Justice Rehnquist and Constitutional Interpretation

John Denvir
Justice Rehnquist and Constitutional Interpretation†

By John Denvir*  

American constitutional theory faces a dilemma. The United States Supreme Court has decided a large number of cases that commentators intuitively feel are "right," but that cannot be justified under the orthodox theory of judicial review. Either the Court's behavior or the orthodox theory will have to change. This Article argues that theory will yield to practice and that a new conception of constitutional interpretation will emerge.

The first part of this Article describes the orthodox theory of constitutional interpretation, which limits the judicial role to finding the historical "intent" of the drafters of the constitutional text, and its new rival, which recognizes a more creative political role for constitutional interpretation. The second part sketches the record of one Justice, William Rehnquist, in interpreting the Constitution. Justice Rehnquist is an apt choice because he has championed the orthodox theory, condemning judges who go beyond the constitutional text for legislating their own subjective preferences. He is at once the most outspoken "apolitical" member of the Court and the Court's most articulate conservative voice. The third part shows the orthodox theory's failure to explain Justice Rehnquist's judicial decisions. It also argues that

† © 1983 John Denvir.  
* Professor of Law, University of San Francisco School of Law. B.S., 1964, Holy Cross College; J.D., 1967, New York University Law School; L.L.M., 1972, Harvard Law School. The author currently teaches constitutional law and legal philosophy. He was formerly a staff attorney with California Rural Legal Assistance and the San Francisco Neighborhood Legal Assistance Foundation.  
The author wishes to thank Mark Schreiber, John Dunn, and Gretchen Strain for valuable research assistance, and Robin Johansen for insightful comments on an earlier draft.  
1. Cases upholding individual freedom of speech are clear examples. See infra text accompanying notes 19-23.  
2. See infra notes 10-15 & accompanying text.  
3. See infra notes 30-37 & accompanying text.  
4. See infra notes 38-160 & accompanying text.  
6. See infra notes 161-75 & accompanying text.

[1011]
the emerging, hermeneutically-based, constitutional interpretation not only better explains Justice Rehnquist's decisions, but also reveals the social ideal immanent in Justice Rehnquist's record. Finally, the fourth part of the Article addresses the question of the legitimacy of the new constitutional interpretation in a democracy.

Two Modes of Constitutional Interpretation

The Orthodox Theory

The orthodox view of judicial review argues "that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written constitution." This theory, once known as "strict construction," is currently called "interpretivism." Although the name is new, the theory is not; its jurisprudential roots go back at least to Justice Holmes' famous dissent in Lochner v. New York, which castigated the majority for reading its own economic preferences into the fourteenth amendment. The orthodox model is premised on two positivist tenets: that law is objectively determinable and that law is logically separate from moral values that are arbitrary and subjective. Judges who depart from the constitutional text (expanded by its history and structure) cease being judges and become, in Justice Rehnquist's words, a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.

Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments. There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa. Many of us necessarily feel strongly and deeply about our own moral judgments, but they remain only personal moral judgments until in some way given the

7. See infra text accompanying note 30.
8. See infra notes 176-249 & accompanying text.
9. See infra notes 250-60 & accompanying text.
12. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).
13. Id. at 75.
sanction of law.\textsuperscript{15}

A judge who departs from the text and instead bases his or her decisions on what he or she thinks is right is necessarily deciding on the basis of bare personal moral judgments which merely reflect that particular judge's values. Because there is no objective morality on which to base judgments on questions of value, such judgments are better left to the legislator who, while no wiser than the judge, is at least more democratically accountable.\textsuperscript{16}

This text-oriented model did not appear to have any obvious political bias so long as there was still a controversy about the history of the first and fourteenth amendments. For instance, Justice Hugo Black was an "interpretivist"\textsuperscript{17} (then called "strict constructionist") and believed both that the first amendment provided broad protections to freedom of expression\textsuperscript{18} and that the fourteenth amendment "incorporated" the Bill of Rights.\textsuperscript{19} His interpretation of these amendments led to the conclusion that the Constitution gave very broad protections to individual rights. Historians, however, have since chipped away both at the "incorporation" thesis\textsuperscript{20} and at attempts to give a libertarian content to the first amendment.\textsuperscript{21} Now it is fairly clear that the framers of the first amendment did not intend the civil libertarian content that the

\textsuperscript{15} Rehnquist, \textit{supra} note 5, at 698, 704.

\textsuperscript{16} If . . . a society adopts a constitution and incorporates in that constitution safeguards for individual liberty, these safeguards indeed do take on a generalized moral rightness or goodness. They assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone's idea of natural justice but instead simply because they have been incorporated in a constitution by the people. Within the limits of our Constitution, the representatives of the people in the executive branches of the state and national governments enact laws. The laws that emerge after a typical political struggle in which various individual value judgments are debated likewise take on a form of moral goodness because they have been enacted into positive law. It is the fact of their enactment that gives them whatever moral claim they have upon us as a society, however, and not any independent virtue they may have in any particular citizen's own scale of values. \textit{Id.} at 704.

\textsuperscript{17} See, \textit{e.g.}, Adamson v. California, 332 U.S. 46, 70-73 (1947) (Black, J., dissenting) (refusal to apply fifth amendment to the states represents unexplained departure from Supreme Court's uniformly strict constructionist practice); \textit{see also} J. ELY, \textit{supra} note 10, at 2.

\textsuperscript{18} \textit{See} Bridges v. California, 314 U.S. 252, 265 (1941) ("the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society").

\textsuperscript{19} \textit{See} Adamson v. California, 332 U.S. 46, 89-92 (1947) (Black, J., dissenting).


\textsuperscript{21} \textit{See generally} L. LEVY, \textit{Legacy of Suppression} (1960).
Supreme Court read into the first amendment in the twentieth century, and that the framers of the fourteenth amendment had no intent other than to outlaw the most egregious forms of official race discrimination. Therefore, a fair application of the orthodox theory would now give a very narrow protection to individual rights, endangering many decisions that commentators of all political persuasions find commendable on substantive political grounds.

Dissatisfaction with orthodox theory is not, however, limited to its unpopular results; criticism of the theory itself is increasing. There is a growing uneasiness with the fact/value distinction which is the linchpin of the orthodox analysis. On the one hand, philosophers are less sure of the "objectivity" of factual descriptions. Any description presupposes a language, and any language necessarily selects aspects of reality and in so doing distorts it. There is a corresponding distrust of the characterization of all moral values as subjective because this conflicts with our "persistent, ineluctable tendency to project normative judgments outward and treat them as objectively valid . . . . [W]e assume a background order within which events come to pass, and that the just is consistent with it and the unjust inconsistent."

The positivist conception of law is beginning to yield to a view of the law as a normative system bridging the gap between fact and value. Legal rights are no longer seen as part of a closed system of determinable fact, but as a system of "open-ended, transcendent, undetermined" principles incapable of being fully known. The theory of constitutional interpretation described in the following section is consistent with this new view of the nature of law.

22. R. Berger, supra note 20, at 205.
24. See supra text accompanying note 14; see also R. Unger, Knowledge and Politics (1975); Dworkin, Law as Interpretation, 9 Critical Inquiry 179 (1982).
26. See K. Burke, Language as Symbolic Action 45 (1966) ("any nomenclature necessarily directs the attention into some channels rather than others").
29. Fletcher, Two Modes of Legal Thought, 90 Yale L.J. 970, 981-82 (1981). Paul Ricoeur points out that language often has a double meaning; it is equivocal. Interpretation concerns the meaning of equivocal expressions. "To interpret is to understand a double meaning." P. Ricoeur, Freud and Philosophy: An Essay on Interpretation 8 (1970).
The New Interpretation

Hermeneutics is a model for the emerging approach described in this Article. Hermeneutics sees knowledge as pragmatically relative to contexts of understanding. The paradigm of the phenomenon of understanding is the interpretation of texts, and hermeneutical theory maintains that while there are no reductionist facts of the matter to be properly or improperly represented by interpretation, nevertheless there are determinate constraints on what gets taken as proper or improper interpretation.30

The hermeneutical insight that there is no one proper interpretation of a text has been applied to constitutional law by Professors Owen Fiss and Ronald Dworkin. Professor Fiss argues that interpretation is neither “a wholly discretionary or wholly mechanical activity,” but rather a “dynamic interaction between reader and text, and meaning the product of that interaction.”31 Professor Dworkin rejects the positivist “distinction between description and evaluation . . . because interpretation is something different from both . . . .”32 A judge’s interpretation of a text “will include both structural features, elaborating the general requirement that an interpretation must fit doctrinal history, and substantive claims about social goals and principles of justice. Any judge’s opinion about the best interpretation will therefore be the consequence of beliefs other judges need not share.”33

In constitutional law, such interpretations will be controversial because the normative theories they reflect are controversial. Professor Dworkin points out that any interpretation of the equal protection clause of the fourteenth amendment will be dependent on some theory of political equality; such reliance is necessary to interpretation.34 And any such theory will be an ideal as well as a description; “the choices theory must make are choices among conceptions of what society ought

32. Dworkin, supra note 24, at 196.
33. Id. Hermeneutics stresses that any such interpretive understanding “is laden with self-understanding, however implicit . . . .” Hoy, supra note 30, at 658. “Understandings are inseparable from values: our vision of the world conditions the ends we hold and our most general forms of consciousness combine ideas and ideals into a single system of beliefs.” R. Unger, Law in Modern Society 258 (1976). Clifford Geertz contends it is “through the construction of [such] schematic images of social order, that man makes himself a political animal.” C. Geertz, The Interpretation of Cultures 218 (1973).
34. Dworkin, supra note 24, at 199.
to be as well as among views of what it is." In a nation divided on the issue of what is a just society, conflicting constitutional interpretations are inevitable.

