them from threats to their tenure and salary.[15] Of primary importance, the Constitution establishes the judicial power, it defines the jurisdiction and crimes of the federal judiciary, and it protects judges by stipulating that they hold offices for life during good behavior and receive compensation that cannot be reduced.

The most prominent Federalist Paper relating to the judicial branch is *The Federalist 78,* penned by Alexander Hamilton. In it, Hamilton articulates the special role for the judiciary to play in protecting the establishment of society. Hamilton makes clear the need for an impartial, independent court, stating that such an agency "is a no less excellent barrier to the encroachments and oppressions of the representative body. And it

[15] As Geyh relates, "In sum, events leading up the Constitutional Convention created a perceived need for judges to be independent individually as decision makers and collectively as a separate branch of government. The distinction between these two forms of independence was, however, conflated to a considerable extent, because the one sustained threat to state judicial independence during this period – manipulation of judicial tenure and salary – simultaneously undermined decision making and structural independence. With all eyes focused on threats to tenure and salary, comparatively little attention was paid to other ways in which the legislature could compromise the integrity of the judicial branch, such as manipulating the courts' duties of nonremunerative resources." Geyh, *When Courts & Congress Collide*, 27.

is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." He reasons that, "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them… it may truly be said to have neither FORCE nor WILL, but merely judgment." Hamilton goes on to add:

> Liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments… The complete independence of the courts of justice is peculiarly essential in a limited Constitution… Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Hamilton's commentary helps give perspective and substance to Article III, and he provides specific duties for the courts beyond simply existing and hearing certain cases. The judiciary, according to Hamilton, is necessary because there needs to be a branch that interprets the laws (judgment) as opposed to creating (will) or executing (force) them. The courts have a duty to secure the rights and liberties of the citizens, primarily found in the Bill of Rights, and to prevent the tyranny of the elected branches by upholding the laws and supervising their actions and conduct in relation to the Constitution. Thus, Hamilton helps establish three traditional responsibilities of the judicial branch not mentioned in Article III: to compel the representative branches to adhere to the constitutional provisions regarding procedure and function of government, to preserve rights and liberties and assure an impartial application of the laws, and also to protect the minority from possible oppression created by a majoritarian system of government. In addition, Hamilton also introduces the special relationship the courts

share with the Bill of Rights and the other amendments, as these are the fundamental and original sources of law judges use in deciding cases involving personal right and the relationship between the government and the people.

The situation of the United States is unique in that these two sources are of relatively recent authorship, yet they are respected and celebrated because of their historic importance and overwhelming authority in directing political and social discourse. In many respects they are easily accessible, intelligible and apply to contemporary issues and controversies. They are new and fresh enough to appear appropriate and pertinent in guiding a modern society and government. However, they are also established, historic and honored. This veneration and significance, combined with their apparent relevance and appropriateness, make the sources appear definitive and comprehensive. And they have developed an aura as works of genius and the ultimate sources of American political theory. For this reason, both sources are studied with an extraordinary amount of reverence, and often represent the last word in debate about governmental procedure and propriety. Taken together, these sources have developed as the quintessential starting place when looking at the role of the courts and judicial behavior.

However, it is in their very ability to transcend time and appear historic yet relevant that both sources become problematic to a functioning government. The venerated and esteemed position they occupy sets a false precedent that they explicitly provide the answers to all functional and moral questions concerning the role of the government. In effect, the Constitution does not make many definitive declarations about what judges should be doing nor how they should be doing it. With respect to the

judiciary, it gives only the most essential procedural details without actually recognizing the exact role courts should take on. Additionally, as Article III does not clearly identify a function, it cannot effectively advise judges on how they should behave. Hamilton helps shed light on the role question, but he too is silent on how judges should undertake their responsibility. Thus, judges have very little original clarification as to what sources of law they should evaluate and use, how to interpret the Constitution and what grand principles of morality and justice they should be enunciating. The sources create only a skeletal framework as "The framers consciously declined to sweat the details that might have provided us with a picture of the independent judiciary as a branch as they visualized it."[16] It would be a mistake to attribute to these documents alone a fully coherent and functioning judicial branch.

A further problem is that the Federalist Papers and Article III are not always completely consistent, and Hamilton assigned powers to the courts that effectively exceed the judiciary's constitutional power. For example, though Hamilton mentions that the judiciary should invalidate laws that conflict with the Constitution, Article III does not explicitly delegate the power of judicial review. Should Hamilton's conception of the judiciary be taken as authoritative in giving the courts unenumerated powers? Or is Hamilton's view even relevant in discussing the function of the judiciary? In answering these questions, it is important to keep in mind that the Constitution was theoretically accepted by the people of the United States via their colonial representatives. As far as providing a basis for functioning government, Hamilton's views are helpful in clarifying and contextualizing but really have no inherent authoritative relevance. The Constitution is the accepted and legitimized framework, and we must therefore live by its provisions

[16] Geyh, *When Courts & Congress Collide*, 46.

and its reticence, its attributions and shortcomings. It is of questionable democratic logic to automatically revert to the framers' intentions to correct deficiencies when the Constitution is the only established and conventional source of legitimate government in the United States.

In addition, Hamilton's wording is that the courts should "void" all acts "contrary to the manifest tenor of the Constitution." Though it sounds nice, this wording is vague and perhaps misleading. The "manifest tenor" of the Constitution could include its explicit provisions, its implications, the fundamental principles of morality, equity and justice which it projects, the framers' intentions or any combination of these elements. Furthermore, Hamilton does not fully account for all the functions the courts gain through the implications of his wording. As Alexander Bickel suggests, "The essentially important fact, so often missed, is that the Court wields a threefold power. It may strike down legislation as inconsistent with principle. It may validate, or… 'legitimate' legislation as consistent with principle. Or it may do neither."[17] Leaving aside the last function Bickel ascribes, it is important to note that the judiciary has the positive power to act as a legitimizing agent. Discourse concerning the judiciary usually focuses on its negative power to void, but the courts can also validate, which is an important role in the interaction with the other branches. But this side to the courts' power is not discussed and therefore is left to be played out in the process.

Another fallacy is assuming that a single conception of appropriate judicial behavior and responsibility ever existed. Whatever original favored view of the courts ever existed underwent several revisions and adjustments as the debates reflected deep disagreement on what exact power should be delegated to judges. In large part, Article III

[17] Bickel, *The Least Dangerous Branch*, 69.

is so sparse because the framers wished to avoid conflict as much as possible and to appease the anti-federalists by making the judiciary so vague that it was acceptable to all.[18] In the end, the framers basically said nothing, and left the procedural details and social responsibility of the courts to be more forcefully and comprehensively announced in later legislation. In addition, the framers were not a unified body that agreed on everything. As Thomas Cooley points out, "Every member of [a constitutional] convention acts upon such motives and reasons as influence him personally, and the motions and debate do not necessarily indicate the purpose of a majority of a convention in adopting a particular cause…"[19] The more modern view of the courts has been an evolving idea that has developed over time as necessity and changing perceptions required, not a canonized depiction that has been handed down from time eternal. All in all, the plan for an independent judiciary was a radical new design with which the framers were experimenting. They had no concrete idea of exactly how it would work or what it should do.

But what is perhaps the biggest shortcoming of the original conception is that it gives no answer to where judges should look in interpreting the provisions of the Constitution and in deciding hard or close cases. As Court of Appeals Judge Richard Posner relates, "The Constitution does not say, 'Read me broadly,' or, 'Read me

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[18] Bickel, *The Least Dangerous Branch*, 102-104. David P. Curie, *Constitution in Congress: The Federalist Period, 1798-1801*, (Chicago: University of Chicago Press, 1997), 47-54.

[19] Cooley goes on: "And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed. These proceedings therefore are less conclusive of the proper construction of the instrument than are legislative proceedings of a statute; since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives." Thomas M. Cooley, quoted in Ely, *Democracy and Distrust*, 17-18.

narrowly'." Besides, the Constitution is primarily concerned with procedure, not announcing moral principles. And whatever insight the Federalist Papers and their personal dictations have in clarifying and elucidating the framers' thoughts, if there is no trace of them in the Constitution, there is no way to provide a completely defensible assessment of them in creating or supporting a theory of adjudication.

