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# ESSAYS AND REVIEWS

## FUNCTION WITHOUT FORM: THE ASYMMETRICAL HERMENEUTICS OF JESSE CHOPER

### INTRODUCTION: ON THE VIRTUES OF THEORY

I don't know very much about the depth psychology of others who spend a substantial portion of their time pondering abstract jurisprudential questions, but, as for me, I live in a near-perpetual state of self-doubt. In my fantasies, colleagues deride me because my footnotes are bereft of case law. Alumni at imagined cocktail parties harangue me with demands for more "practical" courses in law school. Students accost me, in dreams from which I awaken sweaty and shaken, demanding to know what relevance there is to the material I teach. My classmates from law school, almost all of them safely ensconced in the lucrative (and, they say, intellectually challenging) practice of law, attend imaginary reunions to which I am not invited because I am not *really* a lawyer.

Jesse Choper's *Judicial Review and the National Political Process*<sup>1</sup> therefore comes as something of a relief. It is an extended, if backhanded, demonstration of the important role that theory must play in any coherent argument about the substantive content of law. Choper scrupulously, and I believe intentionally, relies on arguments that sound in observation, practice, functionalism, and authority, avoiding totally any consideration of fundamental underlying theory. In so doing, and particularly in trying to apply such arguments to answer complex questions of constitutional policy, he ultimately lapses into a most revealing incoherence.

Each strand of his argument is carefully crafted and his erudition is beyond question. Indeed, he has an encyclopedic grasp of the case law, an admirably practical orientation, and an eminently reasonable claim to relevance. There can be no doubt that Professor Choper is a real lawyer. But is he writing about real law?

I think not, and perhaps he doesn't either. After all, the title of his book does not mention law, but only "political process," and it is hard to cavil with his arguments if they are to be viewed as descrip-

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1. J. Choper, *Judicial Review and the National Political Process* (1980).

tive of the sociological nexus that constitutes contemporary politics. Unfortunately, law and politics are not the same thing. Law is an abstract system of normative justification. The political process is a mechanism for the allocation and implementation of social clout. I may or may not change my behavior because the law requires, forbids, or permits me to do some thing.<sup>2</sup> But if I am called on to legitimate my behavior, law is one response open to me.<sup>3</sup> Perhaps it is not an ultimate justification—perhaps I cannot rely on legality to guarantee ethical rectitude—but it is always a first step and often a sufficient one.<sup>4</sup> Political considerations, on the other hand, have no *prima facie* aura of legitimacy. It is hardly a justification in any normative sense to say that the reason I voted for a piece of legislation in which I did not believe was that doing so was politically astute. If my acts are required by law I can claim that they are probably right (or at least not wrong). But if they are required by politics, then their propriety is irrelevant and the best I can say of them is that they are probably cunning.

So Professor Choper most likely sought to write a cunning book, one that would manipulate the political process to yield outcomes that he found desirable. And measured against this yardstick he is eminently successful: His arguments lead him to conclude that the United States Supreme Court should be the final arbiter of some, but by no means all, constitutional questions. Specifically, it should uphold constitutionally-guaranteed individual rights against government,<sup>5</sup> it should referee disputes in which a litigant claims that a state has trespassed on the powers awarded the federal government in Article I,<sup>6</sup> and it should adjudicate cases in which the constitutional power of an Article III court is somehow thrown into question by an act of the legislative or executive branch.<sup>7</sup> The Court should keep its jurisprudential fingers off those cases that involve

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2. See J. RAZ, *THE AUTHORITY OF LAW* (1979); Griffiths, *Is Law Important?*, 54 N.Y.U.L. REV. 339 (1979); Symposium, *Law and Obedience*, 67 VA. L. REV. # 1 (1981).

3. In fact, even states almost never legitimate their behavior on the basis of power. See J. BRIERLY, *OUTLOOK FOR INTERNATIONAL LAW* 5 (1944).

4. A model of the general process of legitimation under the law is provided by Ronald Dworkin. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-130 (rev. paperback ed., 1977). Under this model, law is built out of, and is therefore often consistent with, morality. There are, however, exceptions. *Id.* at 206-22 (civil disobedience), 326-27 (fundamentally unjust political systems). Some of David A.J. Richards' recent work is an attempt to mesh constitutional adjudication with normative theory. See, e.g., Richards, *The Individual, the Family, and the Constitution*, 55 N.Y.U.L. REV. 1 (1980).

5. J. CHOPER, *supra* note 1, at 60-128.

6. *Id.* at 205-11.

7. *Id.* at 380-415.

congressional incursion into constitutional rights allegedly held by the states,<sup>8</sup> and those that involve squabbles between the two non-judicial branches of the federal government.<sup>9</sup> Basically, this would eliminate *National League of Cities v. Usery*,<sup>10</sup> a handful of cases in which the Court deemed it prudent to intervene in a battle between the other coordinate branches,<sup>11</sup> and a vast body of case law in which the Court upheld Congress' right to act pursuant to its own interpretation of Article I<sup>12</sup> (though, as a practical matter, Choper in fact accords that interpretive right to Congress).<sup>13</sup>

Professor Choper's argument has all the visceral appeal of a schematic diagram. It is laid out clearly, if pallidly: He first urges that judicial review is antimajoritarian and therefore somehow problematic.<sup>14</sup> He then suggests that, even so, there are powerful pragmatic reasons why judicial review is essential to the vindication of individual rights.<sup>15</sup> Having determined that the Supreme Court *should* hear cases in which such rights are implicated, he notes that its practical power to do so is undermined by the fragility of the Court's position.<sup>16</sup> In part because the Court is in fact antimajoritarian, and in part because there will always be a loser for every winner before it, he recognizes an inevitable spiralling social hostility to the Court's decisions which weakens its forcefulness in its all-important duty to vindicate individual rights.<sup>17</sup> For those reasons—fragility and antimajoritarianism—he proposes that the

8. *Id.* at 171-205.

9. *Id.* at 260-379.

10. 426 U.S. 833 (1976).

11. The most significant of these cases is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

12. Notably included are such civil rights cases as *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

13. J. CHOPER, *supra* note 1, at 175. Choper seems to argue that these cases should have been held nonjusticiable, but he explicitly embraces their outcomes and argues that the Court should enforce such outcomes even as it determines them to be non-justiciable. Text accompanying note 70 *infra*.

14. *Id.* at 4-59; accord J. ELY, *DEMOCRACY AND DISTRUST* (1980). Ely's book, like Choper's, is in many ways motivated by an attempt to reconcile judicial review with democratic theory.