Because constitutional interpretation requires that meaning be given to concepts such as "equality," for which there are no objective meanings, such interpretation can never be objective in the sense the traditional theory demands. However, interpretation need not be arbitrary. There are constraints on arbitrariness in any discourse. For example, one constraint internal to legal discourse is "a commitment to the search for truth, to consistency of thought, and to logical analysis of evidence. . . ." Professor Dworkin argues that judges are always constrained by the internal ideal of law, "the challenge of making the standards that govern our collective lives articulate, coherent, and effective."

Before applying the principles of hermeneutics to explain the decisions of Justice Rehnquist, we must examine his record in light of the traditional concepts of judicial activism and judicial restraint.

**Justice Rehnquist on the Text**

The crucial question in constitutional adjudication is whether the court will find that the Constitution has been violated. Judicial "activism" means an expansive reading of the text so as to find violations; judicial "restraint" means a narrow reading of the text in order to avoid judicial intervention. This section examines Justice Rehnquist's record as a judge to determine where he has practiced restraint and where he has been an activist.

**Judicial Restraint**

*Standing*

Before a statute can be ruled unconstitutional, some party must be found to have standing to challenge it. That is, some party must assert

35. R. Unger, supra note 33, at 267.
38. In the following summary I rely on Justice Rehnquist's own opinions and the holdings of cases in which he joined the majority or plurality opinion. While I make no claim that my search has exhausted the sources, I do believe this summary to be a fair representation of Justice Rehnquist's work on the Court.
that the statute violates his or her constitutional rights sufficiently to constitute a "case or controversy." A negative vote on standing is in effect a vote to allow the challenged legislation to stand. Justice Rehnquist has consistently construed the article III phrase "cases and controversies" narrowly, thereby voting to restrict constitutional challenges to legislation.

State Action

The fourteenth amendment protects individuals from abridgment or deprivation by the states of rights granted in the amendment. Therefore, no violation of this amendment can be found unless the Court determines there is "state action" involved in the alleged violation. In the three decades before Justice Rehnquist's appointment, the Court had expanded "state action" to include acts of private parties performing "public functions" and acts of private parties in which there has been some "state involvement."

Justice Rehnquist has been the Burger Court's primary spokesper-


40. *See* Singleton v. Wulff, 428 U.S. 106, 122 (1976) (Powell, J., dissenting in part and concurring in part); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (indigents who had been denied hospital services had no standing to challenge extension by I.R.S. of favorable tax treatment to hospitals that did not serve indigents to extent hospitals were financially able); Warth v. Seldin, 422 U.S. 490 (1975) (plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 722 (1973) (White, J., dissenting in part). Justice Rehnquist did vote to find a justiciable case and controversy in Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977) (individual moving into a specific proposed housing project had standing to challenge on grounds of racial discrimination because of city's refusal to rezone to allow the project), and Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (interpreting § 810(a) of Civil Rights Act of 1968 as giving standing to any person who claims injury by discriminatory housing practices, not just those persons who are objects of such practices).

41. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

42. *E.g.*, Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (shopping center open to the public was functional equivalent of a business district and was subject to first amendment); Marsh v. Alabama, 326 U.S. 501 (1946) (privately-owned town was subject to constraints of first and fourteenth amendments because operation of a town is a public function).

43. *E.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (privately operated restaurant was subject to fourteenth amendment because public ownership and maintenance of its building constituted state involvement).
son in a series of cases severely constricting the state action concept. In *Jackson v. Metropolitan Edison Co.*, Justice Rehnquist limited the “public function” line of cases to situations in which the private actor is performing a function “traditionally the exclusive prerogative of the state,” a phrase he has interpreted narrowly.

The “state involvement” line of cases has also been severely narrowed. In *Jackson*, Justice Rehnquist limited state involvement to situations in which “there is a sufficiently close nexus between the State and the challenged action of the [private party] so that the action of the latter may be fairly treated as that of the State itself.” Under this theory, state involvement may well be sufficient only when the state is a joint participant in the challenged action or compels the private action.

**Procedural Due Process**

One area of constitutional expansion in the late 1960’s and early 1970’s concerned the application of the due process clause require-

44. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (state code provision allowing self-help sale by warehousemen did not make such a sale state action); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (termination of service by a privately owned utility was not state action even though such termination was permitted by utility’s general tariff filed with state utility commission); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) (issuance of liquor license to private club having discriminatory guest practices did not make those practices state action).

46. *Id.* at 353.
47. Joined by Chief Justice Burger and Justices Stewart, White, Blackmun, and Powell.
48. *Id.* at 351.
50. See *Moose Lodge v. Irvis*, 407 U.S. 163, 177-79 (1972). In his early years on the Court, Justice Rehnquist had joined majorities embracing a more expansive concept of state involvement, *e.g.*, *Norwood v. Harrison*, 413 U.S. 455 (1973), but in recent cases he has restrictively interpreted those cases. For instance, in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), Justice Rehnquist refers to *Norwood* as a case involving the remedial powers of a federal court remedying prior de jure race discrimination. *Id.* at 163.
51. This section examines only civil cases. I have not examined in detail Justice Rehnquist’s votes in cases involving criminal procedure. It does appear, however, that Justice Rehnquist has generally voted to uphold state criminal procedures against constitutional attack. See, *e.g.*, *Rakas v. Illinois*, 439 U.S. 128 (1978) (petitioner who had no legitimate expectation of privacy in areas searched had no standing to challenge the search); *Michigan v. Tucker*, 417 U.S. 433 (1949) (failure to afford full *Miranda* safeguards did not result in deprivation of privilege against self-incrimination); *Illinois v. Somerville*, 410 U.S. 458 (1973) (retrial proper where mistrial granted after attachment of double jeopardy). *But see Burch v. Louisiana*, 441 U.S. 130 (1979) (nonunanimous, six-member jury conviction held deprivation of right to jury trial for non-petty offenses); *Ham v. South Carolina*, 409 U.S. 524 (1973) (due process violation where judge refused to make inquiry of racial bias of prospective jurors).
ments of notice and an adversary hearing in diverse civil contexts. Justice Rehnquist has expressed a "philosophical skepticism about the desirability of adversary proceedings in a number of situations," and his decisions are consistent with this view.

There are two central questions in procedural due process analysis. First, has there been the deprivation of a "property" or "liberty" interest that triggers the requirement of due process? Second, if so, what process is "due"? On both questions, Justice Rehnquist has consistently given answers narrowing the individual's right.

On the question of what constitutes "property" or "liberty" for purposes of the fourteenth amendment, Justice Rehnquist has stated that these terms only attain "constitutional status by virtue of the fact that they have been initially recognized and protected by state law . . . ." Therefore, when state law creates a property or liberty interest, it can define or delimit the interest by conditioning its creation on reduced due process protections. For example, in Arnett v. Kennedy, Justice Rehnquist argued that the only "property" an individual had in a government job was the "entitlement" created by the government, and there was no reason why the government could not define the entitlement to include only those procedural protections it wished to grant. This logic would permit the state to completely elude due process requirements if it took the time to draft statutes and contracts artfully.

When a "property" or "liberty" interest is found to be present, Justice Rehnquist generally finds the existing state procedures adequate.

---

58. Id. at 155. In Arnett, the statute that granted the plaintiff government employee a right not to be removed except for cause also established the procedures for determining such cause and expressly omitted further procedural guarantees that might have otherwise been imposed by the Constitution. Therefore, the employee had a right only to the statutorily limited procedures. Id. at 151-54.
In some of these cases, the procedures were virtually nonexistent.\textsuperscript{60}

\textit{Substantive Due Process}

Although "substantive due process" has carried a pejorative connotation since the 1930's,\textsuperscript{61} the Supreme Court has found protection for a series of individual privacy interests in the liberty component of the due process clause.\textsuperscript{62} A political conservative might be expected to be sympathetic to decisions protecting individuals from government intrusion into important personal decisions. In fact, Justice Rehnquist has consistently voted against individuals claiming constitutional privacy rights.\textsuperscript{63} He admits that "liberty" interests are involved in such cases. Liberty, however, "is not guaranteed absolutely against deprivation, but only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective."\textsuperscript{64} This use of the deferential "rational basis" scrutiny results in a rubber stamp of approval in fact if not in theory.\textsuperscript{65}

\textsuperscript{60} See, e.g., Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 22 (1978) (Stevens, J., dissenting) (dissent argued that municipal utility's notice that service would be disconnected if bill was not paid need not inform customers of availability of procedures for protesting proposed termination); Ingraham v. Wright, 430 U.S. 651 (1977) (child's interest in personal security was adequately protected from excessive corporal punishment by requirement that teacher consult principal before punishing child and subsequent imposition of civil liability if punishment is found to have been excessive).

\textsuperscript{61} See Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies. . . ."); see also West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).


\textsuperscript{64} Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

\textsuperscript{65} See L. Tribe, \textit{American Constitutional Law} § 16-3 (1978); see also Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").
**Equal Protection**

Since the middle of the twentieth century, the Supreme Court has interpreted the equal protection clause to require more than just a "rational basis" to support legislation in two types of cases: those involving "suspect classifications" and those affecting "fundamental interests." Legislation that is found to be within one of these categories is subject to strict judicial scrutiny and must be supported by a "compelling state interest" to be sustained. Race and alienage have been treated as suspect classifications. Fundamental interests include the right to vote, the interests in marriage and family, and the right to travel.

Except in cases involving classifications based on race, Justice Rehnquist applies the "rational basis" test to legislation challenged under the equal protection clause. He has criticized the Court's use of the clause to apply greater scrutiny in areas other than race discrimination:

Except in the area of the law in which the framers obviously meant [the Clause] to apply—classifications based on race or on national origin, the first cousin of race—the Court's decisions can be fairly described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle.