In addition, Hamilton's task for the courts, "to secure a steady, upright, and impartial administration of the laws … without this, all the reservations of particular rights or privileges would amount to nothing," makes the Bill of Rights an indispensable source of law since this is where the "particular rights or privileges" are announced. This creates new problems as the Bill of Rights is written with very vague, abstract and theoretical language, and the courts are given no advice or guidance regarding how the amendments should be interpreted or applied. In order to make the Bill of Rights theoretically effective and principled, the framers laid down their ideas in general and abstract terms so that the documents were not bound by a permanent conception of political theory or moral propriety which may become archaic. As Ronald Dworkin relates, "If we look at the text they (the framers) wrote… the language is perfectly general, abstract, and principled." The significance and necessity of this language is explained by Justice Posner: "If the Bill of Rights had consisted entirely of specific provisions, it would have aged very rapidly and would no longer be a significant constraint on the behavior of government officials."

The problem is that vague and abstract provisions are difficult to interpret and enforce. This leads to controversy when attempting to determine exactly what the provisions mean, which is, of course, what is required in particular cases. Thus, in order

to be practically effective, the Constitution and the Bill of Rights cannot consist entirely of arcane provisions and latent protections. Accordingly, in theory, the documents should be general, principled and abstract, while in practice they have been interpreted and applied in a concrete, impulsive and unbalanced fashion, or neglected and discarded altogether. Looking at the impeding controversy and uneven case law surrounding a few of the amendments in the Bill of Rights helps illuminate this dichotomy.

The First Amendment's protections of speech, religion, and the rights to petition and assemble are some of the most infamous liberties assigned by the Bill of Rights. Yet, even the passages in this easily recognized and well-known amendment are contentious and open to different interpretations. The plain language seems to reflect a clear desire to prevent all state interference with these rights, an interpretation espoused by some notable commentators, particularly Justice Hugo Black, who is renowned for his defiant literalist position that "I read 'no law… abridging' to mean *no law abridging*."[20] However, most academics and justices have agreed that the amendment does not protect absolute rights and implicitly accommodates a restricted level of state intervention. The controversy arises when scholars attempt to assign a limit to the designated freedoms and thereby legitimize state prohibitions of certain actions and conduct. What did the framers consider to be the acceptable limits to these freedoms? How should the amendment deal with new forms of technology that the framers could not have envisioned? Does the meaning of the amendment change with evolving attitudes about propriety and moral correctness? How pervasive does a state interest need to be in order to warrant restrictions? Obviously the answers to these questions have a great impact on how the amendment is interpreted, and the political and social climate that surrounds them has a

[20] Bickel, *The Least Dangerous Branch*, 88.

profound influence as well. During times of war or heightened national security, the amendment's freedoms have been contracted with general public approval. Conversely, they have been enhanced during calmer periods. Issues concerning obscenity, libel, and unorthodox religious practices have also proved especially irksome and problematic. All of this has generally led to confusion and irregular, conflicting jurisprudence. Though the amendment's importance to the American political morality can hardly be overestimated, the practical problems it presents for courts can hardly be overlooked either.

The Eighth Amendment, which most famously prohibits cruel and unusual punishment, is also difficult to assign a particular meaning without inviting disagreement. Here, the meaning of "cruel and unusual" has evolved since the amendment was drafted, and its interpretation turns on deciding whether the framers intended to prohibit what they thought was cruel and unusual under their own standards or whether they planned to prohibit whatever is in fact cruel and unusual. Again, the framers' language is not precise and an abstract or principled interdiction could allow for a changing meaning while respecting the general sentiment expressed. Nonetheless, many justices, such Antonin Scalia and Clarence Thomas, argue that the original or textual meaning of the words should supersede changing moral norms.[21] Such an argument has been proffered to support the imposition of capital punishment since the framers never intended for its prohibition and even included textual references to support its acceptance. Others, such as Ronald Dworkin, have argued that the framers meant to outlaw cruel and unusual punishments generally, without respect to particular acts, and thus inclusive of acts that

[21] Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in *Philosophy of Law, Eighth Edition*, ed. Joel Feinberg and Jules Coleman, (Belmont, CA.: Thomas Wadsworth, 2004), 151-160.

may not have been deemed inappropriate at the time.[22] The general case law reflects this disagreement, as capital punishment was prohibited by the Supreme Court in *Furman v. Georgia* 408 U.S. 153 (1972) and later reinstituted in *Gregg v. Georgia* 428 U.S. 153 (1976).[23]

The Ninth Amendment provides: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." The wording appears to clearly indicate the framers' intention to protect unenumerated rights which they did not specifically list in the Bill of Rights. In effect, the amendment is a stopgap protection, but originally it served a purpose and was intended to mean something. The problem is that such a provision is practically impossible to enforce as there is no way to decide which rights and liberties are included to be retained. As a result, the Ninth Amendment has been rendered nearly impotent and meaningless. This is unfortunate because the amendment originally served to protect rights that were deemed important or to preserve the spirit of values that could be seen as fundamental. Though the immediate point is that the amendment cannot be interpreted as a source of law by itself, the larger picture is that judges have either intentionally or ignorantly chosen to reject its deeper meaning and the values it embodies.

So, ultimately, we have no idea what judges should be doing because the traditional sources to which we look to answer such an inquiry are not helpful. For practical purposes, Article III simply establishes a judicial power and defines its jurisdiction. It does not direct judicial behavior, or outline a theory of adjudication, or tell

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[22] Ronald Dworkin, "Comment," in *Philosophy of Law, Eighth Edition*, ed. Joel Feinberg and Jules Coleman, (Belmont, CA.: Thomas Wadsworth, 2004), 161-166.
[23] Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, *Fifth Edition*, (Washington, D.C.: CQ Press, 2004), 614-628.

judges how to interpret vague or abstract provisions. Furthermore, there is no positive evidence that the framers ever intended to create a permanent conception of political morality or even thought about the practical problems encountered when judges have so little constitutional direction. Hamilton's clarification helps provide roles, but it also makes the Bill of Rights an inestimable source of law which is practically impossible to interpret in a neutral and objective way because its mere language gives rise to personal and ideological understandings of its declarations. At the end of the day, the Constitution is simply not an effective source of law when it stands by itself, and it does not direct judicial action enough to create a functional judicial branch.

II) Toward a More Meaningful Dialogue

> "In many cases that although the judge or commentator in question may be talking in terms of some 'objective,' nonpersonal method of identification, what he is really likely to be 'discovering,' whether or not he is fully aware of it, are his own values." – John Hart Ely

In response to the Constitution's reticence regarding the appropriate role of judges and the historical lack of understanding about how they should properly interpret its controversial provisions, judges and scholars have developed adjudication philosophies as they attempt to negotiate judicial responsibilities. In effect, lacking a clear authoritative directive from the onset, these philosophies are judge-made mechanisms designed to create a framework for interpreting the meaning of the Constitution and reaching principled and valid decisions.

The idealistic understanding of the courts casts judges as impartial spectators that simply apply the rule of law without reference to outside moral or legal sources, personal sympathies or political preferences. However, the law is not entirely comprehensive or

concrete since there are gaps in what the lawgiver can reasonably foresee and many provisions and statutes are ambiguous. This leads to difficult cases in which the idea of how judges should behave conflicts with the type of operations judges are practically able to perform. Judges cannot simply apply a clean set of legal rules to all cases that come before them. Adjudication philosophies basically attempt to resolve this problem by devising strategies for dealing with unclear or open-ended provisions and gaps in the law, so that judges may remain impartial and still effectively decide cases.

In American legal culture, adjudication philosophies have commonly followed the principles of two overarching legal schools of thought. Generally, interpretivism asserts that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution," while noninterpretivism contends that "courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."[24] While the former is basically a recommitment to the conventional understanding of how judges should behave, the latter is far more accepting of the role discretion plays in making judicial decisions. Noninterpretivism seeks to accommodate judicial discretion by legitimizing additional sources of law and circumscribing limits to how far judges may go in filling the gaps.