15. J. CHOPER, *supra* note 1, at 60-128; but cf. J. ELY, note 14 *supra*. Although Ely and Choper seem to agree on which fact patterns are the most important ones, they describe the conceptual nature of those cases very differently. Choper believes that they sound in substantive individual rights, while Ely believes them to be procedural political rights. The distinction may be more semantic than qualitative. Note 46 *infra*.

16. J. CHOPER, *supra* note 1, at 129-70.

17. *Id.* at 156-60, 164-68.

Court should stay away from the resolution of all issues that it can reasonably avoid. The test is simple: Can the specific issue be properly resolved by majoritarian means? If so, then the fragility of the Court, if not the importance of democratic theory, requires that it not be subject to judicial review. Professor Choper nominates two broad groups of cases that fail the test but have nevertheless generally been held to be justiciable, cases involving congressional incursions into states' rights<sup>18</sup> and those involving constitutional battles between the legislature and the executive.<sup>19</sup> He concludes with an argument explaining why he feels that the Court should be involved in separation of powers cases in which the judicial branch is a party.<sup>20</sup>

Professor Choper's arguments are thus doubly clever. First, they yield an outcome which, at its core, should consistently please at least the liberals among his readers by simultaneously upholding both the Court's rights-based decisions and the Congress' incursions into areas that were once deemed to be the sovereign responsibility of the individual states. Second, they provide a basis for avoiding at least some of the cases that would otherwise reveal the Court's surprising powerlessness. By permitting Congress and the President to slug out their disputes without the bother of a referee, Choper eliminates one class of cases in which it might become evident that the Court's magic is mere legerdemain. If the Court keeps out of these constitutional crises, it will sacrifice less of its credibility with the other branches.<sup>21</sup> And by maintaining its credibility (read popularity) the Court can continue to count on both Congress and the President to help enforce the decisions about which Choper cares.

All of this amounts, as I have suggested, to a dandy political argument. It presents a political system whose outcomes are congruent with those that many of us would like to see, and whose dynamics look very familiar. If we were social engineers seeking to design a judicial machine that would start with our contemporary social norms and produce a specific set of desired political holdings, we could hardly ask for anything better. And Choper seems, in part at least, to believe that that is his task, since he devotes considerable ink to a delineation of the multifarious desirability of the outcomes his proposed machine would produce. But such a concen-

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18. *Id.* at 171-205.

19. *Id.* at 260-379.

20. *Id.* at 380-415.

21. *Id.* at 129-70.

tration on product rather than process, taken alone, can never be a satisfactory basis for urging the Court to adopt new or variant doctrines.

We are *citizens* in the polity. Instead of a machine that stamps outcomes out of fact patterns, we want a system that assures the legitimacy of the outcomes it reaches. Superior firepower, not conceptual rigor, is probably the best way to ensure that we get the behavioral results we desire. But if we want something more—if we want a source of authority as well as of power and if we want the behavior we produce to be not merely manifest but also legitimate—then our arguments must be primarily theoretical and only secondarily political.<sup>22</sup>

That is the implicit message of Professor Choper's heroic attempt to substitute political procedure for legal process, functionalism for formal argument. It is a conclusion that emerges for the reader who must wonder why it is that a book so carefully wrought, so precisely (if not sparely) written, so detailed, and so meticulously argued, nevertheless does so little to convince the skeptic.

#### MAJORITARIANISM AS AN END-IN-ITSELF<sup>23</sup>

There are both technical and jurisprudential problems with the first (and most basic) leg of Professor Choper's argument, the claim

22. This seems to be the force underlying a passionate and provocative (though sketchy) recent article by Philip Bobbitt, engagingly entitled *Constitutional Fate*. Bobbitt concludes: "Our constitutional fate is determined by the arguments by which the Constitution structures decision; yet we determine their availability by our choice of constitutional functions. The framers could do no more for us than bequeath us such decisions, within such conventions. In our theories, therefore, are our fates." Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 775 (1980).

23. Much jurisprudential discourse is made unnecessarily obscure by analyses which confuse instrumental ends and ends-in-themselves. Institutional procedures may be designed to further ends which are themselves inherently normatively worthy (like Kant's categorical imperatives). These I call ends-in-themselves because they provide a self-contained source of theoretical justification. For utilitarians, the maximization of aggregate utility would be such an end-in-itself. Other ends of the political process may be only way-stations in the process of normative justification. These, which I call instrumental ends (and which are akin to Kant's hypothetical imperatives), are themselves legitimate because they are thought to further, or stand in for, or approximate, or maximize, other legitimate ends. For a utilitarian, the market may be an instrumental end, since it is thought to further the end-in-itself of utility maximization.

Instrumental ends are, therefore, actually means to the accomplishment of other, more deeply embedded ends. But because they often come to stand as surrogates for the ends that they serve, we too frequently elide the two together and

that judicial review is faulty because it is antidemocratic. Certainly, judicial review is antimajoritarian.<sup>24</sup> But, we must ask, so what? For

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view instrumental ends to be as strong a source of justificatory force as we do ends-in-themselves. Thus, the market may come to be viewed not as an instrument or means to the achievement of the self-validating end of maximized utility, but as an autonomous source of legitimacy. Similarly, I suggest here that democracy, which we commonly view as an independent source of legitimacy, is actually only a process, a means, an instrumental end legitimated by the fact that it often furthers individual autonomy.

The distinction is more than one of mere form. Instrumental ends are susceptible to many types of criticism to which ends-in-themselves are not. Thus, we may claim that an instrumental end is unacceptable because it is inefficient, it fails, that is, adequately to foster the norm that lends it justification. That sort of claim, however, would be meaningless if we were discussing an end-in-itself, since efficiency by definition is a measurement against an external criterion. Thus, ends-in-themselves are normative *cul-de-sacs*, cutting off argument by the force of their authority. We can, therefore, even if we are utilitarians at heart, criticize the marketplace because it does not perfectly maximize our ultimate value of utility. But we cannot entertain arguments that suggest that the maximization of utility is somehow not effective, since it is the fundamental norm on which we base our judgments. At worst, it can only be balanced against other, similarly basic ends.

We run into difficulty when we elide an instrumental end into an end-in-itself because in so doing we change the nature of the arguments that we will admit into our discourse. If, after years of relying on an instrumental end as a surrogate for an end-in-itself, we come to believe that the former actually has itself taken on the autonomy of the latter, we will reject much criticism that should be viewed as valid. If, that is, we come to view democracy as an end, rather than as a means to the end of the maximization of individual autonomy, then we will not be swayed by a demonstration that there are circumstances in which democracy actually thwarts autonomy. We will have subordinated the import of a fundamental value to that of its hand servant. If, conversely, we come to view autonomy as simply an instrumental end, then we will improperly be willing to listen to arguments which seek to demonstrate that it is inefficient or impractical. Choper does both. He views democracy as an end-in-itself, flatly castigating judicial review because it is antimajoritarian. And he views autonomy as an instrumental end, strongly affirming individual rights, but nevertheless repeatedly subjecting them to pragmatic arguments which would be out of place if they were deemed to be ends-in-themselves. For a discussion of democracy and participative government respectively as, in effect, instrumental ends and ends-in-themselves, see Waggoner, *Log-Rolling and Judicial Review*, 52 U. COLO. L. REV. 33, 34-35 (1980).