---

66. See generally L. Tribe, supra note 65, §§ 16-13 to -17.
67. See generally id. §§ 16-7 to -12.
68. See infra notes 69-73.
70. See Nyquist v. Mauclet, 432 U.S. 1 (1977); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).
75. See Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 190 (1979) (Rehnquist, J., concurring) (no rational basis for requiring a greater number of signatures to qualify a local candidate to appear on the ballot than to qualify a statewide candidate). Justice Rehnquist pointed out that the irrationality of the legislation was due to earlier decisions of the Court that had knocked out key provisions in the law, and that the appellant Board of Elections had made little effort even to justify the law to the Court under the rational basis test. Id. at 190-91. See also infra notes 76-78.
Accordingly, he disagrees with the Court’s activist approach in scrutinizing classifications based on alienage, sex or illegitimacy, or which impinge upon “fundamental rights” such as the right to vote or travel.

Despite Justice Rehnquist’s acceptance of the principle that race classifications are permissible only if they are a necessary means of advancing compelling state interests, he has normally ruled against civil rights claimants. This seemingly incongruous result is reached by his application of a restrictive test to determine if “discriminatory intent” is present, and by narrow concepts of causation and remedy once a violation has been established.

Free Speech

Three philosophical principles are immanent in Justice Rehnquist’s free speech decisions. First, he accepts a “utilitarian” rather than a “human rights” justification for free speech; it is the need for an informed electorate in a democracy that the first amendment protects.

78. E.g., Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting) (law allowing women to drink at younger age than men passes rational basis test). In Craig, the Court applied an intermediate standard of review: “Classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” Id. at 197.
79. E.g., Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) (state inheritance statute discriminating against illegitimate children not “patently irrational”). Although the Court held that illegitimacy is not a suspect classification, it scrutinized the statute to a greater degree than normally required under the rational basis test. Id. at 766-67.
82. See infra notes 83-85. A memo he had prepared as a law clerk for Justice Jackson caused many to doubt at his confirmation hearings whether William Rehnquist in fact supported the decision in Brown v. Board of Educ., 347 U.S. 483 (1954). He responded that the anti-Brown memo was meant to set out Justice Jackson’s views, not his own, and that he, at the time of the hearings, fully supported the Brown decision. R. KLAGER, SIMPLE JUSTICE 605-10 (1976).
rather than any individual speaker's "claim to be master of his or her own personal development."86 Second, he believes, in accord with his first principle, that the full force of first amendment protections comes into play only when "the government attempts to regulate speech of those expressing views on public issues."87 Finally, he believes that the first amendment limits are incorporated by the fourteenth amendment in only an attenuated form.88 The result of these principles is a decided preference for judicial restraint in free speech cases.89

Justice Rehnquist grants no first amendment protection to obscenity90 and has consistently upheld state power to regulate "offensive speech."91 He insists on the states' right to regulate the "public forum"92 and has consistently voted to limit the situations to which the "public forum" concept applies.93 Justice Rehnquist has also been unwilling to protect so-called "symbolic" speech.94

---

89. Justice Rehnquist has upheld free speech claims in a few cases; all of these cases were decided without dissent and therefore may be considered "easy" cases. See, e.g., Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley, 454 U.S. 290, 300 (1982) (Rehnquist, J., concurring); Givhan v. Western Consolidated School Dist., 439 U.S. 410 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (state criminal law prohibiting publication of judicial review commission violated first amendment); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (Rehnquist, J., concurring) (mandatory public employee union dues used for political purposes violated employees' freedom of association); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (trial judge's prohibition against publishing implicating facts from criminal trial held invalid as a prior restraint); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (state "right of reply" law giving political candidates newspaper space to answer criticism violated freedom of the press); Jenkins v. Georgia, 418 U.S. 153 (1974) (film within first amendment protections because not patently offensive and thus not obscene).
90. E.g., Miller v. California, 413 U.S. 15, 23 (1973) (Burger, C.J.) (defining obscenity and reaffirming that it is not protected by the first amendment). But cf. Jenkins v. Georgia, 418 U.S. 153 (1974) (Rehnquist, J.) (holding that the film Carnal Knowledge was not obscene as a matter of law since it was not patently offensive and was therefore within first amendment protections).
Justice Rehnquist has been unsympathetic to claims by the press for first amendment protection. He has affirmed the right of states to grant remedies for defamation and has denied a press claim for first amendment protection from a warrant to search a newspaper office. He also denies any constitutional right of press access to government-controlled information.

The free speech cases give some credibility to Justice Rehnquist's claim of "neutrality" in constitutional adjudication because sometimes he has reached results that seem at odds with conservative ideology. Notably, he is the sole member of the Court not to grant any first amendment protection to commercial speech. He voted to uphold the rights of a state to silence corporations in referendum elections, and of a public utilities commission to censor the pronuclear power messages a public utility enclosed with its bills to customers. He also has ruled, in an opinion for the Court, that a property owner has no first amendment right to close off his property to free speech activities that the state says must be allowed.

The Establishment and Free Exercise Clauses

Justice Rehnquist has urged the Court to give a narrow scope to both the establishment clause and the free exercise clause of the first amendment, thereby extending a good deal of discretion to legislatures in this area. "By broadly construing both clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny." He does not view the establishment clause

95. See, e.g., Time, Inc. v. Firestone, 424 U.S. 448, 461-64 (1976) (publishers are liable for defamation of private individuals where injury and fault proven).
98. See supra text accompanying note 15.
103. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. 1.
105. Id. at 721.
as a major bar to state aid to religious education\textsuperscript{106} and is hostile to most claims that a law interferes with the claimant's free exercise of religion,\textsuperscript{107} agreeing with Justice Harlan's comment that "those situations in which the Constitution may require special treatment on account of religion are . . . few and far between."\textsuperscript{108}

"Dormant" Commerce Clause

The Supreme Court traditionally has interpreted the Commerce Power in its "dormant" state—when Congress has not exercised its power to regulate—to be a bar to protectionist state legislation.\textsuperscript{109} Because the Court's decisions in this area are premised on the free trade principles, one might expect Justice Rehnquist to support this "activist" initiative. In fact, with few exceptions,\textsuperscript{110} he has voted to uphold state regulation of interstate commerce, and contends that the "State must simply prove, aided by a 'strong presumption of validity,' that the . . .


\textsuperscript{109} See, e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (rear fender mudguard regulation held to burden interstate commerce unreasonably); H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949) (state's denial of interstate milk distribution license to protect local market unconstitutional); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945) (state interest in train length safety regulation outweighed by national interest in uniform transportation system); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (regulation prohibiting sale of out-of-state milk that didn't meet minimum price scale imposes unconstitutional burden on commerce). In all of these cases, the Court invalidated under the commerce clause state laws that discriminated against interstate commerce, even though Congress had not exercised its power to regulate the subject of the state law—hence the term "dormant" commerce power.

benefits of the law are not illusory."  

Requiring only that a state have some substantial interest in regulating the subject matter, Justice Rehnquist has sometimes voted to allow states to apparently discriminate against interstate commerce, and has even voted to exempt South Dakota's experiment in socialism (a state-owned cement plant) from the restraints of the dormant commerce clause. He also voted to uphold a Maryland statute which appeared to reflect local animus against multinational oil companies.

Cruel and Unusual Punishments

Justice Rehnquist consistently has voted against claims based on the cruel and unusual punishments clause of the eighth amendment. Some of these cases have involved the death penalty. Another case upheld the constitutionality of a harsh recidivism statute.

Judicial Intervention

To this point, Justice Rehnquist's record might be characterized as judicial restraint with a vengeance; he even upholds legislation which he may abhor on policy grounds. However, the foregoing reflects only a portion of his record. Justice Rehnquist has in fact been an "activist" in several areas of constitutional law.

The "Takings" Clause

The fifth amendment states that "private property" shall not "be


116. Rummel v. Estelle, 445 U.S. 263 (1980) (Rehnquist, J.) (upholding recidivism statute that imposed mandatory life sentence upon third felony conviction, as applied to defendant who had obtained a total of $229.11 during course of three felonies).
taken for public use without just compensation."

Justice Rehnquist has given the clause an activist interpretation. For instance, dissenting in *Penn Central Transportation Co. v. New York City*, he argued for an expansive definition of both the terms "property" and "taking."

**The "Contract" Clause**

The Burger Court has rediscovered the "contracts clause," another constitutional text which had fallen into disuse. Cases have involved the amendment of a law regulating the state's own debts, and the retroactive application of a law to a contract between private parties. In both situations, Justice Rehnquist found an unconstitutional "impairment" of contracts.

**The Tenth Amendment**

Justice Rehnquist gave an activist, expansive reading to the tenth amendment in the landmark case of *National League of Cities v. Usery*, in which he interpreted the amendment as a bar to Congressional regulation of the "States as States." In *Federal Energy Regula-

---

117. U.S. CONST. amend. V.
119. Id. at 138. See also Kaiser Aetna v. United States, 444 U.S. 164 (1979) and Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), in which "takings" arguments were upheld. But also note that Justice Rehnquist wrote the majority opinion rejecting a "takings" argument in PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), and joined the majority in rejecting a "takings" argument in Agins v. City of Tiburon, 447 U.S. 255 (1980).
121. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (Blackmun, J.) (repeal of a statutory covenant that had limited the Port Authority's ability to use revenues pledged as security for bonds issued by Port Authority violated the contract clause).
122. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (Stewart, J.) (retroactive application of law that modified the funding required of an employer to his pension trust fund under his private agreement with his employees violated the contract clause).
123. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.
125. Id. at 845. The *Usery* Court held that the application of federal minimum wage and maximum hour provisions to employees of state and local governments was unconstitutional to the extent the provisions operated "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions . . . ." Id. at 852. Justice Rehnquist has not attempted to apply the tenth amendment to federal regulation of private parties. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 307 (1981) (Rehnquist, J., concurring) (federal coal mining regulation did not violate tenth amendment).