Overall, the interpretivist approach is more closely aligned with the traditional role assigned to judges. In addition, it can also reconcile itself with the American ideal of democracy as it prevents justices from exercising extra-constitutional power by enacting their policy preferences from an unelected position of government. It binds them to enforcing only the objective meaning of the words of the Constitution, and it rejects the

[24] Ely, *Democracy and Distrust,* 1.

notion that judges may interpret the Constitution in light of their own values and preferences. This compatibility gives interpretivism a definite theoretical advantage over its counterpart since it seems to be the practicable embodiment of how Americans think judges should behave. In contrast, as John Ely argues, the most fundamental criticism leveled against noninterpretivism is that it is inconsistent with democratic theory:

> Thus the central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like. That may be desirable or it may not, depending on the principles on the basis of which it is done.[25]

The obvious problem with noninterpretivism is that it defends judicial review in conjunction with a liberal amount of judicial discretion based on principles not necessarily defined, incorporated or even associated with any specific text of the Constitution or legislative statute. In other words, it seems undemocratic, and it appears to delegate a considerably larger amount of power to judges who are supposed to be automatic, objective umpires not philosopher king lawgivers.

Thus, from a purely theoretical standpoint, interpretivism seems to be the hands down favorite as a method of judicial review. However, as the previous section noted, there are basically two needs that an adjudication philosophy must fill. The first is answering what general role judges should take on. The second is formulating a way for judges to carry out that role, particularly in interpreting and giving substance to unclear or open-ended constitutional provisions. The problem with interpretivism is that it is basically a restatement of what judges should be doing, not an effective mechanism for dealing with ambiguities, gaps or difficult moral and legal questions. In other words, it

[25] Ely, *Democracy and Distrust,* 4.

neglects the second need. Its logic is similar to telling judges to do X, and then explaining to them how to do X by repeating that they should be doing X. It offers no new helpful information on how judges should deal with the problematic cases they face.

In contrast, noninterpretivism is specifically designed to account for gaps, inconsistencies and abstract provisions in the rule of law. It argues that in such places, "the Supreme Court should give content to the Constitution's open-ended provisions by identifying and enforcing upon the political branches those values that are, by one formula or another, truly important or fundamental."[26] Accordingly, noninterpretivism can overcome the deficiencies of an interpretivist approach. But does the end justify the means? Obviously interpretivism is impractical, but should we respond by automatically abandoning our idealistic view of the courts and the role designed for judges?

All things considered, the two schools of thought are only as effective as their limitations, and in that respect they seem to be equally disappointing. Interpretivism looks good on paper but lacks a fully rounded theory. Nonintepretivism is a complete theory, but allowing judges to effectively determine the meaning of the law seems to make the legal community uncomfortable. In appearance, the one sacrifices a practical approach for philosophical pandering while the other loses sight of its purpose in reaching a pyrrhic victory.

The overall dissatisfying nature of the two approaches has led scholars within the legal community to attempt to combine their positive elements to provide a complete

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[26] Ely goes on: "Indeed we are told this is inevitable: 'there is simply no way for courts to review difficult substantive choices among competing values, and indeed among inevitably controversial political, social, and moral conceptions.' '[C]onstitutional law must now be understood as the means by which effect is given to those ideas that from time to time are held to be fundamental …' The Court is 'an institution charged with the evolution and application of society's fundamental principles,' and its 'constitutional function,' accordingly, is 'to define values and proclaim principles.'" Ely, *Democracy and Distrust,* 43.

philosophy that abides by the theoretical role assigned to judges and presents a realistic solution to the problems they face. However, it has been in this step, the effort to fill both needs in an acceptable way, which has led to a misguided and grossly deceptive dialogue concerning judicial behavior and adjudication philosophies. Generally, the aim is to appear interpretivist, and thus inline with the idealistic notion of judicial behavior, while finding subtle ways to introduce additional sources of law to help decide cases. It is thus important to unpack the adjudication philosophies that have followed and at least correctly identify them for what they are and what they claim to be.

Under the interpretivist umbrella, adjudication philosophies can be divided into two groups, those that are actually a strict or pure interpretivist approach and other philosophies often associated with interpretivism. The former type, a sort of "clause-bound interpretivism," is most closely aligned with the literalism of Justice Black. It is a rigid approach that looks strictly at the text of the Constitution to divine its meaning, and it refuses to recognize any outside source of law or the subjective opinions of individual judges. As already noted however, this is not a fully coherent theory as it cannot successfully deal with the basic interpretive problems justices face. Indeed, Justice Black's literalism often reached somewhat absurd results, and he found it impossible to deal with certain open-ended texts, like the Ninth Amendment. Overall, literalism and its counterparts have been discredited and discarded.

The other types, known more commonly as "restraintism," "originalism" or "textualism," claim descendence from an interpretive approach and thus presume to honor the idealistic standard of interpretivism. However, their adherents realized that a clause-bound interpretivism would not be feasible because the Constitution is impossible

to interpret on its own as a source of law. So these judges and scholars sought to infuse the clause-bound variant with the values and principles of the past, namely those of tradition, convention and the framers. The basic reasoning behind this addition is that these values are fundamental to the identity of the nation and represent the most universal and impartial way to give content to the Constitution. But this approach should not be confused with interpretivism proper, and it shares many of the characteristics and problems of noninterpretivism. Of primary importance is that it is simply value imposition in a glossed and doctored form. These strategies venerate tradition and the sentiments of our ancestors, and it is no coincidence then that this approach has been accepted and advocated by political conservatives. That it claims to represent the framers' values or some historical interpretation of the Constitution is not a viable defense or distinguishing attribute.

Taking a step back, when interpreting the Constitution a judge has two options. He must either go simply by what the text actually says, or he must introduce new elements to help give the words meaning and substance. There is no middle ground, and there is no "close enough to what the Constitution probably means." It makes no difference how important the intentions of the framers or the original conception of the Constitution's meaning seem to be to interpreting the Constitution today. Referring to these elements is no closer to actual interpretivism than the most egregious case of noninterpretivism; both strategies inject personal opinions of what the law should mean. That one strategy appears, wrongly, to restrict the power of judges or to provide a fundamental clarification of the Constitution's meaning does not automatically make it more appropriate or inline with what judges should be doing.

Another outgrowth of the misrepresentation of adjudication philosophies has been the attempt to discredit any form of noninterpretivism that does not at least appear or pretend to be "neutral," or "objective," or essentially interpretivist. In many ways, current legal discussion portrays "noninterpretivists" as judicial atheists who have no faith in a comprehensive adjudication philosophy. Without a guiding light, as the depiction goes, these apparent judicial rogues base their decisions on subjective conceptions of morality and an ad hoc determination of whatever strikes them to be a good idea at the time. In this respect, the fashionable "activist" charge levied against them may indeed be fitting. But what does it really mean to be an activist? The explanation given by Professor Douglas Kmiec of Pepperdine seems to be a helpful starting point.

> What we mean by activism is judges who are willing to read into the Constitution things that are not in the text or judges who disregard the obvious intent of a constitutional provision or judges who are committed to keeping the Constitution, as it were, "up-to-date" – "up-to-date" not in terms of the people's perspective, but in terms of their own.[27]

Kmiec's definition seems to encapsulate what most people think of when they envision an activist judge. A fair reading of this charge seems to imply that judges should not be activist, meaning they should willingly straightjacket themselves within theories of adjudication that are based solely on clearly defined sources of positive law, such as common law precedent and the language of the Constitution. In other words, it carries an implied endorsement of interpretivism.

The problem with such a characterization, however, is that interpretivism is defunct. By endorsing interpretivism, the activist charge fails to account for the imprecision of the Constitution, and it wrongly assumes that a single viable constitutional

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[27] Douglas Kmiec, quoted from Voice of America, (Washington, Mar. 2005). http://www.voanews.com/english/archive/2005-03/2005-03-07-voa48.cfm?CFID=14363158&CFTOKEN=35146139

theory of adjudication exists which can give clear answers to unclear constitutional questions. In reality, no judge actively seeks to "read into the Constitution" his own personal moral standards without any reference to the law. The mere vagueness of the amendments makes it practically impossible to form a unified interpretation, also meaning that judges could come up with drastically different constructions equally backed by sound legal arguments. Again, the problem is that judges encounter cases which the rule of law cannot answer.

> The United States Supreme Court does not hear very many "easy cases"—cases in which the application of preexisting legal rules control the outcome of the dispute. Indeed, the Supreme Court has a discretionary appellate jurisdiction (for the most part), and the Court rarely grants the writ of certiorari in cases in which the law is clear. Instead, the Court tends to focus on those cases in which the law is uncertain, the lower courts are divided, or there is a perceived need for a change in the law. Moreover, cases which are controlled by clear rules of law are usually settled.[28]

Another difficulty for Kmiec's definition is that there is no "obvious intent," as there was never a completely unified intent in the first place. And such a line of reasoning also assumes that the intent of the framers is relevant anyway, which is a subjective value choice in and of itself, even if it is a correct view. The framers never said, "Discern our intentions and take them to be the last word in political morality." In fact, some of them thought the exact opposite (Thomas Jefferson once proposed that the Constitution should expire every nineteen years to avoid this precise line of reasoning).[29] Assuming that legislative intent is pertinent means actively choosing to accept its relevance.