The distinction discussed in this footnote, though in some senses quite traditional (see, e.g., C. FRIED, *ANATOMY OF VALUES* 27-39, 112-15 (1970); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1252-60 (1981)), may be more facile than the subject warrants. For a more detailed analysis of the issue in a related context (moral discourse), see P. FOOT, *VIRTUES & VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 157-73 (1980).

24. I use the terms "antidemocratic" and "antimajoritarian" interchangeably in this essay, even though they may be clearly distinguished in other contexts. It is easy, and by and large harmless, to lose sight in general argument of the ways in which democracy, majoritarianism, and representative government are both similar and different. It is important, however, to keep all of these concepts, which are instrumental ends—political processes which are not necessarily inherently self-validating—distinct from the end-in-itself that they serve. The thrust of this section of

one thing, Choper's discussion of the executive branch is almost exclusively limited to direct actions of the President,<sup>25</sup> and the Court does seem less politically responsive than an elected chief executive. Yet the vast federal administrative machine, fueled by tenured civil servants and maintained by appointed overseers, is in many ways both a more influential and a more pervasive component of the executive branch than the President himself. And this bureaucracy seems to be neither very flexible nor terribly amenable to direct majoritarian influence.<sup>26</sup>

Furthermore, in spite of the dangers that we are asked suddenly to note, the Court has in fact not succumbed, and indeed has often appeared to be more stable than either the legislature or the executive. Indeed, it has often been the instrument for the legitimation (through law) of actions taken by the other branches. Antimajoritarian or not, it seems to work.<sup>27</sup>

But these are minor quibbles; they are not indicative of the

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the text is an attempt to demonstrate that Choper mistakenly seems to believe that any or all of these instrumental ends are self-legitimizing. My colleague Paul Cox seeks to demonstrate that John Ely, in effect, does the same thing by subordinating judicial review to majoritarianism. Cox, Book Review, 15 VAL. U. L. REV. 637, 644-47, 661-64 (1981).

There is certainly solid foundation in Ely's text for Professor Cox's reading. J. ELY, *supra* note 14, at 55, 82, 89. Cox views Ely as torn between the inherent value of democracy and his distrust of elective political process as a means of expressing the collective substantive will.

I tend to view Ely's theory as less internally conflicted, though I readily admit that in doing so I ignore some of the plain meaning of his text. The fact that he distrusts democratic process when it fails to provide representation for some minority of citizens, thereby elevating access to government process to a higher level of normative importance than he accords majoritarian decision-making itself, suggests very strongly that he views democracy as an instrumental end serving some higher, unarticulated end-in-itself. Thus, precisely because Ely is less concerned about whether a majority actually backs any particular policy than he is about whether *all* citizens have been permitted to participate in the process generating the policy, we must assume that there is a coherent normative principle in which Ely believes and which generates both his taste for democracy and his distrust of democratic political process. As Professor Cox notes, *supra* note 24, at 644, that underlying principle appears to be an adoption of Ronald Dworkin's notion of "equal concern and respect," particularly as it applies to political process. J. ELY, *supra* note 14, at 82; R. DWORKIN, *supra* note 4, at 180.

25. J. CHOPER, *supra* note 1, at 46-47.

26. Paul Cox argues that the antimajoritarian nature of federal bureaucracy should cause the Court to be most careful about deferring to executive assessments of the will of the majority. Cox, *supra* note 24, at 650-53.

27. Much of the history of attempted incursions into the Court's power, history that Choper himself presents, strongly suggests its ability to withstand even extreme political hostility. See, e.g., J. CHOPER, *supra* note 1, at 47-55.



book's crucial lack of an articulated theoretical base. It is far more devastating that Choper never asks *why* we should view democratic process as a fundamental political virtue.<sup>28</sup> In some ways, that failure is understandable—thinking such thoughts runs counter to everything most holy about our political self-image. But, even though it forces us to look behind the assumptions that have been instilled in us since elementary school civics class, the question bears close scrutiny: Is democracy an end-in-itself?<sup>29</sup>

The inquiry is important to an assessment of Choper's work because if democracy is not *per se* desirable, if sensitivity to the will of the majority is not the prime directive of American government, then Choper's entire first chapter, on which virtually all of his remaining argument is based, must topple. If, conversely, democratic theory does drive American government, we are forced to wonder what we are doing with a Constitution in the first place.

Constitutions are not amenable to the will of the majority. Although our document may have been indirectly ratified at one time (by a group of states whose voters did not include blacks, women, native Americans, or the poor), it hardly derives its current authority from the historical accident of that somewhat embarrassing electoral pedigree.<sup>30</sup> The Constitution itself is profoundly anti-majoritarian, and not merely in its Bill of Rights. It is *theoretically* antidemocratic<sup>31</sup>, because its very existence reflects an insistence on the part of the Framers that the legitimacy of government lies not in mob acquiescence but in fundamental principles, in *rights*, in precepts that cannot justifiably be violated even by a unanimous citizenry. This is the theory that underlies the Declaration of Independence, a theory based in natural law every bit as deeply as, though in direct opposition to, the divine right of kings. This is the theory that breathes majesty into John Marshall's consummately wise recognition that "we must never forget that it is a *constitution* we are expounding."<sup>32</sup>

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28. Professor Choper seems to feel that it is an absolute value, an end-in-itself. *Id.* at 10-11.

29. See Waggoner, *supra* note 23, at 34.

30. It seems to me that the frequently-espoused belief that governments derive their authority from the consent of the governed (an assumption written into the Declaration of Independence) may well be too strong. If individual autonomy is absolute, then no government can ever be acceptable. We must draw the line between permissible government encroachments on individual liberty and impermissible ones. Where we draw that line is, at the very least, controversial. See note 49 *infra*.

31. *But see* J. ELY, *supra* note 14, at 49, 89-90.

32. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

Choper's claim of the primacy of democratic process proves both too much and too little. It proves too much because if taken to an extreme it argues that the Constitution itself, or at least the overwhelming preponderance of it which does not sound in individual rights, should be voided because it violates the fundamental value of majoritarian government. It proves too little because if the argument is to be dropped short of that extreme, it fails to provide a principled basis for doing so.