Tory Commission v. Mississippi, he joined Justice O'Connor's dissent, which criticized the majority for upholding a federal statute against a tenth amendment claim. Justice O'Connor asserted that the legislation, which directed states to consider the adoption of specific utility regulatory standards and prescribed the procedures to be followed during the consideration process, permitted Congress to "conscript" state agencies "into the national bureaucratic army." The dissenters viewed this structuring of a state agency's regulatory agenda as regulation of "States as States."

The Eleventh Amendment

Justice Rehnquist has also revitalized the eleventh amendment, giving it meaning well beyond a strict reading of the text. Historically, it has been constitutionally permissible to bring a suit in federal court against a state official to enjoin the enforcement of an unconstitutional state statute or to command compliance with federal laws, even though the probable effect of the decree is the increased expenditure of funds from the state treasury. This indirect impact on the state itself does not bring these suits within the eleventh amendment's prohibition of federal jurisdiction of suits against states.

Justice Rehnquist sharply limited this means of invoking federal jurisdiction to remedy state violations in Edelman v. Jordan. In that case, he held that the eleventh amendment constituted a bar to a federal court decree enjoining state officials from withholding benefits which had been wrongly withheld in the past. Justice Rehnquist found that the eleventh amendment precluded such a retroactive award of monetary relief, and held that the decree could enjoin only prospective conduct of state officials. He attempted to extend Edelman in

---

127. Id. at 775-77.
128. Id. at 777.
129. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State." U.S. Const. amend. XI.
133. Id. at 653-56. State officials had failed to meet federal time limits for processing applications for government assistance, and had failed to make payments for the period during which the applicants would have been eligible had the officials acted within the prescribed time guidelines. Id. at 653-54.
134. Id. at 667-69. Justice Rehnquist acknowledged that the Court had affirmed such
arguing that an award of attorneys' fees in a section 1983 action against state officials was a retroactive penalty barred by the eleventh amendment, but the majority failed to go along.

Perhaps the most highly publicized issue during Justice Rehnquist's tenure on the Court has been the constitutionality of so-called "benign discrimination": race-conscious remedies for prior societal discrimination. Despite his record of restraint on most equal protection issues, Justice Rehnquist believes benign discrimination violates the Constitution. He has also voted against race-conscious remedies on statutory grounds, not reaching the constitutional question.

The Appointments Clause

The appointments clause rarely figures in constitutional litigation. In the one case that has come before the Court during his tenure, Justice Rehnquist interpreted the clause to be a bar to congressional legislation. He joined the majority in striking down congressional involvement in the appointment of members of the Federal Election Commission as unconstitutional.

...
Executive Privilege

Justice Rehnquist infers a constitutional right of executive privilege, not explicit in the text, to support presidential claims for the need of confidentiality. He argues that the constitutional principle of separation of powers requires that the President have a privilege to keep his communications confidential.44

Legislative Privilege

Justice Rehnquist reads the speech or debate clause145 expansively in a variety of contexts.146 For example, in Doe v. McMillan,147 in which the Court held that members of Congress are immune from liability for the preparation of a committee report for distribution to Congress, he argued that the immunity should extend to public dissemination as well.148

Delegation of Powers Doctrine

Justice Rehnquist has attempted to reinvigorate the "unlawful delegation of legislative powers" doctrine. The doctrine was a favorite of the conservative 1930's Court, where it was used to strike down New Deal legislation.149 It fell out of favor in the 1940's,150 but Justice Rehnquist has argued that the unlawful delegation doctrine does not

145. 
"[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6.
146. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (Burger, C.J.) (issuance of a subpoena by a congressional committee in furtherance of a legitimate congressional investigation is protected by the absolute prohibition of the speech or debate clause, so it cannot be challenged in court); United States v. Helstoski, 442 U.S. 477 (1979) (Burger, C.J.) (in prosecution of congresswoman on charges of accepting money to influence her performance of official acts, evidence of legislative acts could not be introduced because purpose of speech or debate clause was to preclude prosecution for official acts); Davis v. Passman, 442 U.S. 228, 251 (1979) (Stewart, J., dissenting) (argued for remand to consider whether speech or debate clause precluded suit against member of Congress by a former employee for sex discrimination in employment). But see Hutchinson v. Proxmire, 443 U.S. 111 (1979) (Burger, C.J.) (newsletters and press releases of members of Congress are not protected by the speech or debate clause).
148. Id. at 338. (Rehnquist, J., concurring in part and dissenting in part).
149. See, e.g., Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (delegation to President of authority to approve codes of fair competition upon application of trade and industrial associations was an unconstitutional delegation of legislative power); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (delegation to President of transportation regulation powers unconstitutional).
"suffer from . . . the excesses of judicial policy making that plagued other doctrines of that era." Accordingly, he argued that congressional occupational safety legislation should be struck down as an unlawful delegation.

The Commerce Power

Since the New Deal, the Court has rarely doubted Congress' power under the commerce clause to regulate private individuals. While Justice Rehnquist has not voted to strike down congressional legislation as exceeding the commerce power, he has argued that the test to be applied for finding commerce power jurisdiction is stricter than the present Court acknowledges.

The Enforcement Clause of the Thirteenth, Fourteenth, and Fifteenth Amendments

Justice Rehnquist also wishes to limit the power granted to Congress by the civil rights amendments. In City of Rome v. United States, he called the majority's upholding of a provision of the Voting Rights Act of 1965 under the fifteenth amendment's enforcement clause a "total abdication" of its responsibility to scrutinize congressional legislation to ensure that Congress does not exceed its constitutional powers. He argued that the Court's decision allowed Congress to decide whether a particular state action violated the Civil War amendments, and thereby to define the extent of its own power under the enforcement clauses of those amendments. He emphasized that Congress can legislate under the amendments only "if the prohibition

---

(1946) (SEC authorized to regulate holding companies whose structure is "unduly or unnecessarily complex").

152. Id. at 686.
153. "Congress shall have power . . . to regulate Commerce with foreign nations, and among the several states, and with Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.
154. L. TRIBE, supra note 65, § 5-4, at 235-36.
155. "[T]he Court asserts that regulation will be upheld if Congress had a rational basis for finding that the regulated activity affects interstate commerce . . . . In my view, the Court misstates the test . . . . [I]t has long been established that the commerce power does not reach activity which merely 'affects' interstate commerce. There must . . . be a showing that regulated activity has a substantial effect on that commerce." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 311-12 (1981) (Rehnquist, J., concurring) (citations omitted) (emphasis added).
156. U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.
158. Id. at 207.
159. Id. at 220-21.
is necessary to remedy prior constitutional violations by the governmental unit, or if necessary to effectively prevent purposeful discrimination by a governmental unit."\[160\]

**Justice Rehnquist as the Text**

This section will examine Justice Rehnquist's record within the context of three different theories of constitutional interpretation. First, the orthodox theory will be reconsidered to see if it explains his record. Then, two alternative models will be described: the structure/substance model Justice Rehnquist purports to follow, and an individualism/paternalism model that he actually follows. These models will be examined against the background of six factual propositions derived from Justice Rehnquist's record. It will be argued that the second alternative model not only explains his record more convincingly, but also reveals the social ideal that is at the core of his approach to constitutional interpretation.

**Reconsidering the Orthodox Theory**

The orthodox theory of judicial review attempts to prevent judicial creativity by requiring that the judge implement only values anchored in the "intent" of the framers, as evidenced by the constitutional text, its history, and structure.\[161\] Reconsideration of the theory in light of Justice Rehnquist's record reveals two inadequacies. First, the theory fails to account for a large quantity of well-entrenched constitutional doctrine. Second, it is unable to prevent judicial creativity even in those areas in which we can discern the framers' intent.

The application of free speech rights to state legislation is one clear example of the orthodox theory's failure to explain established doctrine. Justice Rehnquist concedes the applicability of free speech rights to the states,\[162\] yet it has become fairly clear that the framers of the fourteenth amendment had no such "intent."\[163\] Some interpretivists, like Judge Robert Bork, have attempted to expand the concept of "intent" to include free speech rights against a state. Judge Bork argues that the structure of the Constitution sets up a political democracy and that the concept of a political democracy implies a need for the free

\[160\] *Id.* at 213.

\[161\] See supra text accompanying notes 10-15.


exchange of political ideas. But once we allow "structure" to play this creative function, almost any political value can be similarly inferred from the structure, and the "intent" theory becomes an amorphous blob, incapable of justifying any result.

The second weakness of the orthodox theory is the inevitability of judicial creativity even in those areas where we are able to discern some historical "intent" on the part of the framers. Assume that a judge were able to solve the perhaps insurmountable historiographical and epistemological problems of deciding which historical personages count as the "framers" and how to identify a unitary "intent" from a myriad of individual psychological states. The judge still would be forced to choose between a narrow conception of the framers' intent limited to concrete applications envisaged by the framers, and some more abstract conception of their intent capable of application to unforeseen situations.

If a judge chooses the concrete conception, the Constitution becomes a document of only antiquarian interest. This conception is inconsistent with Justice Rehnquist's record, particularly in areas in which he has taken an activist stance. Yet if a more abstract notion of the intent is chosen, the interpretive task has just begun. First, the judge must decide which of the various conceptions of intent advocated should be chosen. Then that conception, along with other relevant con-


165. The conservative Judge Bork is not the only theorist to rely on the "political" structure of the Constitution to justify his own preferred results; the liberal John Hart Ely uses parallel reasoning to achieve more egalitarian results. See J. Ely, supra note 10, at 73-104.

Ely argues that the Court should go beyond values derived from the text to perform a "representative-reinforcing" function. Id. at 87. For instance, it is proper for the Court to enforce free speech rights against the states because "they are critical to the functioning of an open and effective democratic process." Id. at 105. It is also permissible for the Court to protect minorities from inequitable results of the majoritarian process when "existing processes of representation seem inadequately tilted to the protection of minority interests. . . ." Id. at 86. But as several commentators have shown, Ely's "representation-reinforcing" theory founders on the same positivist shoals as other interpretivist theories. "Participation" as a political value is not granted any special status in the constitutional text; therefore there is no more warrant for the Court to enforce "process" values than any other extra-textual value. See, e.g., M. Perry, supra note 11, at 77-86; Dworkin, The Forum of Principle, 56 N.Y.U. L. REV. 469 (1981); Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063 (1980); Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Law, 89 YALE L.J. 1037 (1980).