Furthermore, Kmiec's depiction assumes that the judicial branch can be completely isolated from external restraints on its power and that judges have free reign

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[28] Lawrence Solum. "The Attitudinal Model & the New Institutionalism." *Legal Theory Lexicon,* June 2005. http://legaltheorylexicon.blogspot.com/2005/06/legal-theory-lexicon-045-attitudinal.html
[29] Ely, *Democracy and Distrust*, 11.

to implement whatever policy decisions they favor. It is this implicit allegation that really gives the activist charge its bite, for if judges had this high level of freedom or discretion, they could openly defy or even shape the rule of law and contradict the traditional Hamiltonian portrayal of the impartial and weak judicial branch. It seems ironic then, that this charge has come from legal academics who generally argue that judges cannot possess this power because their decisions must gain recognition and acceptance from the legal community.[30] If legal academia's central premise were true that judges must gain the acceptance of the wider legal community by correctly and uninterestedly applying legal norms, no justice would be able to be an "activist."

So what is going on with the activist label? Judges, and the legal community at large, have an image to uphold, and their actions must appear compatible with the idealistic view of the impartial judges of Hamilton's weak judiciary. Decisions that contradict this image pose a great threat to the security of the judicial branch which depends on the public's tacit consent and acceptance of its authority. The spell the courts cast is only meaningful if people believe in their power. Once people see judges as merely self-interested human actors, the entire judicial establishment is discredited. Thus, if the branch loses this faith, it effectively loses its influence.[31] Accordingly, the legal community has an invested interest in promoting and defending the established view of

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[30] Lawrence Baum, *Judges and Their Audiences*, (Princeton, New Jersey: Princeton University Press, 2006), 97-106.

[31] Thus, first and foremost, the justices must protect the Court's institutional legitimacy and its implicit authority to be capable of advancing any sort of policy at all. Lee Epstein and Jack Knight relate that the justices are acutely aware that routine divergences from the idealistic role associated with the judiciary will undermine the Court's influence, not only in relation to the other branches but in the eyes of the public as well. If the judiciary continuously steps beyond its limitations, the public may no longer take note of the Court's decisions which could disrupt the Court's institutional setting since it is "dependent on public support for its legitimacy, autonomy, and tacit authority. Retaining such public confidence is vital to protecting the Court's ability to make rulings free from intrusion by the other two branches of government." Jeff Yates, *Popular Justice: Presidential Prestige and Executive Success in the Supreme Court* (Albany, N.Y.: State University of New York Press, 2002), 16. See also: Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, D.C.: C.Q. Press, 1998), 46-49, 145-157.

judges and the value of legal reasoning based solely on the rule of law. Since activist departures from this idealistic image would endanger the courts, judges must defend the faith and criticize all blasphemers. While this reaction is understandable and helps promote the image we all want to see of judges, it is hardly realistic and it is damaging to the way we talk about the courts.[32]

In contrast to legal academia's dogmatic study of the judiciary is a breadth of political science research designed to accurately account for the decisions justices make. Most political scientists have come to agree that judges are primarily concerned with "seeing their policy preferences etched into law," meaning that justices vote according to their personal ideologies in an attempt to make case law reflect their sincere ideological preferences, opinions and beliefs.[33] Thus, these scholars "emphasize the political dimension of the Supreme Court—with liberal, moderate, and conservative Justices lining up in more or less predictable patterns, especially with respect to certain politically-charged issues—implied fundamental rights, federalism, and criminal procedure, for example."[34] This research has been comprehensively incorporated into a theory of judicial decision making known as the attitudinal model, originally advanced by Jeffrey Segal and Harold Spaeth.

> The basic insight of the attitudinal model is that judicial decisions can, in at least some circumstances, be explained and predicted by the attitudes of

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[32] In honest, judges are very sophisticated decision makers who make rational choices to interpret the law as they think it ought to be interpreted. Unfortunately, they are often so preoccupied with appeasing outside interests by appearing neutral that they neglect to consider what the best law could be. Instead of trying to develop strategies that fit the preconceived idealistic mold of how judges should behave (a mold which really is not useful), judges should attempt to be honest with the public in an effort to help achieve the best rule of law possible. The smoke and mirrors only come back to hurt us all, and as Alexander Bickel relates, the judges may have fooled themselves as much as anyone else. See: Bickel, *The Least Dangerous Branch,* 92-93.

[33] Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, D.C.: C.Q. Press, 1998), 9-10.

[34] Lawrence Solum. "The Attitudinal Model & the New Institutionalism." *Legal Theory Lexicon,* June 2005. http://legaltheorylexicon.blogspot.com/2005/06/legal-theory-lexicon-045-attitudinal.html

> judges. Thus, a simple attitudinal model might code each justice as occupying a point on a real line from left to right. A judge at the left-most point on the line would be very liberal. A judge on the right-most point of the line would be very conservative. The model might then predict how a judge's attitudes (or position in attitudinal space) would correlate with positions on particular issues. Conservative judges are likely to vote against a right to abortion; liberal judges may be likely to uphold assertions of national power against challenges on federalism grounds.[35]

Without a specific agenda to promote, the attitudinal model offers a more realistic account of the courts that can be understood in conjunction with the impracticability of an interpretivist approach. If they are going to give content to the Constitution's open-ended provisions, judges must rely on some outside authority for direction since the actual text is simply insufficient. The obvious difficulty is that there is no effective baseline to explain what the law means. In other words, each judge (as does every person) interprets the rule of law differently according to a personal opinion of what the law is and what it ought to be. This individualistic interpretation is often a direct reflection of the judge's personal ideological preferences. Though they may be very sincere in their interpretation and honestly decide cases according to what they perceive the law to mean, there is no way around the fact that the application of the law involves an inherently subjective factor.

Adjudication strategies have an underlying political and philosophical significance that relates to how Americans view the democratic process and their relationship to their government. It is so important to appear interpretivist because this approach corresponds with the way we like to think of judges. As Ely relates, "Interpretivism does seem to retain the substantial virtue of fitting better our ordinary notion of how the law works: if your job is to enforce the Constitution then the

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[35] Lawrence Solum. "The Attitudinal Model & the New Institutionalism." *Legal Theory Lexicon,* June 2005. http://legaltheorylexicon.blogspot.com/2005/06/legal-theory-lexicon-045-attitudinal.html

Constitution is what you should be enforcing, not whatever may happen to strike you as a good idea at the time."[36] We do not want judges making the law, and having them tell us what it means based on their own subjective moral values and political preferences hardly seems much better. In the end, we do not want an elite group telling us how we will run our lives because it seems to subvert our democratic ideal. Unfortunately, this vision of the courts is not only unrealistic in terms of what judges actually do but also in terms of what they are even capable of doing.

All this goes to show is that the term "activism" has lost is practical effectiveness and significance in legal discussions. As it turns out, the term as it is used today and its underlying implication may not be as abhorrent as pretended. Similarly, "restraintism" has been rendered meaningless as well. This is not to say that the concerns expressed with terms such as "activism" are not valid or relevant. To the contrary, they are incredibly significant, but they have become clouded by ineffective dialogue. As Judge Posner points out,

> The liberal judicial activists may be imprudent and misguided in their efforts to enact the liberal political agenda into constitutional law, but it is no use pretending that what they are doing is not interpretation but "deconstruction," not law but politics, because it involves the exercise of discretion and a concern with consequences and because it reaches a result not foreseen 200 years ago.[37]

Like many other hot-button words, "activism" seems to imply more than it may sensibly signify. So what does it mean to be an activist judge? Well, really, not a whole lot. The activist label has acquired a considerable amount of theoretical baggage as it has

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[36] Ely, *Democracy and Distrust,* 12.