At base, the most significant aspect of constitutional government is its theoretical force. Other countries get along perfectly well without constitutions. They protect the rights of their citizens, through common law and legislation, at least as scrupulously as we do. But we are in some sense conceptually enriched because our charter, by its very existence as well as in its terms, assures us that the foundation of our polity inheres in a set of principles on which we can rely for authority and legitimacy.

If, therefore, the Constitution is itself antimajoritarian, then it makes remarkable sense that the branch of government responsible for ultimate constitutional interpretation should similarly be separate from the democratic process.<sup>33</sup> Thus, if Professor Choper wishes to argue that democracy is a self-validating end-in-itself, he should do so and seek to convince such hardcore skeptics as I of the virtues of mob rule. If, as is likelier, he views it as something less, then he must articulate a coherent theory in which democratic process plays a part, and he must demonstrate how the role it plays is explicitly in conflict with the notion of judicial review.<sup>34</sup>

#### THE SUPREMACY OF INDIVIDUAL RIGHTS

It becomes evident that democracy *qua* democracy is not Professor Choper's fundamental value, since his second chapter is devoted to an extended discussion of the importance of individual rights. He sees these, quite evidently, as trumps,<sup>35</sup> but it is far from clear why. He argues pragmatically that individual rights will not in fact be protected by any majoritarian government, since the will of the many is often likely to overwhelm the rights of the individual.<sup>36</sup>

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33. Bobbitt, *supra* note 22, at 754.

34. Ely, unlike Choper, does a first-rate job of articulating a coherent political theory. J. ELY, *supra* note 14. As suggested in note 24 *supra*, Paul Cox feels that Ely's theory embodies a conflict between judicial review and democratic process, while I believe that he espouses an autonomy claim in which each plays a legitimate role.

35. See R. DWORKIN, *supra* note 4, at 188-92.

36. J. CHOPER, *supra* note 1, at 64-65.

And so he insists that the Court must be free to address conflicts of this sort precisely because its tie to majority will is so severely attenuated.<sup>37</sup>

But why should we wish to protect individual rights? Certainly it is not simply because they are guaranteed by the Constitution. The core of that document as originally ratified was virtually silent as to individual rights. Three years later the Bill of Rights added a number of protections, but these were limited protections against *federal* incursion into specified individual rights. Seventy-seven years after that, the fourteenth amendment extended the reach of those limited constitutional protections to actions taken by states. The vast bulk of the material contained in the Constitution, even to this day, deals with the allocation of institutional rights, both between the national authority and the states and among the three branches of the federal government.<sup>38</sup> So, if Choper were arguing that individual rights need not yield to majoritarian pressures simply because those rights are part of the antidemocratic principles embodied by the Constitution, then he has neither shown that they are central to that document, nor demonstrated that the other important institutional principles which are in fact basic to it should not be accorded, as a matter of constitutional theory, similar protection.

It may be true, as Professor Choper seeks to show, that for political reasons it is *less likely* that, for example, the Congress will violate constitutional principles of federalism than that it will violate individual rights.<sup>39</sup> Likelihood, however, is a concept borrowed from statistics. It may be relevant in policy arguments that seek to select among various permitted options, but it has no place in arguments of principle about acts that are normatively mandatory or proscribed. It is not sufficient answer to a hypothesized violation of principle that such acts are improbable, or that the Court would be ineffective to stop them. If the theory on which our political institutions, including the Supreme Court, are founded has any meaning at all it is that whether violations of fundamental principles are likely or not, whether the Court's intervention is efficient or not, the Court has a duty to hear and decide such cases.

In denying that duty with respect to some cases, but asserting it with respect to the protection of individual rights, Professor

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37. *Id.* at 64-70.

38. This observation is similar to Ely's that the Constitution deals almost solely in procedural rights. J. ELY, *supra* note 14, at 88-101; *see* note 15 *supra*; note 46 *infra*.

39. J. CHOPER, *supra* note 1, at 171-90.

Choper therefore implicitly breaks rather daring theoretical ground. He seems to be asserting that, although the legitimacy of the Constitution is by and large based on its adoption of democratic principles, there exist some rights (which, coincidentally, happen also to be mentioned in the Constitution) that are so fundamental that they displace even majoritarianism as an institutional value. These rights are never clearly identified, nor are we given any basis for determining their content on our own. Moreover it is odd, if not bizarre, that a professor of constitutional law and the author of a number of treatises and texts in the area,<sup>40</sup> should be making this sort of claim. For it is a claim that essentially sounds in a common law reliance on natural principles of justice, a claim that directly controverts the value and import of, or for that matter the need for, a constitution.

It is possible, of course, that Professor Choper does not mean to make this claim at all. It is possible that he in fact accepts the fundamental import of the Constitution as a source of legal authority, and that his arguments are all meant to be pragmatic. He may simply be seeking the best way to implement the constitutionally expressed values of our political system, and his arguments may be read as demonstrations that the Court is not suited to certain types of political involvement. If so, then his plainly theoretical opening chapter about the Court's antidemocratic nature is puzzling in its irrelevance.

More importantly, he never asks whether there are any questions that the Court has a *duty* to address, even when it cannot do so efficiently.<sup>41</sup> If we accept the Constitution as a source of normative political values that take precedence over political process, do we not all, including the justices of the Supreme Court, owe it an allegiance that prohibits us from sitting silently by while it is violated before our eyes. So we must ask how it would be possible for the Court, for pragmatic rather than theoretical reasons, voluntarily to refuse jurisdiction over cases that allege unconstitutional action.

#### THE DAINTINESS OF JUDICIAL AUTHORITY

The desire to show some positive institutional harm caused by judicial review may be the impetus for Professor Choper's third ma-

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40. In addition to writing the volume under review, he is an author of W. LOCKHART, Y. KAMISAR, AND J. CHOPER, *CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS* (5th ed., 1980); W. LOCKHART, Y. KAMISAR, AND J. CHOPER, *THE AMERICAN CONSTITUTION: CASES AND MATERIALS* (5th ed., 1980).

41. See, e.g., the discussion of the futility of judicial action in J. CHOPER, *supra* note 1, at 222, 323.

for argument—that the Court's authority is fragile and should be husbanded in order to retain its maximum effectiveness with respect to the all-important decisions concerning individual rights.<sup>42</sup> For this argument to work, however, he must include in it two critical steps, two steps which he unfortunately does not even mention. First, as just noted, he must show why, as a matter of political theory, it is permissible to sacrifice some constitutional cases as non-justiciable. Second, he must show that, by sacrificing such cases in practice, desirable theoretical ends are met in fact. There is a striking circularity to the way in which these are implicitly addressed by Professor Choper. His theoretical argument seems to be that other mechanisms will do at least a tolerable job of protecting the institutional principles of the Constitution,<sup>43</sup> but that only the Court can uphold the rights of individuals.<sup>44</sup> So the Court must be sheltered from as much criticism as possible if individual rights are to be afforded any protection. He then details an extensive catalogue of cases, almost all of which involve either individual rights or the invalidation of unconstitutional state laws (both of which he argues *should* be justiciable), cases which have collectively weakened the Court's popular support.<sup>45</sup> Since antimajoritarian activity undermines its popularity, such activity should be minimized, and since the Court cannot give up its jurisdiction over individual rights, everything else should be sacrificed.