167. See Dworkin, supra note 165, at 488-97 (the framers had both abstract and concrete intentions; even if they were discoverable it is impossible to discover which is dominant).

168. See supra notes 117-60 & accompanying text.
stitutional principles, such as stare decisis and deference to legislative judgment, must be applied to the case at hand. Text, history, and structure are of little help in these later stages.

Consider, for example, the case of Allied Structural Steel Co. v. Spannaus\(^{169}\) in which Justice Rehnquist joined the majority in finding a Minnesota pension reform law an unconstitutional "impairment" of contractual obligation.\(^{170}\) It is clear that the eighteenth century framers had no specific intent on the twentieth century issue of pension reform. But if a judge like Justice Rehnquist conceptualizes the framers' intent at some more abstract level—perhaps the protection of certain "reliance" interests—several questions present themselves. Should the contract clause apply when the legislation adds supplementary duties to the contract rather than merely annuls existing duties? To what extent, if any, should the legislation's retrospective effect be considered? Is the legislature's legitimate interest in regulating in the public interest constitutionally undermined by its choice of a narrow class of politically unrepresented corporations to bear the burden of the reform? Should the legislature's allegedly punitive purpose be constitutionally relevant and how can that purpose be determined? Each of these questions can be answered, but not by reference to the text, history, or structure of the Constitution. In fact, the only way a judge like Justice Rehnquist could divine the framers' intent in a case like Spannaus would be to assume they were right-thinking people, people much like himself.

A parallel problem faced by Justice Rehnquist was giving contemporary content to the concept of equal protection in cases like Fullilove v. Klutznick,\(^{171}\) in which he found "benign discrimination" in violation of the due process clause of the fifth amendment.\(^{172}\) First he had to read the concept of equality into the fifth amendment, because the text is silent. Then, because neither the framers of the fifth nor the fourteenth amendments had any "intent" regarding benign discrimination, he was forced to choose one for them. Not surprisingly, his choice reflected certain substantive political values.\(^{173}\)

In cases such as Spannaus and Fullilove, the text does not provide the answers, so the judge must. The orthodox theory ignores this necessary creative element in constitutional interpretation. The "new"


\(^{170}\) The law was found to violate the contract clause, U.S. CONST. art. I, § 10. See supra notes 120-22 & accompanying text.


\(^{172}\) Allied Structural Steel Co. v. Spannaus, 448 U.S. at 522-32.

\(^{173}\) See infra notes 200-01 & accompanying text.
hermeneutical theory of interpretation, on the other hand, has the creative element at its center.

The "new" theory of interpretation concedes that constitutional interpretation inevitably includes claims about social goals and values that cannot be traced to the text. It argues that these claims in part reflect normative theories of justice that are something more than a description of facts; they are evocations of an ideal. The remainder of this section seeks to discover the social ideal animating Justice Rehnquist's work as a judge.

Interpreting Justice Rehnquist

In order to construct a theory to explain Justice Rehnquist's record, six factual propositions summarizing his record are first set out. Then two possible interpretations of his record are examined. Finally, in the course of evaluating the second interpretation, or individualism/paternalism model, it is argued that this second model reveals the social ideal upon which Justice Rehnquist's constitutional interpretation is based.

Factual Propositions

Justice Rehnquist's record can be summarized by the following six propositions:

I. Justice Rehnquist votes to narrow access to the federal courts. (Justiciability)
II. Justice Rehnquist votes to narrow the application of constitutional norms to private parties. (State Action)
III. Justice Rehnquist votes to narrow the protection of individual rights in the Constitution, except as noted in Proposition IV. (Individual Rights I)

174. See supra notes 30-37 & accompanying text.
176. These propositions are not expected to be controversial. An early commentator on Justice Rehnquist made similar conclusions about his voting patterns. Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv. L. Rev. 293 (1976). I do not mean, however, to endorse Professor Shapiro's criticism of Justice Rehnquist's craftsmanship. See infra notes 248-60 & accompanying text.
177. See supra notes 39-40 & accompanying text (standing).
178. See supra notes 41-50 & accompanying text (state action).
179. See supra notes 51-60 (procedural due process), 61-65 (substantive due process), 66-85 (equal protection), 86-102 (free speech), 103-08 (establishment and free exercise clauses), 115-16 (cruel and unusual punishment) & accompanying text.
IV. Justice Rehnquist votes to expand the protection of individual rights in three areas: the contracts clause,\textsuperscript{180} the takings clause,\textsuperscript{181} and equal protection where the claimant has been disadvantaged by an affirmative action plan.\textsuperscript{182} (Individual Rights II)

V. Justice Rehnquist votes to expand state power relative to national power.\textsuperscript{183} (Federalism)

VI. Justice Rehnquist votes to enforce the separation of powers between the branches of the federal government.\textsuperscript{184} (Separation of Powers)

\textit{The Structure/Substance Model}

Justice Rehnquist has sketched one constitutional vision, which might be referred to as the "structure/substance model," in his extra-judicial writings.\textsuperscript{185} For Justice Rehnquist, the basic problem of government is finding a way for individuals with different moral and political views to live together in the absence of a method of determining which view is correct.\textsuperscript{186} Democracy's solution to this problem is to agree on a process of decision that grants each individual an equal voice, even though it may not produce all the substantive decisions any one individual might desire. This process, which "might loosely be called 'majority rule,'"\textsuperscript{187} is the basic premise of our Constitution.

The framers of the Constitution selected a certain form of majority rule, a form that places the majoritarian process within a structure that provides for a division of power between the executive and legislative branches of government, between the national and state governments, and between the individual and either level of government:

\textsuperscript{180} See supra notes 120-22 & accompanying text (contract clause).
\textsuperscript{181} See supra notes 117-19 & accompanying text (takings clause).
\textsuperscript{182} See supra notes 138-40 & accompanying text (equal protection-affirmative action).
\textsuperscript{183} See supra notes 109-14 ("dormant" commerce clause), 123-28 (tenth amendment), notes 129-37 (eleventh amendment), 153-55 (commerce power), 156-60 (enforcement clauses of the Civil War amendments) & accompanying text. Justice Rehnquist's votes upholding state legislation against claims of federal constitutional rights also support this proposition. See supra text accompanying notes 39-116.
\textsuperscript{184} See supra notes 141-43 (appointments clause), 144 (executive privilege), 145-48 (legislative privilege), 149-52 (delegation of powers) & accompanying text. His votes against claims of individual rights at odds with congressional legislation also support this proposition. E.g., Rostker v. Goldberg, 453 U.S. 57 (1981) (Congressional decisionmaking regarding defense given great deference).
\textsuperscript{185} See generally Rehnquist, supra note 5; Rehnquist, \textit{Government by Cliche}, 45 Mo. L. Rev. 379 (1980).
\textsuperscript{186} "There is no conceivable way I can logically demonstrate to you that the judgments of my conscience are superior to the judgment of your conscience, and vice versa." Rehnquist, supra note 5, at 704.
\textsuperscript{187} Rehnquist, supra note 185, at 384.
The Constitution that they drafted was intended to endure indefinitely, but the reason for this very well-founded hope was the general language by which national authority was granted to Congress and the Presidency. These two branches were to furnish the motor power within the federal system, which was in turn to coexist with the state governments; the elements of government having a popular constituency were looked to for the solution of the numerous and varied problems that the future would bring. Limitations were indeed placed upon both federal and state governments in the form of both a division of powers and express protection for individual rights. These limitations, however, were not themselves designed to solve the problems of the future, but were instead designed to make certain that the constituent branches, when they attempted to solve those problems, should not transgress these fundamental limitations.\footnote{Rehnquist, \textit{supra} note 5, at 699 (emphasis in original).}

The role of the judiciary is to police the structure of government set out in the Constitution to ensure that no branch or level of government exceeds its authority. The judiciary should not interfere with the majoritarian process of decision-making on substantive issues, because a substantive decision by the judiciary has no worth independent of the values of the particular judges who made the decision. It is only success within the majoritarian process that can give substantive values legitimacy.\footnote{See \textit{supra} note 14 & accompanying text.}

In many ways, this structure/substance model explains Justice Rehnquist's record quite well. For instance, it is clearly consistent with Propositions V (Federalism) and VI (Separation of Powers); his activism on these issues is easily reconciled with the model's premise that one branch or level of government should not transgress into areas reserved to another. Congress should not usurp areas reserved to the states nor undercut the autonomy necessary to the effective operation of the executive branch. Proposition I (Justiciability) can also be seen as an issue of structure, ensuring that the judiciary does not encroach on areas of substantive decision-making reserved to the legislative branches of national and state government. Proposition II (State Action), while not required by the model, is not inconsistent with it; a charter for government and its norms should not be enforced against private parties, unless the majoritarian process so chooses.

The structure/substance model is less successful in explaining other aspects of Justice Rehnquist's record. While the model provides for protection of individual rights, Justice Rehnquist gives expansive protections to those rights covered by Proposition IV (Individual Rights II), but reads individual rights narrowly in a host of other situa-
tions covered by Proposition III (Individual Rights I). If the judicial branch is authorized only to police the structure of government in a neutral manner, why are some individual rights expanded and others contracted?

One also might question the structure/substance distinction itself. At first glance, Justice Rehnquist's narrow reading of most individual rights (Proposition III) seems appropriate because these appear to involve questions of substance rather than structure. Yet, on closer examination, many of these rights have excellent claims to "structure" status. For instance, the issue of procedural due process involves the "structural" protections required before a majority-approved norm can be applied to an individual. So too, the right to vote clearly pertains to the very structure of the democratic process. And similarly, a "structural" claim can be made for free speech rights in a democracy.