[37] Judge Richard A. Posner, "What Am I, A Potted Plant? The Case Against Strict Constructionism," in *Judges on Judging: Views From Behind the Bench*, ed. David M. O'Brien, (Washington, D.C.: C.Q. Press, 2004), 169.

been declared completely inconsistent with the role of the courts. Accordingly, it has been developed as a politicized and impassioned attack devise for politicians, scholars and justices to criticize decisions with which they disagree. In particular, it has been used by conservatives to create a theoretical framework for discussing proper judicial conduct as a response to the liberal rulings of the Warren Court. But the term, like Kmiec's definition, is a strawman. It can be easily attacked because it appears inconsistent with democratic theory and the place for judges, but it does not accurately depict the complex nature of judicial decision making or the real behavior of judge. Given the impracticability of a literalist approach, most judges have found that they must import some outside source to help define the rule of law. In this sense, all judges are "activists," or more accurately no judges are activist.

III) Between Value Imposition and Procedural Guidance

"Government of, by, and for the people was… required to be also principled government, with the counter-majoritarian restraints that this implies. This is why the idea of popular sovereignty – freeing the people to vote… without reference to principle – was inadmissible, indeed, revolting." – Alexander Bickel

"The constitutional function of the Court is to define values and proclaim principles. But this is not a function to be exercised with respect to some exceedingly few matters, while society is left wholly to its devises of expediency in dealing with the great number of its other concerns." – Alexander Bickel

When the way we want judges to decide cases is impracticable and the way judges actually approach constitutional issues may seem unattractive and incompatible with democratic theory, a very specific problem emerges. The preceding section argued that the established theories of adjudication are similar because none of them are actually interpretivist. Instead, they all give substance to the Constitution in view of a certain set

of personalized value preferences, which are neither objective nor universal. This may or may not be desirable depending on the benefits such an approach provides and whether it is indeed unsuited to our system of government.[38] It is thus necessary to start again from the beginning and reexamine what judges ought to do in the first place, and then how they should go about doing it. This section will address what general role courts should play in a democracy that must somehow create its political morality: should judges be protective agents of fundamental values or should they allow the democratic process to make such determinations by deferring to the self-governing nature of democracy.

In his book, *Democracy and Distrust*, John Hart Ely examines these issues as he attempts to provide a solution to the adjudication dilemma. Recognizing the practical problems with interpretivism and noninterpretivism, Ely's goal is to provide a role for judges that corresponds with the idealistic view of the law while giving them an actual feasible job to do. After discarding narrow interpretivism,[39] he turn his attention to determining whether judges should intervene in the democratic process by enforcing or announcing particular legal and moral principles, or simply be passive umpires who ensure the procedural integrity of a democratic system by "policing the process of representation."

If noninterpretivism is the solution, there must be some variation that can transcend philosophical and ideological differences to fill out the Constitution in a way that makes sense to everyone and respects the traditional depiction of the rule of law. Ely exhaustively examines seven proposed ways to announce or discover fundamental values, and in the end he rejects them all. The judge's own values are too idiosyncratic and

[38] In addressing these issues, it is important to keep in mind the reality of judicial decision making, especially considering what judges are capable of doing and what they actually do.
[39] See in particular: Ely, Chapter Three: "The Impossibility of a Clause-Bound Interpretivism," 43-72.

obviously undemocratic. Allusions to natural law can be made to support any particular cause, and the idea that there are objective moral truths out there to be discovered through reason is not widely appreciated.[40] Neutral or general principles that can be applied to a group of cases, so that like cases are treated alike, have no mechanism for determining their appropriateness outside of the mere convenience of their application.[41] Similarly, asking judges to examine cases through reason or moral philosophy does not guarantee that they will reach appropriate results since there is no consensus regarding which moral principles are fundamental and which form of moral reasoning is best.[42] Using traditional values to aid today's interpretation of the Constitution is archaic, and like natural law, it can be used to support almost anything. In addition, it is hard to determine which tradition counts, and some beneficial programs, like those designed to benefit minorities who have been traditionally discriminated against, obviously have no precedent. Furthermore, Ely questions whether looking to the past to govern today is reconcilable

[40] "The advantage, one gathers, is that you can invoke natural law to support anything you want. The disadvantage is that everybody understands that. Thus natural law has been summoned in support of all manner of causes in this country – some worthy, other nefarious – and often on both sides of the same issue" (Ely, *Democracy and Distrust,* 50). "All the many attempts to build a moral and political doctrine upon the conception of a universal human nature have failed. They 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 universal. One has to choose between triviality and implausibility." (Ely, *Democracy and Distrust,* 51-52)

[41] "An insistence on 'neutral principles' does not by itself tell us anything useful about the appropriate content of those principles or how the court should derive the values they embody…. Even in the unlikely event that we could agree on what degree of generality should be required, however, we still would not have arrived at a formula that would guarantee the *appropriateness* of the principle" (Ely, *Democracy and Distrust,* 55).

[42] "The error here is one of assuming that something exists called 'the method of moral philosophy' whose contours sensitive experts will agree on, that 'there are only two kinds of reasoning – one is sound and the other is unsound.' That is not the way things are… Experience suggests there will be a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class… Thus the values judges are likely to single out as fundamental, to the extent that the selections do not simply reflect the political and ethical predispositions of the individuals concerned, are likely to have the smell of the lamp about them" (Ely, *Democracy and Distrust,* 57-59).

with democracy in the first place.[43] The final two, deferring to consensus and predicting progress, share the same flaw in that the court is simply not the most qualified branch to conduct such legislative investigations. Additionally, the use of consensus to protect minority rights simply does not make sense, and predicting progress is antidemocratic in the same way as reverting to tradition. Ultimately, Ely finds no acceptable method of discovering fundamental values, and he subsequently rejects all adjudication philosophies under the noninterpretivist umbrella.

After rejecting noninterpretivism, Ely advances a comprehensive theory of adjudication based on the need to preclude judges from making subjective value choices in determining what the law means. He envisions the courts taking a "participation-oriented, representation-reinforcing" approach to judicial review, thereby reassuring and implementing constitutional protections of procedural due process.[44] In other words, the idea is to define the judiciary's power in terms of its policing and enforcement of the procedural fairness of the democratic process, not its role in giving content to the vague or open-ended provisions of the Constitution. His approach thereby restricts the courts' interference with the value choices made through the legislative process, thus avoiding the failings of noninterpretivism.

Ely largely credits the Warren Court's "pursuit of 'participational' goals of broadened access to the processes and bounty of representative government, as opposed

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[43] "[P]eople have come to understand that 'tradition' can be invoked in support of almost any cause… Top this all off with the tremendous uncertainties in ascertaining anything very concrete about the intellectual of moral climates of ages passed, and you're in a position to prove almost anything to those who are predisposed to have it proved or, more candidly, to admit that tradition doesn't really generate an answer, at least not an answer sufficiently unequivocal to justify overturning the contrary judgment of a legislative body" (Ely, *Democracy and Distrust,* 60). "There are, however, serious theoretical problems with tradition as a source of constitutional values. Its overtly backward looking character highlights its undemocratic nature: it is hard to square with the theory of our government the proposition that yesterday's majority, assuming it was a majority, should control today's" (Ely, *Democracy and Distrust,* 62).

[44] Ely, *Democracy and Distrust,* 87.

to the more traditional and academically popular insistence upon the provision of a series of particular substantive goods or values deemed fundamental," as the theoretical foundation of his adjudication method.[45] In addition, he references Justice Stone's famous footnote in *United States v. Carolene Products Co.* as an important predating contributor to the participational value approach.[46] Justice Stone conceptualized that the Supreme Court should concern itself with threats to participation in the political process and whether a dominant majority can unequally deprive a smaller faction of political rights or the distribution of social goods. He argued that any legislative attempt to restrict the political process or any form of prejudice which constricts the political protection of minorities should be met with "more exacting judicial scrutiny."[47] Ely argues that this "process-oriented" approach to judicial review was applied by the Warren Court to "clear the channels of political change" and "correct certain kinds of discrimination against minorities."[48]

> If, therefore, the republican ideal of government in the interest of the whole people was to be maintained… a frontal assault on the problem of majority tyranny was needed. The existing theory of representation had to be extended so as to ensure not simply that the representative would not sever his interests from those of a majority of his constituency but also that he would not sever a majority coalition's interests from those of various minorities.[49]

Ely explains that the protection of minorities and other unrepresented interests "proceeds by what amounts to a system of virtual representation: by constitutionally tying the fate of outsiders to the fate of those possessing political power, the framers insured

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[45] Ely, *Democracy and Distrust,* 74.
[46] Ely, *Democracy and Distrust,* 75-77.
[47] Ely, *Democracy and Distrust,* 76.
[48] Ely, *Democracy and Distrust,* 74.
[49] Ely, *Democracy and Distrust,* 82.

that their interests would be well looked after." In other words, Ely's role for the courts is to enforce some conception of the golden rule on the democratic process – those in power should treat minorities as they treat themselves and their favored interests. Thus, he argues that judges should

> focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.[50]

Since the interests of minority groups are so diverse, even the most comprehensive list of fundamental values would be insufficient to cover them all. The only way to successfully protect minority rights is to ensure that they may participate in the democratic process and are not unduly singled out by repressive legislation.