In short, this argument insists that we accept that individual rights cases are theoretically distinguishable from institutional rights cases, so that it is permissible to sacrifice the latter to benefit the former. It also requires us to view them as pragmatically indistinguishable, so that it does not matter that Choper's examples demonstrating the weakening of the Court are almost all of the sort over which he would have the Court retain jurisdiction.

In fact, we have reason to wonder whether either of these claims is valid. Why, for example, would we wish to distinguish institutional rights from individual ones? Perhaps because the underlying normative philosophy on which we premise the legitimacy of our political system itself distinguishes persons from things. Perhaps, that is, we accept an autonomy-based theory of individual rights, and therefore accord them a special political priority.

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42. *Id.* 129-70.

43. *See id.* at 176-90.

44. *Id.* at 64-65.

45. *See id.* at 146-50.

So persons would have rights that take precedence over any that an institution such as a state or a branch of the federal government might assert. I find this sort of argument generally to be quite appealing, but it would be naive to believe that this ordering of normative priorities alone provides a basis for distinguishing between individual and institutional constitutional claims.

Here again the reason lies in the fact that the Constitution itself is almost entirely devoted to the sort of claims that I have been facetiously labeling "institutional." If that foundational document in fact is primarily concerned with such matters and is unconcerned about the protection of individual rights, that would appear to argue that our system, for better or worse, does not accept the sort of ethical premise of personal autonomy that I have just suggested it does.

Alternatively, perhaps institutional rights are actually a specialized form of individual right.<sup>46</sup> Perhaps they are therefore not theoretically distinguishable from other rights based on personal autonomy. We should note that the Constitution, even including the Bill of Rights and the fourteenth amendment, does not reach individual rights in any absolute fashion. It is, after all, a political document, and it protects individual rights only as those lie against institutional actions.<sup>47</sup> Interpersonal clashes of personal rights are beyond the scope of the document. If we understand the Constitution to set out the rights of the individual as against the power of the state, then it becomes plausible that individual rights will in-

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46. Interestingly, although Professor Ely's constitutional theory, unlike Professor Choper's, is process-based, he fails to discuss the question of institutional, rather than individual, procedural rights. Insofar as my argument will suggest that an institutional right is merely a specialized individual right to government process, I see no reason why anything in his argument would contradict my claim that the Court should take cognizance of these rights as well.

47. This is the distinction that I believe Professor Ely means to make when he argues that the Constitution yields procedural, rather than substantive, rights. J. Ely, *supra* note 14 at 75-101. It is a deceptive distinction, and one that Paul Cox feels is untenable in practice. Cox, *supra* note 24, at 663 n.127. My own sense is that Ely is simply articulating the fact that the substance of government is procedure. Thus, the substantive content of a document creating a government will necessarily be concerned with the procedures that define the institutions constituting the government itself. And when we seek to infuse expanded meaning into the open-ended terms of such a document, the values that we must rely on are those values that breathe life into our political theory. In this sense, then, all constitutional interpretation is procedural: it is concerned with the ways in which government processes impinge on individual autonomy, not with the independent substantive norms that are the subject of moral philosophy. J. ELY, *supra* note 14, at 48-54, 89-90.

clude certain claims of process. The most fundamental of these is a right to know the law, a right to a stable political process embodied in a coherent social contract. I am suggesting that there may be a fundamental political claim to the form of government embraced by and articulated in the Constitution,<sup>48</sup> and that each one of us has the absolute right to insist, in literally every political forum, that the social contract be enforced. The legitimacy of constitutional government, then, would rely not on its sensitivity to the will of the majority, but on the basic propriety of a set of norms which can only be modified by the sort of overwhelming consensus necessary to set in motion the creaky and cranky machinery of constitutional revision.<sup>49</sup>

Institutional rights, then, are in fact personal ones, and at least historically they were construed as such by the citizenry. The con-

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48. This claim is not content-specific. That is, we have a formal right to insist on the government articulated in the Constitution, independent of the content of that articulation. There may also be a content-specific right. Text accompanying note 84, *infra*.

49. It is fair to assert that these claims may sound in the autonomy of individuals because claims about the basic legitimacy of government may be viewed as claims about the legitimacy of the state's power to intervene in individual lives. It is common to ask how any government not directly consented to by those it governs can assert the right to impinge on the autonomy of its citizens. I am suggesting that the availability of certain fundamental institutional rights, including the right to rely on continuity in form of government, may serve the same legitimating role that active assent does. My notion here is that certain very basic rights to political procedure (rather like those implicitly suggested by Lon Fuller) have a fundamental importance that derives from their ability to legitimate the rest of the government's substantive and procedural political theory. See L. FULLER, *THE MORALITY OF LAW* 39 (2d ed. 1969). Alan Goldman makes the argument that judges have a special obligation to obey the law in order to provide precisely this sort of stability and consistency within the social contract. Goldman, *The Obligation to Obey Law*, 6 *SOC. THEORY & PRAC.* 13, 17 (1980). He does not, however, seem to feel that such stability is itself sufficient legitimation of a political structure. *Id.* at 22-23. Whether or not it constitutes a sufficient justification for a particular government, it does appear to be at least a necessary condition for legitimacy. How likely is it that we would initially consent to enter into an agreement whose terms could be changed whenever an institution created by the agreement deemed it wise to change them? Even if that institution represented the will of a majority of the participants, would we not demand that any changes in the fundamental agreement must require something much closer to unanimity precisely *because* we feel that government requires the continuing consent of the governed? Thus, even if one accepts the more traditional notion of consensual government (which is a substantially stronger requirement than the one I suggest above) it seems likely that we will insist upon a consistent interpretation and implementation of the procedures of government laid out in our Constitution, an interpretation and implementation, that is, which is not subject to legislative whim.

troverly provoked by cases such as *McCulloch v. Maryland*,<sup>50</sup> *Martin v. Hunter's Lessee*,<sup>51</sup> *Cohens v. Virginia*,<sup>52</sup> *Chisolm v. Georgia*,<sup>53</sup> and the Cherokee Nation Cases<sup>54</sup> gives some inkling of the visceral nature of the early development of these rights. For a more contemporary barometer of the extent to which we feel a personal stake in the outcome of such litigation, we need only examine our own response to the Watergate litigation<sup>55</sup> and, less recently, the Steel Seizure Case.<sup>56</sup>

If my view of the basis in personal autonomy of those constitutional rights generally thought to be institutional is correct, then, as should become evident, much of the remainder of Choper's argument comes undone. Even if I am wrong, however, and Professor Choper relies on an unstated constitutional theory that affirms his distinction between personal and institutional rights,<sup>57</sup> there remains the second, pragmatic hurdle which his argument must leap. Is it really true that decision-making in the cases that he would have the Court eschew contributes significantly to a diminution of the Court's influence and strength?