Conversely, many of the issues that the model denotes as structural can be viewed as substantive. Federalism (Proposition IV) is a good example. While the issue of national versus state power has no intrinsically necessary substantive impact, the framers of the Constitution realized that the size of the electorate might well have an effect on the substance of their decisions. As James Madison put it, "the smaller the number of individuals composing a majority, the smaller the compass within which they are placed, the more easily will they concert their plans of oppression." Alexander Hamilton also argued that the national legislatures "will be less apt to be tainted by the spirit of faction." Contemporary observers confirm the fact that "the smaller the population and geographic area, the greater the likelihood of dominance by a single political party or machine with a single set of mores and the greater the opportunity for aggregation of economic power to overshadow the political scene." Federalism can easily be viewed as a question of substance rather than one of structure.

If an issue can be characterized as a matter of both structure and substance, then the model provides little guidance to the judiciary as to its proper stance in reviewing an issue. A judge who views free speech rights as essentially a component of structure will be active in reviewing a free speech claim, whereas a judge who views these rights as an

190. For an analogous argument see Tribe, supra note 165, §§ 17-1 to -3.
191. See J. Ely, supra note 10, at 105-16; Bork, supra note 164, at 23.
issue of substance will be deferential to the other branches of government.

A second problem with the model is its failure to explain the historical phenomenon of the political linking of particular structural and substantive issues. For example, in American history, federalism has usually been an "instrumental" value; one's view of federalism has been linked to some larger substantive issue. The contrast between the abolitionists' support of state power in the antebellum period and their intellectual heirs' preference for federal control at first seems a paradox, but the positions are easily reconciled. The abolitionists favored "states rights" when Congress protected slavery; after the passage of the fourteenth amendment, it was the Southerners who argued that federalism should protect them from "imposition of a national norm upon local patterns of racial domination."

Since the 1930's, supporters of "states rights" have been united on two substantive issues; they have opposed increased federal regulation of the economy and federal pressure for racial equality. This raises the possibility that the structure/substance model's defense of state autonomy may be linked to some substantive value.

A third criticism of the structure/substance model focuses on the controversial nature of its basic assumption: the majoritarian process grants each individual an equal voice. Certainly this was not true at the time the constitutional structure was set up: slaves, women, and men without property were denied the vote. Furthermore, contemporary observers challenge the accuracy of the model's assumption today. In fact, it is a truism that political influence correlates with socio-economic status. The poor are likely to be both apathetic about politics and without the financial resources necessary to be effective. Conversely, the well-to-do are both active and able to muster the financial and organizational resources necessary to "work" the system effectively. This greater success of the well-to-do starts the cycle again,

197. See J. Choper, supra note 194, at 192 (explaining regional differences in racial equality).
199. See Parker, supra note 198, at 242-43.
reinforcing the poor's apathy and rewarding the well-to-do with even more hope and financial resources to wage the next political battle.

The substance/structure model is no more able to explain Justice Rehnquist's decisions than was the traditional "intent" theory. This leads to a suspicion that, despite his apolitical rhetoric, Justice Rehnquist does read the text in light of an unstated political vision. The next section attempts to sketch the content of that vision.

The Individualism/Paternalism Model

Justice Rehnquist's extrajudicial writings give a clue to his conception of the majoritarian system of government. He does not claim that each individual has an equal voice in the majoritarian process; he claims only that each individual has an equal right or opportunity to compete to have his or her views heard:

Representative government is predicated upon the idea that one who feels deeply on a question as a matter of conscience will seek out others of like view or will attempt to persuade others who do not initially share that view. When adherents to the belief become sufficiently numerous, he will have the necessary armaments required in a democratic society to press his views upon the elected representatives of the people, and to have them embodied in positive law. . . .

The laws that emerge after a typical political struggle in which various individual value judgments are debated likewise take on a form of moral goodness because they have been enacted into positive law. 200

A social ideal that gives a central place to competition and to the justice of rewarding the successful competitor could be the underlying theme of Justice Rehnquist's work. The following is a sketch of such a vision, which I term the acquisitive ethic or, alternatively, the individualism/paternalism model. 201 In this social vision, human beings are perceived as self-interested maximizers of their own goals and ambitions. Not only is a person self-interested and acquisitive by nature, he or she is also competitive. It is only through competition that an individual's goals are met because our collective appetites dwarf the finite resources available to satisfy them.

200. Rehnquist, supra note 5, at 704-05 (emphasis added).

The marketplace is the forum where this competition takes place. It consists of voluntary exchanges between individuals, each making a trade that improves his or her own position. To permit the market to function, two conditions, historically identified with capitalism, must prevail. First, each individual's property, including his or her own labor, must be alienable; second, there must be no limitations on the right of individuals to accumulate property. Because talent and drive are not evenly distributed throughout society, there will be winners and losers, the rich and the poor, but this is justifiable because the rich have succeeded as a result of their own virtue. Even the losers, because of the wealth created by exchange, are better off than they would be without the competition of the marketplace.

The law provides the framework within which the competition of the marketplace occurs. The law defines property, enforces contracts, and remedies and deters violation of personal and property interests through tort and criminal law.

The state is a double-edged sword. In one sense, the state is necessary in order to defend against foreign aggression, protect the security of property, and provide the institutional framework in which voluntary transactions are possible. On the other hand, and especially as the franchise is extended, the state can be viewed as a tool that the unsuccessful may use to expropriate the gains of the successful. The ignorant majority, through the state, may also impede the creative power of the market by imposing paternalistic restrictions on voluntary exchanges.

As to substance, law should favor individual autonomy over paternalism. For example, it should give as much free rein as possible to individual creativity by restrictively defining the scope of obligation in tort law, and by using narrow conceptions of causation and remedy. In contract law, the legal system should view itself as a facilitator rather than as a regulator of private exchanges and thereby allow the parties to reap the benefits of their bargains without regard to seemingly unjust results. Finally, law in all areas should eschew "paternalism" in favor of fostering self-determination. There is no way to subsidize the loser except to penalize the winner, an act which is both unjust and self-defeating.

On the level of form, the individualistic ethic prefers general rules to open-ended standards. General rules have the advantage of being knowable in advance and therefore can be rationally considered by an actor planning his or her activities. Open-ended standards—which lead to injustice in the individual case because of their rigidity—have little appeal to believers in the acquisitive ethic. A rule is knowable in
advance, and, therefore, if someone finds himself or herself on the wrong side of a rule, it is only because of stupidity or indolence. The race truly is to the swift.

There is an interesting paradox surrounding the individualism/paternalism model's view of morality. On an abstract level, it is outspokenly skeptical of value questions. Its belief in the tendency and right of each individual to pursue his or her own subjective goals is the psychological engine of the model itself. However, historically, the model has been closely tied to a specific morality that is sometimes termed the "Protestant work ethic." Capitalism requires a spirit of enterprise, asceticism, and willingness to defer gratification; this spirit is threatened by a hedonistic morality. Restraints on hedonism are necessary in order to channel psychic and emotional energy into the production of wealth.

Individualism and paternalism replace structure and substance as the ruling concepts in this model. The appropriate judicial strategy is to take the constitutional stance that most frustrates paternalism and most nurtures individualism. The model has a surprisingly strong power to explain Justice Rehnquist's record.

The most striking instance of the model's accuracy is in its application to Proposition IV (Individual Rights II). The model specifically dictates that the law protect property lawfully acquired, and ensure the existence of a framework for contractual exchange. The other facet of Proposition IV, enforcing equal protection against affirmative action, also squares with the model because the claimants in these cases are victors in "merit" competitions whose victory has been snatched away by a paternalistic state.

Proposition III (Individual Rights I) can also be explained by the model once it is recognized that here a different type of individual right is involved than in Proposition IV. The guiding principle behind the Warren Court's activism was, as both defenders and detractors have pointed out, equality. To foster equality the Warren Court interpreted the fourteenth amendment as a paternalistic restraint on the majoritarian process.

The judicial strategy of the Warren Court under the fourteenth

203. See, e.g., J. ELY, supra note 10, at 73-75.
204. See, e.g., Kurland, Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government, 78 HARY L. REV. 143, 144 (1964) ("First and foremost . . . has been the emerging primacy of equality as a guide to constitutional decision.").
amendment is most easily discerned in decisions under the equal protection clause involving "suspect" classifications: race, alienage, sex, and illegitimacy. Yet equality is also a strong unarticulated theme in the "fundamental right" branch of the equal protection doctrine. Successful "right to travel" challenges have involved plaintiffs unable to afford the "basic necessities" of life; the major "right to marriage" case invalidated a statute that had a disproportionate impact on the poor; and the "right to vote" cases often involved requirements that effectively barred minorities, the poor, or unpopular political groups from the vote or the ballot. Justice Rehnquist has consistently urged a narrow interpretation of equal protection.

The theme of equality is also reflected in the Warren Court's procedural due process decisions. The due process clause of the fourteenth amendment may speak in terms of fairness rather than equality, but the poor and powerless were its primary beneficiaries in the Warren era. In fact, many of the landmark decisions in this area spoke clearly of the need to bring the poor some semblance of equality before the law. Similarly, in civil settings, the Warren Court often invalidated state procedures that affected poor people.

205. See supra notes 69-70, 77-79 & accompanying text. The cases cited throughout this section as "Warren Court cases" refer to cases decided while Chief Justice Warren sat on the Court as well as to their progeny, that is, to those cases adopting the egalitarian philosophy of the Warren years.


209. See, e.g., Bullock v. Carter, 405 U.S. 134 (1972) (substantial filing fee requirement); Williams v. Rhodes, 393 U.S. 23 (1968) (rigorous requirements for new party to get on state ballot).