Additionally, Ely argues that his theory avoids the problems of interpretivism because it focuses on the procedural aspects of the Constitution. Indeed, Ely claims, clause-bound interpretivism fails simply because it looks for fundamental values in the constitutional text. Judges should avoid looking for these values invariably, since they can neither be found in the Constitution nor anywhere else. Instead, the Constitution is not "an enduring but evolving statement of general values," but rather it is primarily concerned with the "procedural fairness of individual disputes (process writ small)" and "ensuring broad participation in the processes and distributions of government (process writ large)."[51]

In effect, Ely argues that the legal community has misunderstood the purpose of the vague and open-ended constitutional provisions and assumed that they were missing

[50] Ely, *Democracy and Distrust,* 77.
[51] Ely, *Democracy and Distrust,* 87.

something.[52] Contrary to the common description, the Constitution is entirely concerned with providing a framework for a system of announcing values – the political process. Accordingly, "preserving fundamental values is not an appropriate constitutional task."[53] In contradistinction to its counterparts, a participational adjudication philosophy is completely consistent with democratic theory, and the approach gives judges a role they are uniquely qualified and situated to fulfill as "experts on process" and as "political outsiders."[54] Thus, as Ely argues, the approach can overcome the deficiencies of both interpretivism and noninterpretivism, and it is a fully functioning theory consistent with the spirit of the Constitution and the idealistic view of the judiciary and the rule of law.

Nonetheless, there are a number of assumptions Ely makes in enunciating his theory which must be examined. First, it is important to recognize that the democratic ideal consists of a value choice that it is better for a people to be self-governing than arbitrarily governed. In other words, democracy in and of itself consists of a political moral preference for representative government. Ely simply accepts this value as the starting place for American political morality, relating, "We have as a society from the beginning, and now almost intrinsically, accepted the notion that a representative democracy must be our form of government. The very process of adopting the Constitution was designed to be, and in some respects it was, more democratic than any that preceded it."[55] Later, he adds, "rule in accord with the consent of a majority of those governed is the core of the American governmental system."[56] But he does not question whether there is a more fundamental belief associated with democracy. A representative

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[52] Ely, *Democracy and Distrust,* 87-88.
[53] Ely, *Democracy and Distrust,* 88.
[54] Ely, *Democracy and Distrust,* 101-104.
[55] Ely, *Democracy and Distrust,* 5.
[56] Ely, *Democracy and Distrust,* 7.

government might be good in its own right, but its value could also be a derivative of some greater social or moral goal. Thus, Ely's work is premised on an initial assumption he makes about the value of democracy, and that reinforcing the democratic ideal should be the main, and possibly the only, goal of any adjudication philosophy.

Ely also assumes that democracy is concerned only with the procedural aspects of regulating a government. Put another way, he presumes that there are no substantive values intrinsically associated with a liberal regime type. This allows him to make the argument that all substantive values are simply foreign add-ons that have no fundamental relationship to the democratic ideal. As such, these value impositions are simply the subjective value choices of participants in the process. However, this does not necessarily have to be the case. Even if moral values and principles are not announced in the Constitution, that does not mean that they are not a part of the American political morality or national ethos.

In addition, Ely takes it for granted that the democratic process will actually function in an idealistic manner – that public officials and elected representatives will most often act in the majority's best interest. He simply has no method for protecting the majority from a ruling elitist plutocracy or similar governmental arrangement. Ely also seems to simply accept that democracy will necessarily bring about winners and losers. As long as the game is played fair, he seems to accept whatever outcome the process brings about. Perhaps this is simply the cost of democracy, but it is a heavy price to pay and not one that should be taken lightly. As Judge Posner opines

> Opposite the unrealistic picture of judges who apply the law but never make it, hangs an unrealistic picture of a populist legislature that acts only "with the consent of the governed." Speaking for myself, I find that many

> of the political candidates whom I have voted for have failed to be elected and that those who have been elected have then proceeded to enact much legislation that did not have my consent. Given the effectiveness of interest groups in the political process, much of this legislation probably didn't have the consent of a majority of citizens. Politically, I feel more governed than self-governing. In considering whether to reduce constitutional safeguards to slight dimensions, we should be sure to have a realistic, not idealized, picture of the legislative and executive branches of government…[57]

Furthermore, Ely complicates the issue by using the British concept of virtual representation to explain his defense mechanism for minorities. What he fails to address, however, is that the British system of virtual representation assumed that representatives would act in the nation's interest as a whole.[58] British members of parliament were not beholden to constituencies and would not have felt obliged to represent particular interests, such as those of a certain party or class. Instead, they would have voted according to personal interpretations of the best interest of the people all together.[59] This concept made the protection of minority groups more feasible since the British system could not accurately be described as the rule of the majority, at least not in the same sense as the United States.

Since Ely's virtual representation does not have the same premise or effect as the British system, his theory encounters problems in relation to what it allows the majority to do to the minority. Of primary importance is that Ely's theory simply allows the majority to treat the minority like it treats itself. That works well when the minority wants to be treated and behave like the majority. But when the minority seeks rights not

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[57] Judge Richard A. Posner, "What Am I, A Potted Plant? The Case Against Strict Constructionism," *Judges on Judging: Views From Behind the Bench*, ed. David M. O'Brien, (Washington, D.C.: C.Q. Press, 2004) 167.
[58] Russell Kirk, *Edmund Burke: A Genius Reconsidered*, (Wilmington, Delaware: Intercollegiate Studies Institute, 1997), 82-87.
[59] Russell Kirk, *Edmund Burke: A Genius Reconsidered*, (Wilmington, Delaware: Intercollegiate Studies Institute, 1997), 82-87.

accepted or condoned by the majority, this approach becomes problematic. It may be procedurally fair if we live in a society which has a universal ban on red cars, but that does not mean it is morally acceptable to tell everyone in the society that they cannot have a red car. The ban is a subjective value choice which the majority can make and enforce on the minority without fear of reprisals from Ely's courts. Many of today's controversial social issues involve attempts to make prohibitions of this form, and Ely's theory does not elucidate an acceptable way of dealing with them.

All in all, Ely's theory fails to account for the full responsibility of the courts. His work begins and ends with the central premise that democracy is in and of itself a value, and it fails to fully account for the moral component of many difficult questions. In many ways, the courts have become a forum wherein resolution is sought for many social controversies such as abortion, euthanasia, drug decriminalization, and stem-cell research. Ely's theory sidesteps these issues by relegating their resolution to the democratic process. At this point, his assumption of the primacy of the participational and representative value of democracy becomes important since it neglects the additional value of individual freedom and autonomy which seems to accompany the theoretical foundation of democracy.

Thinking of judges as referees in the game of democracy sounds appealing as a way of keeping them and their decisions neutral. However, democracy is not merely a game with little consequences for the losers, and allowing the majority to simply dictate how the minority will live based on subjective values, even if done "fairly," does not seem to square with the political morality of the United States. In other words, Ely's

theory reverts to "might makes right," regardless of the moral legitimacy or acceptability of the values it announces.

IV) Principles of Political Morality

Ely's work seemingly leaves an inescapable void. Through his systematic and convincing critical attack on both orthodox interpretivism and noninterpretivism, his insights reveal the basic flaws of any previously advanced adjudication philosophy. Yet, his own solution appears to be a copout, a way of avoiding the problems of the other philosophies by avoiding meaningfulness entirely. It is as if Ely took an honest look at the state of contemporary constitutional debate, determined it was worthless, and decided the answer lay in creating an escape route to dodge constitutional debate in the first place. The arthritis in his hand was acting up, so Ely cut the arm off at the shoulder. No resolution comes of an enterprise aimed at evading the problem.