Several questions demand answer here: Is the national Supreme Court more fragile with respect to federal separation of power questions than the state supreme courts are with respect to parallel state cases? If not, then we may observe not one, but fifty-one institutions that have accepted the burden of addressing these sorts of questions and have survived essentially unscathed. Second, we must wonder whether the *particular* cases that Professor Choper would have the Court refuse have in fact contributed to the fragility that he documents. If so, would it not have been wise for him to in-

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50. 17 U.S. (4 Wheat.) 316 (1819).

51. 14 U.S. (1 Wheat.) 304 (1816).

52. 19 U.S. (6 Wheat.) 264 (1821).

53. 2 U.S. (2 Dall.) 419 (1793).

54. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

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

56. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

57. Professor Choper seeks to articulate a principled distinction between individual and institutional rights. J. CHOPER, *supra* note 1, at 201-03. I am simply not convinced by his flat assertion that the Constitution's allocations of institutional powers function solely to regulate traffic and create a workable government. A constitution hardly seems necessary to serve these ends, which could as easily be addressed through legislation or common law. I am similarly skeptical about his flat claim that individual citizens have no interest in the assertion and protection of states' rights. *Id.* at 203-05.



clude a substantial number of such cases among the examples he provides? In fact, he offers virtually no such documentation. Instead, he shows that individuals fail to obey the Court's rights-based decision-making and that they are angered by those decisions and by ones in which the Court overturns the constitutional interpretation of state officials.<sup>58</sup> But these are cases that Choper would have the Court hear.

Suppose, however, that it is true that decision-making in the hard cases that Choper would make nonjusticiable in fact contributes to popular hostility toward the Court. He never shows why it is reasonable to believe that the avoidance of such decision-making would be any less dangerous to the Court's credibility. Is it not plausible that, if he is correct that these cases have nothing to do with individual rights, they will have very little impact, one way or the other, on the electorate? Perhaps, in a purely functional argument of the sort Choper favors, the fact that the litigants in such cases as these are political institutions, not persons, will make them more responsive to the Court's determinations than the unruly populace that must respond to the Court's rights-based decision-making.<sup>59</sup> Furthermore, Professor Choper fails to demonstrate that unpopularity is, in practice, dangerous to the Court's mission. It seems likely that, since in every judicial case there is a loser, and in every case of Supreme Court dimension there will likely be an entire class of losers, general low-level hostility to the Court's decision-making will constantly grow.<sup>60</sup> But it is not clear that this social hostility varies directly with the number of cases actually decided, or that some of it can be avoided by simply avoiding jurisdiction. Nor is it clear that this decentralized hostility has any tendency to coalesce into a significant political opposition to the Court, an opposition composed of parties whose interests are otherwise disparate.<sup>61</sup>

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58. *Id.* at 146-50.

59. The only empirical examples Professor Choper presents have to do with the response of citizens, not governments, to judicial action. *Id.* at 146-50.

Indeed a strong argument can be made that institutional litigants will be less obstreperous than human ones because they have a stronger ethical duty to obey the Court than do mere citizens. *See* Goldman, *supra* note 49, at 13.

60. *Id.* at 156.

61. Professor Choper seeks to make this argument by fiat, bolstered by the unconvincing example of a supposed coalition between opponents of the Court's school prayer decision and its school desegregation decisions. *Id.* at 158-60. The missing link is the failure to demonstrate that the opponents of these issues were in fact meaningful distinct groups even prior to the Court's actions.

Finally, one must wonder whether dodging jurisdiction would not in fact generate still greater hostility than decision-making does.<sup>62</sup> Certainly almost all losers whose cases are so meritorious that they gain review by the Supreme Court will feel that they have been cheated when the Court holds for the other side. But it is only human nature that, if the federal judiciary abstains from deciding an entire class of cases, *all* of the would-be litigants will feel cheated. Each will believe itself to be a probable winner, and each will feel robbed of a favorable outcome. Thus, if the Court hears a case, one party will likely be disaffected. But if it holds that same case to be nonjusticiable it may well have added *two* aggrieved parties to the ranks of its opponents.

#### THE ASYMMETRICAL HERMENEUTICS OF CHOPER'S FEDERALISM

Professor Choper, then, has far to go if he is to be able to maintain his fragility claim even on pragmatic grounds. To provide theoretical justification he must go further still. Perhaps, however, these are merely lapses in his argument, not fallacies. Clearly, I lack the necessary jurisprudential predisposition to do him justice when I seek to articulate the way in which he might try to defend these claims. Nevertheless, in examining his next claim, the "Federalism Proposal," the weaknesses already outlined return with a vengeance. And, as before, even if we ignore these recurring problems, new and independent difficulties arise.

The Federalism Proposal is the notion that the Court should stay asymmetrically clear of federalism questions. That is, it should declare nonjusticiable those cases in which it is alleged that a piece of federal legislation is an unconstitutional incursion on states' rights<sup>63</sup> even though it should continue to hear cases in which it is alleged that a state has encroached on federal constitutional prerogatives.<sup>64</sup> This has significant fragility problems, as noted above. If public attitudes toward the Court are indeed undermined by some of its decision-making, does the Federalism Proposal really afford any sanctuary? Specifically, even if we limit ourselves to the two sorts of cases it addresses, what benefit does it provide?

Perhaps the most revealing example is one that Choper himself suggests, Jefferson's highly critical response to *McCulloch v.*

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62. Professor Choper asserts, without demonstration, that this is not the case. *Id.* at 169-70.

63. *Id.* at 175-76.

64. *Id.* at 205-11.

*Maryland*.<sup>65</sup> What would have happened if the Court had not acted? As a preliminary matter, we should note that *McCulloch* appears to have been justiciable even under the Federalism Proposal, since it sought to invalidate a state law that infringed on a federal institution.<sup>66</sup> Thus, once again, Choper relies for his fragility argument on the hue and cry generated by a case that he would permit the Court to have heard.