210. See supra notes 66-85 & accompanying text.

211. See supra notes 51-60 & accompanying text.

212. It is a truism that not all classes of society are equally represented in the ranks of criminal defendants, the group that benefited most directly from the Warren Court's interpretation of due process. See C. Silberman, Criminal Violence, Criminal Justice ch. 4 (1978).

213. "From the very beginning, our state and national constitutions have laid great emphasis on procedural and substantive safeguards to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." Gideon v. Wainright, 372 U.S. 335, 344 (1963) (emphasis added). See also Douglas v. California, 372 U.S. 353 (1963).

Because the model opposes paternalistic intervention to further equality, it suggests that Justice Rehnquist would oppose the Warren Court's expansive reading of the due process clause in procedural settings. Indeed, Justice Rehnquist has consistently voted to restrict due process protections. A parallel point can be made about the free speech cases. There is no shortage of speech in the United States; we are inundated by speech. As Kenneth Karst has pointed out, the central issue in free speech has always been one of equality: whether the majority may allow some messages while banning those from unpopular sources. Justice Rehnquist's position in favor of allowing the majority to regulate who may speak, what they may say, and when they may say it also is consistent with the model.

The free exercise cases also frequently have benefited minority religions; majority religions have usually been successful competitors in the legislative arena. In fact, the Supreme Court interpreted the establishment clause as a barrier to prevent politically powerful religions from reaping the full harvest of their legislative victories. Justice Rehnquist, on the other hand, has opposed the restrictions the Court has placed on the government—that is, the politically successful—with respect to the support of (establishment clause) or interference with (free exercise clause) religion.

The "privacy" cases at first appear to be a counterexample. The individualism/paternalism model fosters autonomy, yet Justice Rehnquist is hostile to claims of privacy made under the fourteenth amendment due process clause. The apparent inconsistency clears up, however, if we distinguish between "privacy" claims to which the majoritarian process is responsive, and those to which it is not. For instance, to the extent "privacy" refers to quiet suburban retreats, shel-

---

215. See supra notes 51-60 & accompanying text.
224. See supra notes 63-65 & accompanying text.
Constitutional Interpretation

tered from the annoying aspects of contemporary life, there is no need for judicial intervention because the majoritarian process protects this type of privacy. The Warren Court privacy decisions protected another type of privacy, the claim to freedom in personal choices that may offend the majority's moral sensibilities.225 It is this paternalistic intervention, in furtherance of the values of equal concern and respect for each individual, that Justice Rehnquist opposes.

Justice Rehnquist's voting pattern fits the model well even in those areas where he concedes the applicability of a paternalistic constitutional norm. For instance, he admits that the state must intervene to restrict racial classifications but puts the heavy burden of proving intent on the plaintiff.226 Once a violation is established, he again limits the incursion by applying narrow conceptions of causation227 and remedy.228 The model would predict exactly this approach in the handling of these constitutional torts; it favors a narrow definition of duty and restrictive concepts of causation and remedy so as to foster autonomy.

Proposition II (State Action) easily fits the model. Justice Rehnquist has been the Burger Court's principal spokesman in a series of cases severely limiting the "state action" concept, thereby limiting the application of the fourteenth amendment's paternalistic standards to the private sector.229 This reflects a desire to limit paternalistic regulation of the free market. A parallel tendency to interpret paternalistic legislation restrictively is seen in Justice Rehnquist's votes in cases involving civil rights statutes.230

Proposition I (Justiciability) also readily fits the model. In the contract clause and takings clause cases, money damages are easily demonstrated, so standing and other elements of justiciability are not a


229. See supra notes 41-50 & accompanying text; see also H. Kalven, The Negro and the First Amendment ch. 7 (1967).

bar to access to the federal courts. It is only in the fourteenth amendment cases where the injury claimed is intangible that justiciability becomes problematical. It is exactly those cases in which Justice Rehnquist would deny access, thereby limiting the fourteenth amendment's paternalistic function.

The model also permits us to view Proposition V (Federalism) from a new perspective. Justice Rehnquist prefers state to national power. This mirrors the modern conservative dogma that rejects the federal government's interference with "states rights" in its pursuit of civil rights and social welfare goals. Business interests have been more successful in local forums than in the national arena, and the local forum is exactly where Justice Rehnquist's federalism decisions have sought to reallocate power. More important, the very structure of federalism works against paternalism because a paternalistic value must be implemented on a national scale to be effective; otherwise it will be undermined by dissenting states. Even states that favor the paternalistic value may be forced to abandon it in a federal system in order to attract businesses looking for an unregulated climate.

Proposition VI (Separation of Powers) also can be linked to the model's values. The autonomy of the legislative and executive branches works as a brake on the ability of the federal government to regulate the states and the private marketplace. So too the "unlawful delegation of legislative authority" doctrine, which Justice Rehnquist favors, would make regulation by federal bureaucracies more difficult. By forcing Congress to create the regulatory programs it wants, rather than allowing it to direct executive agencies to carry out this function, the doctrine would increase the workload of Congress and thereby discourage increased regulation.

A similar parallel between the model and Justice Rehnquist's decisions appears in the legal norms found in each. The model prefers hard rules to open-ended standards because rules are knowable in advance and therefore foster and reward rational planning. Justice Rehn-

231. See supra notes 117-22 & accompanying text.
232. See supra text accompanying notes 39-40.
234. See supra text accompanying notes 192-94.
235. See supra notes 149-52 & accompanying text.
quist adopts a similar stance towards legal norms, arguing for a strict “two-tier” theory of equal protection analysis rather than the more flexible approach championed by Justice Marshall. The model concedes that general rules have the drawback of permitting cases of individual injustice, but argues that the value of certainty outweighs this disadvantage. Justice Rehnquist similarly tolerates the individual injustices generated by a system of rules: “[the legislator] strives for a level of generality that is administratively practicable, with full appreciation that the included class has members whose needs may not be as marked as those of isolated individuals outside the classification.”

Justice Rehnquist’s endorsement of the majoritarian process is also given new meaning if we view politics as a competition between elites in which the political consumer votes for the product he or she prefers. Hence, the political arena is also a marketplace that favors those competitors with talent and resources. In fact, Justice Rehnquist’s restrictive reading of right-to-vote cases even permits the majority to control who can compete, who can vote, and the weight of each vote.

Still, a question remains. The model rejects paternalism, so one would expect an adherent to vote to invalidate the host of paternalistic legislation that comes before the Court each term. Yet Justice Rehnquist routinely votes to uphold paternalistic legislation that he may himself abhor on substantive grounds. A series of partial replies is required to address this apparent inconsistency. First, in some areas, Justice Rehnquist has indeed invalidated paternalistic legislation


238. See Dworkin, supra note 201, at 177-92.


241. See, e.g., Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (upholding voting right limitation for water district board to landowners, with votes weighted according to land assessment value).

(Proposition IV).243 Second, as Justice Rehnquist himself has noted, wholesale invalidation of social welfare legislation is no longer a politically viable option for a court.244 More important, any attempt to reduce the political element in law to a simple reflection of a judge's subjective preference is too simplistic an approach.245 There is no reason to doubt that judges on the whole adopt what H.L.A. Hart calls an "internal perspective," which requires them to decide individual cases as the "law" requires.246 Still, consciously or, more likely, unconsciously, a judge must adopt certain ground rules. These rules in turn reflect a certain inchoate social ideal and help create or maintain the form of society that the ideal envisages.

In a paradoxical way, Justice Rehnquist's embrace of the majoritarian process is doubly effective. It not only reinforces a process that produces outcomes more benign than any other politically viable process, but also legitimates the inequality that this process inevitably produces. It performs this apologetic function by emphasizing each individual's formal equality.247

Conclusion—The Future of Judicial Review

Summary of the Argument

While a detailed discussion of the legitimacy of judicial review is beyond the scope of this Article, some sketch of the role a nonpositivist theory envisages for courts in the future appears necessary. First, a summary of the argument may prove helpful. I have argued that 1) there is an inevitable political element in constitutional adjudication that cannot be escaped by reference to the constitutional text and 2) Justice Rehnquist's constitutional decisions reflect a certain social vision that I term the "individualist ethic."

I do not attack the legitimacy of Justice Rehnquist's decisions or the propriety of his methodology in reaching them. I certainly do not claim that he deduces his conclusions from some set of ideological theorems. I claim only that Justice Rehnquist's decisions, like those of Justice Brennan, reflect a social ideal not required by the constitutional text.248 This, of course, implicitly contradicts Justice Rehnquist's claim

243. See supra notes 121-22 & accompanying text.
244. See Rehnquist, supra note 5, at 704-06.
245. See Kennedy, supra note 175, at 209-20.
247. See Kennedy, supra note 175, at 217-18.
248. Of course, alternative interpretations are possible. Jeff Powell has argued that federalism is the key to understanding Justice Rehnquist's decisions. See Powell, supra note
that he plays a wholly apolitical role in judging.\textsuperscript{249}

Some readers may believe that I have unmasked the ideological function of Justice Rehnquist's jurisprudence only at the cost of robbing judicial review of any claim to legitimacy. I hope the following discussion shows that the emerging theory of interpretation does not