In the end, relegating the judiciary to a rather insignificant role based on an idealistic, and fundamentally flawed, depiction of democracy is not a viable solution. This conclusion leads to the aforementioned void, as it appears the study of judicial behavior has reached the end of the road and failed to solve its internal problems; it seems there is nowhere left to look, no alternate route left to explore.

At this point it may be useful to examine what the rule of law means in a general sense, in particular where does it come from and how does it function.[60] Judicial behavior is so important because it has a direct connection to the legitimacy of law. If an

[60] The following discussion will be based on the assumption that constitutional law is a social construct, a source of positive law, and thus void of any inherent connection to a universal morality. Of course, if one subscribes to natural law theory, one could simply use natural law to interpret the Constitution. This discussion will presuppose that natural law is an ineffective basis of an adjudication philosophy.

adjudication philosophy is seen as unacceptable, it must be because the philosophy somehow undermines the perceived legitimacy of the law. Thus, the only acceptable method of deciding cases is one that respects where legitimate law comes from and how legitimate law regulates the interactions between social institution and members of the community. If judges must accommodate legitimate law, perhaps defining what legitimate law is will provide insights into how judges should go about their task. The remainder of this section will explore legitimate law through the legal philosophies of H.L.A. Hart and Ronald Dworkin. It is hoped that this discussion will compel the stagnant legal dialogue to examine new ideas by indicating what sources may be appropriate to give content to the Constitution and what genuinely difficult issues judges face as they apply the law.

H.L.A. Hart's theory of law consists of two groups or types of rules; one variety directly governs conduct while the other provides mechanisms for creating, modifying or eliminating the first. The first type, known as "primary rules of obligation" distinguishes acceptable from unacceptable behaviors, while "secondary rules" provide mechanisms to "introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations."[61] The most prominent secondary rule is the rule of recognition, which articulates criteria for identifying legally valid conventions by reference to some general characteristic possessed by all primary rules. Thus, primary laws are those social norms recognized by the rule of recognition.[62]

Under Hart's theory, legitimate law consists of all rules that are valid by reference to the rule of recognition. However, the rule of recognition is an ultimate rule as there is

[61] H.L.A. Hart, "Law as the Union of Primary and Secondary Rules," in *Philosophy of Law*, *Eighth Edition*, ed. Joel Feinberg and Jules Coleman, (Belmont, CA.: Thomas Wadsworth, 2004), 76.
[62] H.L.A. Hart, "Law as the Union of Primary and Secondary Rules," 74-78.

no criterion for assessing its validity. As a result, the rule of recognition simply derives its authority from its acceptance by those who internalize the legal system as not only a guide for their own behavior but as a reason to criticize others for failure to comply. People who take the internal point of view thereby have a genuine interest is obeying the law and use it to justify sanctions against those who do not.[63] Hart claims that a person who takes an internal point of view towards a legal system and "seriously asserts the validity of some given rule of law, himself makes use of a rule of recognition which he accepts as appropriate for identifying the law."[64] He argues that the rule of recognition can be neither valid nor invalid but is simply accepted as appropriate standard for identifying or changing primary rules. Thus, the internal point of view presupposes the legal validity of the system and thereby accepts the rule of recognition as the model for determining what is law, thus giving the rule of recognition its authority.[65]

The primary compliant against Hart's theory of law is that it is unable to account for principles in the law that seem legitimate based solely on sound moral arguments.[66] In

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[63] Hart contrasts this description with the external point of view in which a person does not accept the law and therefore has no reason to use it to criticize the behavior of others. He clarifies this distinction by bringing up the idea of obligation. He argues that someone feels an obligation to behave in a certain way if such behavior is controlled by more than a mere psychological fear of negative consequences or the ability to predict that punishment corresponds to certain actions. In other words, someone feels obligated when that person accepts a social rule as a standard of conduct. Conformity with such a standard is usually insistent, and social pressure to act in accordance is great because such rules are seen as necessary to maintain social life and may often conflict with what a person wants to do. Therefore, a person who takes an internal point of view feels obligated to obey the law while someone who takes an external point of view does not and might merely feel obliged to obey. H.L.A. Hart, "Law as the Union of Primary and Secondary Rules," 78-84.

[64] H.L.A. Hart, "Law as the Union of Primary and Secondary Rules," 79.

[65] H.L.A. Hart, "Law as the Union of Primary and Secondary Rules," 78-84.

[66] This compliant comes from Lon Fuller and Ronald Dworkin. When the rule of recognition cannot provide a definitive answer to a legal question, judges sometimes decide hard cases based on moral principles. In such instances, the legality of the given principles cannot be verified by a pedigree standard because their acceptance as legal principles depends solely on sound moral arguments. As a result, Dworkin argues, the rule of recognition would be incapable of accounting for such principles. In addition the rule of recognition has no mechanism for choosing which moral principles to include and which to disregard because they have nothing in common and cannot overrule other principles. Therefore, Hart's rule of recognition is undermined when encountered with the internal morality of certain legal principles

other words, the criticism is that some moral principles become part of the law through judicial decisions in hard cases even if they have never been enacted as positive law.[67] From this line of reasoning, two conclusions are made. First, formalism cannot account for judicial decisions in hard cases, and, second, moral principles are part of the law even if they cannot be recognized by the rule of recognition.[68]

Hart answers these criticisms by maintaining that judges decide hard cases by appealing to what the law ought to mean but not what it morally ought to mean. Instead, judges look to the "social purpose" of the law, or some fundamental normative concept inherently involved with the rule of recognition, to give legal content to moral principles. Jules L. Coleman expands on Hart's defense by asserting that judges have developed normative standards for dealing with hard cases that involve arguing from principles of political morality.[69] Thus, Coleman argues that moral principles or norms that seem intrinsically linked to the political nature of a regime become part of the law through sound moral arguments if hard cases. The significance of this assertion lies in its acceptance of political moral conventions that transcend the rule of recognition. These

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which it cannot accommodate. Please see: Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review,* 71, 630(1958), and Ronald Dworkin "The Model of Rules," *University of Chicago Law Review* 35, 14 (1967).

[67] An example is *Riggs v. Palmer*, 115 N.Y. 506 (1889), in which the Court of Appeals of New York invalidated the will of Francis Palmer because the beneficiary of the will, Elmer Palmer, killed Francis to receive the estate. Though no written statute could be applied to invalidate Elmer's claim to the estate, the majority ruled that it would be morally impermissible to allow Elmer to benefit from his own wrongdoing, reasoning that, "The principle which lies at the bottom of the maxim, *volenti non fit injuria* [to a willing person, no injury is done], should be applied to such a case…"

[68] The second conclusion assumes that judges do not have the strong discretion to implement whatever policy considerations they choose or feel appropriate when deciding hard cases. In other words, it assumes that most cases have a "correct" answer by which judges should abide. If the correct answer cannot be defended through positive law, it must be derived from some conception of morality that binds judges even when the rule of recognition does not accept or validate such moral principles. Thus, judges either have the discretion to write moral norms into the law through their decisions or they are bound by moral principles to make certain decisions that cannot be defended through reference to prior legal norms or positive law as validated by the rule of recognition.

[69] Coleman uses the "separation of powers" as an example of a principle of political morality.

conventions derive their authority because it is their general acceptance that leads a society to accept or internalize the rule of recognition. Consequently, these sources of political morality may be relied on to provide a final authoritative source of law to which judges can appeal.[70]

Ronald Dworkin's theory of law similarly acknowledges the value of applying principles of political morality. [71] Dworkin advances his theory under the title, "law as integrity," which he argues asks judges to assume "that law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards."[72] Notice that Dworkin's characterization of the law alludes to principles of justice and fairness in addition to procedural due process. He contends that judges are obligated to construct the best possible meaning of the law. This task requires them to interpret and apply the law with reference to "the two constituent virtues of political morality… justice and fairness."[73] Thus, judges must go beyond simply policing the process of representation and enforcing procedural due process. In contrast, they must decide cases based on which interpretation "shows the