There were, however, two issues in *McCulloch*, and the Federalism Proposal would distinguish between them. The first was whether the Congress had the right to create a federal bank, the second whether Maryland had the right to tax it. The first would not be justiciable, the second would. Let us assume that the Court ruled as Choper would have wished. It would not have found the first question to be judicially cognizable. But that would most certainly not have prevented it from reaching the second, and far more controversial, one. Under Choper's plan the Court would have yielded to Congress with respect to the constitutional interpretation of the limits of its authority, and it would therefore have assumed the Bank to be constitutional as a tautological matter of statutory interpretation—if Congress enacted the statute, its content must by definition be constitutional.<sup>67</sup> Believing the power to tax to involve the power to destroy, it would then necessarily have reached precisely the same result, in precisely the same forum, as was in fact reached in *McCulloch*. And it seems likely that the resulting outcry would have been every bit as great.<sup>68</sup> Quite simply, it is dif-

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65. "The Court's act of legitimation provoked Jefferson's famous characterization of the Justices as 'the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric.'" *Id.* at 231. (quoting 1 C. WARREN, *THE SUPREME COURT IN HISTORY* 546 (1932)).

66. This is but one of several examples of Choper's appeal to an example that does not fit his argument. Perhaps the most striking instance is a list of two executive, one military, and one Congressional action which are then lumped together and described as "majority-sponsored activities." J. CHOPER, *supra* note 1, at 142-43.

67. This irrebuttable presumption of congressional authority to interpret the Constitution is stronger than the standard rebuttable presumption of the constitutionality of legislative action. It is precisely this small but significant added procedural twist that generates the problems described in the text.

68. Choper seems primarily to be nervous about the fact that the hostility generated by its decision was directed at the Court, even though it was Congress' act that was upheld. J. CHOPER, *supra* note 1, at 142-43. He may well be correct that at least some of its more sophisticated critics would have aimed their political barbs at the legislature rather than the Court if the Federalism Proposal had been followed. But we must wonder how many critics would in fact have been that sophisticated and, more importantly, whether their ire would work more violence to the system as a whole if it were channeled into political fury at an unbridled Congress rather than into

ficult to understand precisely how the fragility argument cuts when applied to the kinds of cases captured by the Federalism Proposal.

We will again want to know more than Professor Choper tells us about his jurisprudential assumptions if we are to accept the Federalism Proposal. This is the chapter in which he most explicitly presupposes that institutional rights are not grounded in individual liberties. Rather, he seems to believe that institutional rights are mere housekeeping concerns, in which individuals should really have no interest. His apparent message is, let the various governments slug it out among themselves. Why should we get involved? I have suggested at least one reason—that institutional rights are formed out of individual rights—why I think we, as individuals, *are* involved, involved as a matter of fundamental political legitimacy. For Professor Choper's perspective to be the correct one, I would want to have an alternative theory that provided both a source of government authority and an understanding of the theoretical role played by the body of our Constitution.

These questions begin to take on the well-worn quality of a catechism. The Federalism Proposal, however, also raises new issues. In particular it requires a theoretical understanding of the nature of doctrinal interpretation, an understanding that legitimates two parallel, entirely separate hermeneutic paths with respect to a single body of law. Interpretation of the powers of the Congress or the President with respect to the states is to be left to those branches. But interpretation of the power of the states with respect to the federal government is left to the Court. This might be plausible, if seemingly out of balance, were it not for the fact that all of those powers are often inseparably interdependent.

A pair of hypothetical fact patterns suggested by McCulloch may dramatize this point: Let us assume that Congress creates a federal bank and locates one of its branches in Maryland. Maryland, it turns out, has a previously-enacted moderate tax on banks located within its borders, and it seeks to collect payment from the federal bank. The federal bank refuses, arguing that, since the power to tax is the power to destroy, Maryland's actions at least implicitly impermissibly impinge on Congressional prerogatives. Maryland responds by acknowledging that the power to tax may *become* the power to destroy, but argues that the two are distinguishable and that it may exercise the former without asserting the latter. No one raises the

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intellectual frustration over the Court's reasoning process. I make this point somewhat more strongly in the final paragraph of this essay.

question whether Congress had the authority to create the bank in the first place.

Let us suppose, further, that the case reaches the Supreme Court, and that that body must address the issue whether Maryland can tax a congressionally-created bank. Congress has been silent on the question, though the Solicitor General argues that Maryland's action is constitutionally impermissible. The Court, under the Federalism Proposal, would find the question to be justiciable. It holds that Maryland may constitutionally impose such a tax.<sup>69</sup>

Congress, incensed, acts. It passes a law prohibiting imposition of any state tax on any federal bank. Maryland, in its state courts, deems the new congressional act to be unconstitutional. The case reaches the Supreme Court again. In this instance the Court is faced with the constitutional doctrine it has developed, on the one hand, and that developed by the Congress, on the other.<sup>70</sup> Separate strands of constitutional authority have been permitted to develop, and Maryland justly feels that its conceptual position is strongly bolstered by the Court's original acquiescence in it. Congress' act appears to be a mere power play, not a reasoned constitutional judgment.

But, Choper argues, the Court must defer to Congress's will. Actually, that is only part of what he argues. The Federalism Proposal asserts: "the constitutional issue of whether federal action is

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69. This is not inconsistent with what the Court actually held in *McCulloch*. It suggested that other forms of state tax might validly be applied to the federal bank. 4 U.S. (4 Wheat) 436-37 (1819).

70. A situation very similar to this existed in postwar Italy, where two separate courts had distinct, ultimate interpretive authority. One was responsible for interpreting the Italian constitution, the other for interpreting the common law. Because it was impossible to maintain totally separate doctrinal strands, intense conflicts emerged between the two courts, conflicts that could not be resolved within the Italian legal system. See Merryman and Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 AM. J. OF COMP. L. 665 (1967).