\textsuperscript{233} For instance, Powell argues that Justice Rehnquist's "negative attitude toward federal protection of civil liberties flows quite naturally from Rehnquist's federalism and does not necessarily stem from an antipathy toward civil and political rights in general." \textit{Id.} at 1344. The best way to test this thesis would be to study Justice Rehnquist's civil liberties decisions as a state court judge interpreting a state constitution; this is not possible. A less perfect, but still instructive, technique is to look at Justice Rehnquist's record in cases involving civil liberties claims against federal incursion; here the federalism issue is factored out. Justice Rehnquist in fact has a clear record of voting against civil rights and liberties claims made against the federal government. \textit{E.g.}, United States v. Kras, 409 U.S. 434 (1973) (bankruptcy filing fee does not deny indigents equal protection); Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting) (fifth amendment due process violation in denial of benefits to spouses of servicewomen); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (upholding prohibition on federal employees' participation in political management or campaigns); Schlesinger v. Ballard, 419 U.S. 498 (1975) (differentiating between male and female officers for discharge purposes is a rational classification); Mathews v. Eldridge, 424 U.S. 319 (1976) (due process does not require an evidentiary hearing prior to termination of disability payments); Greer v. Spock, 424 U.S. 828 (1976) (military regulations may prohibit distribution of political literature); Hampton v. Mow Sung Wong, 426 U.S. 88, 117 (1976) (Rehnquist, J., dissenting) (requirement barring aliens from civil service employment violates due process); Matthews v. Diaz, 426 U.S. 67 (1976) (denial of Medicare to aliens residing in United States less than five years does not violate the fifth amendment due process clause); Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726 (1978) (holding valid the F.C.C.'s power to regulate indecent broadcasting); Haig v. Agee, 453 U.S. 280 (1980) (holding valid the Secretary of State's revocation of a U.S. citizen's passport on grounds that the citizen's activities damaged national security); Brown v. Glines, 444 U.S. 348 (1980) (no first amendment violation in requiring Air Force members to obtain approval before circulating petitions on Air Force bases); Secretary of the Navy v. Huff, 444 U.S. 453 (1980) (upholding regulation requiring military personnel to obtain approval before circulating petitions addressed to Congress); Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding requirement of possible military service for males but not females); United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114 (1981) (non-delivery of unstamped letters does not abridge first amendment rights); Federal Communications Comm'n v. WNCN Listeners Guild, 450 U.S. 582 (1981) (policy of F.C.C. to promote diversity in radio broadcasts by licensing with regard to the market upheld).

Where Justice Rehnquist has voted to uphold individual rights against the federal government, they have been "anti-egalitarian rights" covered by Proposition IV. \textit{E.g.}, Fullilove v. Klutz, 448 U.S. 448 (1980) (Stewart, J., dissenting) (due process—affirmative action); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (takings clause); Buckley v. Valeo, 424 U.S. 1, 290 (1976) (Rehnquist, J., concurring in part and dissenting in part) (invalidation of expenditure limits for candidates). It should be noted that in \textit{Buckley} Justice Rehnquist also dissented against the majority's upholding of funding procedures that Justice Rehnquist believed discriminated against minority parties in violation of the first and fifth amendments. \textsuperscript{249} \textit{See supra} notes 185-89 & accompanying text. I also believe that, stripped of its legal trappings, Justice Rehnquist's social vision is a difficult one to defend on the level of normative discourse.
threaten the legitimacy of judicial review and actually can increase the efficacy of public interest litigation.

Judicial Review, Expanded Doctrine, and Normative Discourse

It is true that we can no longer rest the case for judicial review on the claim that judges find one "objective" answer inhering in the constitutional text. Yet this should not be especially surprising or alarming. With the possible exception of Justice Black, no Supreme Court Justice in recent memory has made such a claim. The argument for judicial review must be a "functional" one; judicial review is an essential part of American democracy because it is a superior way of deciding certain controversial questions. For instance, we ask judges to decide claims of individual rights against the majority because we feel it unfair to allow the legislature, the representatives of the majority, to be the judge of such disputes. While there is no way to make the discharge of such a task uncontroversial in a society divided on questions of political morality, it is not difficult to conclude that the relatively well-insulated judiciary has a better institutional claim of competence to decide questions of individual rights than does the legislature, which is so sensitive to majoritarian prejudice.

The Court's openness to individual claims of injustice and its adherence to rules of rational argument can combine to create a unique form of political decision-making, which Roberto Unger terms the regime of "expanded doctrine." This model in many ways mirrors the orthodox theory of judicial review. It requires judges to start their interpretive task with consideration of certain authoritative materials. It also requires them to respect certain canons of acceptable argument, the foremost of which is treating like cases alike. Judges are also required to accept some institutional restraints on their role. Finally, as a practical matter, constitutional doctrine is regularly subjected to the quite considerable majoritarian restraints of the appointments power.

Yet the regime of expanded doctrine departs from the orthodox theory in important ways, some already presaged by actual constitutional practice. First, judges must concede, at least at the Supreme Court level in "hard" cases, that the authoritative materials and adherence to accepted canons of arguments do not require any one decision; there is a necessary indeterminacy that can only be resolved by refer-

250. See M. Perry, supra note 11.
251. See R. Dworkin, supra note 14, at 142.
ence to a political vision not required by the text or canons of argument. This concession has the initial advantage of candor; judges will be forced to admit that any interpretation, activist or passivist, is a political act, and will feel less constrained to torture both history and precedent to reach their conclusions. I should emphasize that the theory does not permit judges to incorporate social philosophy wholesale in their decisions. They must observe what Professor Ronald Dworkin terms the "internal ideal" of law: treating like cases alike.253 Yet this technical requirement itself becomes a catalyst for change as judges attempt the Herculean task of reconciling their remedy of injustice in one area of law with arguably parallel injustices in other areas.254 This concept of "internal development" is hardly revolutionary; the whole history of the equal protection clause since Brown v. Board of Education255 illustrates its practice. Once practices that disadvantage racial minorities are declared unfair, the dynamic of precedent forces states to defend practices that disadvantage other minority classes, such as aliens, women and illegitimates. The dynamic may be stopped or reversed on the institutional level by political correction through the appointments power, but on the level of normative discourse increasingly large areas of the status quo are shown as vulnerable to claims of injustice.

Expanded doctrine "integrates into standard doctrinal argument the explicit controversy over the right and feasible structure of society, over what the relations among people should be like in the different areas of social activity."256 It is not that traditional doctrine does not assume a certain proper structure of government and society; it does so, but covertly, and the assumed structure is inimical to the claims of injustice. The regime of expanded doctrine makes the controversial nature of such assumptions explicit and forces them to be defended on the normative level. Expanded doctrine portrays a society always in the process of remaking itself, one in which no transitory structure is immune from the need to justify itself. The evolution of litigation from a forum for the resolution of individual disputes to a more overtly political role illustrates the model's potential for institutional reform.257 Expanded doctrine also has the advantage of openly tying law to politics. Judges and lawyers will be forced to admit that they are engaging in a

253. See Dworkin, supra note 37.
256. See Unger, supra note 252, at 578.
form of political discourse in which they cannot claim infallibility nor accuse others of incompetence because of ignorance of legal norms.

Three Problems

The Possibility of a “Right-Wing Ideological Coup”

Some may fear that conceding some indeterminacy in the constitutional text may allow a future conservative majority to interpret the Constitution with a right-wing bias.

It is true that the new interpretation, as a matter of logic, is no less hospitable to Justice Rehnquist’s social vision than to Justice Brennan’s. But then the orthodox theory’s insistence on enforcing the framers’ intent has not curbed Justice Rehnquist either. Also, the move from the level of “intent” to normative discourse is one that favors the interests of public interest clients. Once exploitative relationships are cut off from the support of legal terminology, their vulnerability to rational argument increases. The distinction between de jure and de facto race classifications illustrates a vulnerable social practice hiding behind neutral legal terminology. I do not wish to claim that justice will always emerge from the process of normative discourse; obviously we all too often are able to convince ourselves that justice lies on the side of our personal advantage. However, I do believe a type of discourse that accentuates the normative element helps public interest clients more than one that ignores that dimension. Also, there is an institutional tilt towards equality in the litigation process itself. A lawsuit creates the one forum in which government officials are forced to account for their handling of a concrete instance of injustice to the body pledged to uphold society’s ideals. The tension between the abstract ideals that support the system and the concrete injustice creates a strong impetus for remedial action so as to relieve the tension.

No theory of judicial review can prevent a conservative majority from being appointed to the Supreme Court. In the long term a political culture’s values will be reflected in its constitutional doctrine. But even here the new theory seems preferable to the old since it expressly points out that questions of constitutional law are always political in the larger sense. A conservative majority’s interpretation may be the “law” in the limited sense that refers to practices enforced by the State, but the new interpretation also emphasizes the importance of law in a

larger sense, as an ongoing debate on political morality that can never be terminated by a 5-4 decision.

The Spectre of Skepticism

Some may fear that the new theory's rejection of the distinction between "fact" and "value" casts constitutional law into a sea of subjective opinion. While this objection is often raised, upon examination it does not prove a serious problem. Skepticism can take two forms. The "radical" form argues that no attempt at human reason can bring us any closer to understanding the world or our place in it. While this position is irrefutable, it is also irrelevant in constitutional debate where each participant, whether liberal, conservative, or radical, believes that his or her "truth" has relevance to the problem of how to structure government. Therefore, skepticism normally appears in a more genteel form, one which really is a form of negative normative argument. One claims that since an opponent cannot prove his or her position to be true in terms of the criteria of validity employed in the natural sciences, it must be judged false. This tact simply misunderstands the structure of normative discourse where arguments can be persuasive without being incontestable. The fact that normative discourse is always to some extent open-ended and has truth criteria less rigorous than the natural sciences does not make it irrational. If it did, the "genteel" skeptical argument would collapse into a "radical" one, and we would all be condemned to silence.

The "Death" of Law

A more troubling objection argues that the concession of an irreducible normative element in constitutional interpretation will lead to the gradual obliteration of the fragile line between law and politics in the narrow electoral sense. If judges were not only perceived as, but also perceived themselves as, the agents of a political party or ideological creed, it would destroy a distinctive part of the American form of democracy. Yet there is nothing in the "new" interpretation that requires this result and nothing in the "old" that prevents it. In fact, I believe that a candid role of judicial review in American democracy serves the cause of judicial review better than a cynical "textual" apology that must increasingly ring hollow even in the ears of its speakers.

259. R. Dworkin, supra note 14, at 279-90; Unger, supra note 252, at 648-54.