[70] Jules Coleman, "Negative and Positive Positivism," in in *Philosophy of Law*, *Eighth Edition*, ed. Joel Feinberg and Jules Coleman, (Belmont, CA.: Thomas Wadsworth, 2004), 895-100.
[71] This discussion of Dworkin's theory of law is a highly selective consideration of the elements that fit best with the current points under deliberation. Dworkin's theory as a whole is far more expansive and comprehensive. The current point is that under a certain understanding of their theories, both Hart and Dworkin recognize the importance of principles of political morality. By way of this understanding, the hope is to introduce potential sources of American political morality and evaluate their usefulness in helping judges decide difficult cases.
[72] Ronald Dworkin, "Integrity in Law," in *Philosophy of Law*, *Eighth Edition*, ed. Joel Feinberg and Jules Coleman, (Belmont, CA.: Thomas Wadsworth, 2004), 142.
[73] Ronald Dworkin, "Integrity in Law," in *Philosophy of Law*, *Eighth Edition*, ed. Joel Feinberg and Jules Coleman, (Belmont, CA.: Thomas Wadsworth, 2004), 145.

legal record to be the best it can be from the standpoint of substantive political morality."[74]

Taking a step back, and applying these theories to the United States, the Constitution is generally recognized as the rule of recognition and the supreme source of law. Nonetheless, its acceptance depends on its accordance with American principles of political morality which may not only give substance and meaning to the Constitution's passages but also provide additional sources of law to which judges can appeal when faced with hard cases. Thus, there may indeed be fundamental values which Ely has overlooked. Moreover, these values are inherently connected to the Constitution since they have been internalized and accepted in much the same way. Accordingly, in applying the moral principles these values suggest, judges might find a theory of adjudication which lies between the rigid interpretivist and noninterpretivist dichotomy.

There is a certain fundamental appeal to the value of individual freedom of choice which a democratic system of government seems to embody. This is not to say that people generally have an inalienable natural right to individual liberty and personal autonomy, or to claim a connection between American political morality and natural law. It is to say, however, that the United States is committed to these principles, if for no other reason than through its commitment to a liberal regime type, representative democracy. Contrary to Ely's view, the democratic ethos involves more than simply allowing people to participate in determining how a select group will rule over them. Instead, the American political morality is founded on concepts of liberty which have a substantive moral value beyond simple procedural fairness.

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[74] Ronald Dworkin, "Integrity in Law," in *Philosophy of Law*, *Eighth Edition*, ed. Joel Feinberg and Jules Coleman, (Belmont, CA.: Thomas Wadsworth, 2004), 145.

However, liberty is not a unified philosophical concept and it involves competing notions of the best interests of the individual. On the one hand, according to the 'negative' conception of liberty, "people are free simply to the extent that their choices are not interfered with…. that to be free is, more or less, to be left alone to do whatever one chooses."[75] On the other, "a person or group is free in the 'positive' sense to the extent that they exercise self-control or self-mastery."[76] In contrast to the negative account's positive portrayal of complete individual autonomy, the positive variant stresses the need to promote an individual's "real" interests. In other words, positive liberty involves the ideal to free individuals of their base passions and to promote participation in beneficial practices. The effects of both of these concepts on American principles of political morality can be seen in debates over abortion, homosexuality, pornography, drug use, gun control and so on.[77]

In addition, American political morality is also committed to notions of communal cohesion and individual sacrifice for the general welfare. This classical republican model stresses civic responsibility and centers "on the idea of promoting a specific conception of the good life as consisting in active citizenship and healthy civic virtue on the one hand, while combating any sort of corruption that would undermine these values on the other."[78] Thus, the United States also shares a bond with the ideals of

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[75] Republicanism," *Standford Encyclopedia of Philosophy*. Published Jan. 10, 2003; Revised Jun. 19, 2006. http://plato.stanford.edu/entries/republicanism/#ClaRepTra
[76] Republicanism," *Standford Encyclopedia of Philosophy*. Published Jan. 10, 2003; Revised Jun. 19, 2006. http://plato.stanford.edu/entries/republicanism/#ClaRepTra
[77] Republicanism," *Standford Encyclopedia of Philosophy*. Published Jan. 10, 2003; Revised Jun. 19, 2006. http://plato.stanford.edu/entries/republicanism/#ClaRepTra
[78] "Republicanism," *Standford Encyclopedia of Philosophy*. Published Jan. 10, 2003; Revised Jun. 19, 2006. http://plato.stanford.edu/entries/republicanism/#ClaRepTra

classical republicanism which greatly influenced the drafters of the Constitution and the American principles of political morality.[79]

All in all, the problem is not that one cannot find the fundamental values that make up the principles of American political morality. Indeed, they are very easy to find if one honestly seeks them out. The real problem is that they fall into two categories, those relating to classical liberalism and those relating to classical republicanism, and they come into open conflict with each other. Liberalism's appeal of negative liberty and individual freedom of choice is contrasted by republicanism's ideal of positive liberty and civic virtue. With the principles of political morality in sight, the issue of fundamental values is not one of where to look, but rather where to play out the contradiction and controversy. Of course, Ely's answer would be simple: the problems should be resolved through the political process with minimal substantive interference by the courts. But as we have already seen, that is a nonsolution and as Hart and Dworkin maintain, these principles are actually already part of the law, and must be applied as such.

When they decide hard cases that have no clear constitutional or moral answer, judges are often determining which of these competing notions will rule the day. This is why it is essential that the Court does not become a tool to further partisan agendas, and judges do not become pawns to political ideologues.[80] In making these decisions, judges should not exist as outgrowths of the political process through which the meaning of the law becomes the personal preferences of a court's majority.

There is a difference between legitimate law and efficacious law, though the distinction is subtle and clouded by the democratic political structure of the United States.

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[79] Robert Kelley, "Ideology and Political Culture from Jefferson to Nixon," *American Historical Review,* 82 (June 1977), 536.
[80] For more information on this subject, please see Geyh, *When Courts & Congress Collide*, 171-222.

Legitimate law shares an intrinsic bond with the philosophical and theoretical foundations of society. It is derived from the principles that make up society's political morality, and it shares the same characteristic as the rule of recognition: it must be accepted and internalized to be valid. Efficacious law is merely law that a group within society feels represents its interests. Though efficacy may be a necessary condition of legitimate law, it is surely not sufficient. The key to promoting appropriate judicial behavior is recognizing the difference between the two kinds of law and creating methods for judges to employ principles of political morality without reverting to personal ideological preferences when resolving conflicts between values.

Conclusion

Politics before the bar of the American judicial branch revolve around what Charles Gardner Geyh describes as the "dynamic equilibrium" between judicial accountability and independence.[81] With the declining use of traditional, "draconian" methods of promoting judicial accountability,[82] the courts have realized an overall entrenchment of independence norms which lend the judiciary a "high degree of institutional credit."[83] Nonetheless, as society has grown to appreciate the importance of judicial decisions in directing American social and political life, an outgrowth of the courts' institutional credit, it appears political representatives have come to view the courts as valuable political tools. If representatives can control the personalities of judges, the courts become mechanisms to promote policy preferences which can be manipulated

[81] Geyh, *When Courts & Congress Collide*, 253-282.
[82] Such as restrictions on jurisdiction, administrative and budget controls, impeachment. Please see Geyh, *When Courts & Congress Collide*, 110-170.
[83] Geyh, *When Courts & Congress Collide*, 51-110; Bickel, *The Least Dangerous Branch.*

and used to achieve desired results largely because of their independence and the perception that they operate outside of politics. In other words, it seems the political institutions have realized that fighting the courts is not nearly as useful in terms of advancing policy as simply annexing them as legitimizing agents.

Thus, the attempt to promote judicial accountability has resulted in the growing use judicial appointments to further partisan agendas.[84] This trend is troubling because it conflicts with any appropriate role envisioned for judges. It asks judges to overlook the basic shortcomings of a blind interpretation of a constitution full of vague and ambiguous passages. It asks judges to invent strategies for giving content to the Constitution based merely on ideological considerations, under the pretense of remaining neutral and unbiased. It asks judges to perpetuate a false image of the courts and the rule of law as simple operating mechanisms which function correctly under the direction of properly trained officials. It asks judges to defend and criticize decision through the facades created by a misleading and detrimental dialogue. Ultimately, it asks judges to substitute efficacious law for legitimate law. The hope of this essay has been to explain how judicial behavior is much more complicated than pretended, to show why the current conversation over the courts is useless, and to offer possible ways to begin a new discussion into how judges should operate and decide hard cases. The road ahead may be uncertain, but that should not mean we ought to revert to degenerative judicial practices and give up the search for the legitimate court and appropriate judicial behavior.

[84] Geyh, *When Courts & Congress Collide*, 171-222.