In a recent article Lawrence Sager suggests an interesting distinction that would complicate the hypothetical still further: he argues that the balance of judicial versus congressional authority shifts as between a case in which the Supreme Court holds state practices to be constitutionally infirm and a case in which it holds, absent congressional action, that a specific state action is constitutionally permissible. He notes that, within the bounds of its constitutional powers, Congress may invalidate state action of the latter type, and the Court will thereafter be bound to enforce this new piece of legislation. Sager, *The Shortcut to Outlaw Abortion*, N.Y. REV. OF BOOKS, June 25, 1981, at 39, 40. As I read Sager's argument, the Court could invalidate such congressional action if it deemed it to exceed congressional authority under the enumerated powers. *Id.* at 41. Under Choper's Federalism Proposal, such a claim of congressional overreaching would also be nonjusticiable.

beyond the authority of the central government . . . should be treated as *nonjusticiable*, final resolution being relegated to the political branches—i.e. Congress and the President.”<sup>71</sup> Thus, in vesting final interpretive authority in federal political branches, Choper seems to feel that nonjusticiability—a lack of jurisdictional power even to hear a case—is equivalent to federal supremacy—a judicial holding, in a justiciable case, that another branch may legitimately determine the scope of its own action. In fact, of course, holding the issue (which here is the entire case) to be nonjusticiable would simply throw the question back into the entire political arena, which happens to include the internal political mechanism of the state of Maryland. Alternatively, the Court could recognize congressional or presidential supremacy. But doing so would reveal an inexplicable tenet of underlying constitutional theory: we are asked to believe that the document has no coherent independent meaning, but rather is simply an abstract armature around which the political branches can sculpt whatever substantive law is currently in vogue with their constituents.<sup>72</sup>

The Court, then, would have to take one of two actions under the Federalism Proposal. First, it could accept jurisdiction, rule the case justiciable and then rule, according to Choper’s claim, that Congress’ actions are *per se* constitutional. Under this approach, the Court would view its initial judgment about the constitutionality of Maryland’s action to have been contingent—Maryland’s tax was constitutionally-valid only in the context of congressional silence. Once Congress spoke, the matter became a simple question of statutory enforcement, and the Court would be required to subordinate its prior reasoned interpretation of Maryland’s rights to Congress’ more recent (and more self-serving) political one. This seems to be the result that Choper would require.<sup>73</sup>

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71. J. CHOPER, *supra* note 1, at 175 (emphasis added).

72. The dangers of this form of political shuffleboard are discussed in Sager, *supra* note 70. It is possible, and recent events even suggest that it is likely, that minorities of voters who are “passionate” on at least two distinct issues can manipulate the representative political process in such a way that this approach to constitutional interpretation is not even majoritarian. See Rogowski, *Representation in Political Theory and in Law*, 91 ETHICS 395, 400 (1981), citing A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 55-60 (1957).

73. “In such decisions, unlike its constitutional rulings on individual liberties and national power versus states’ rights, the Court does not speak the final constitutional word. The federal political branches do.” *Id.* at 207. It is unclear what Professor Choper means by alluding to Supreme Court rulings on the constitutional balance between national power and states’ rights. The Federalism Proposal seems explicitly to permit Congress to preempt that sort of decision-making on the part of the Court by allowing it to enact legislation that will then be deemed nonjusticiable. In addition, the

The Court's other alternative would be to hold the issue to be *genuinely* nonjusticiable. It would then have to decide whether, absent any conclusive constitutional interpretation, it was bound to enforce an extension of congressional power that its earlier doctrinal interpretation had suggested was unconstitutional. If Choper were urging genuine nonjusticiability, then, the Court would make no judgment about the constitutionality of Congress' (or Maryland's) actions. Instead, it simply would refuse to hear those issues because the rules of the game, once Congress has acted, do not grant it discretion to do so.<sup>74</sup>

Unfortunately, whether the Court rules or not, since it does not presume to issue an authoritative constitutional judgment, Maryland has its own enforcement mechanisms,<sup>75</sup> and the federal government (in the form of the bank and in the person of its officers) is very much present in Maryland. So the Federalism Proposal, by bifurcating doctrinal development and vesting final authority in the political branches, serves only to exacerbate tensions and transfer the locus of discussion from right to might.

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passage quoted here seems to transform adjudication in which *both* the state and a federal political branch have acted into a simple matter of statutory or administrative interpretation on the Court's part. The only remaining cases in which the notion of a Supreme Court constitutional ruling with respect to a clash between states' rights and those of a federal political branch might have any meaning would be those in which the state *has* acted and the federal branches have *not*. But if Professor Choper means that these decisions are actual, final interpretations of the Constitution by the Court, then subsequent Congressional action of the type described in the text could not be granted the deference that the Federalism Proposal seems to require.

However this apparent internal conundrum is worked out, we are left with the difficulty suggested in the text. The *McCulloch* example is substantially less unnatural than it may initially seem. The current congressional attempt to circumvent *Roe v. Wade* by reinterpreting the word "person" in the fourteenth amendment would, if it succeeds and is accepted by the Court, create a very similar circumstance. Many of the concerns expressed about the propriety of such congressional action ( *see, e.g.,* Sager, *supra* note 70) are equally applicable to the *McCulloch*-based hypothetical. (I recognize, of course, that the abortion question sounds in individual rights and is therefore justiciable even on Choper's terms. That distinction, however, does not appear to mitigate the applicability of the kind of argument that Sager makes to questions that sound only in institutional rights.)

74. Another area of dense undergrowth in the jungle of Professor Choper's reasoning is the question whether his implicit constitutional theory defines his various nonjusticiability proposals to be discretionary refusals of jurisdiction on the part of the Court or rather to be mandatory theoretical limitations on its constitutional reach.

75. The actual events surrounding the bank cases (including the impounding of federal reserves and the arrest of federal employees) is richly illustrative of the point made by the hypothetical fact pattern. *See* 4 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 323-30 (1919).

Ultimately, then, these two hypothetical cases highlight the central problems implicit in the Federalism Proposal as Choper defines it. If the Proposal actually urges that the Court should *not* decide the constitutionality of issues on which Congress or the President has acted, but that it *should* decide the constitutionality of issues on which the other federal branches are silent but on which a state has acted, then two parallel lines of constitutional doctrine are encouraged. This will inevitably lead to a clash between those parallel doctrines, a clash that, by definition, will lack the reflective quality inherent in judicial decision-making.<sup>76</sup>

The other possibility, which is admittedly more faithful to Professor Choper's arguments,<sup>77</sup> is that the Court should in fact decide all federalism cases on their merits. Its decision-making, however, is to be tempered by the understanding that only Congress and the President can make an ultimate, authoritative constitutional interpretation. The Court takes on the quality of a fidgety go-between, hoping that, when the other branches have been silent, its judicial interpolation will not tread on legislative or executive toes. As soon as one of the other branches speaks, even if it reads the Constitution differently from the way in which the Court had, the Court must adapt its view to that of the majoritarian body and must enforce the new rule. In doing so it finds the question of the Constitution's reach to be justiciable, and holds that the answer to that question is to be found in, for example, congressional action. One must wonder, then, why the Court should be involved at all. Would it not be far better to leave the question entirely up to Congress and the executive, allowing them to respond to state incursions directly? State actions, under this approach, even when taken in the context of congressional and presidential silence, are reviewable by those branches and by state courts. Why should such state action be so suspect that the Supreme Court must be called in to make contingent decisions which, if they offend either the Congress or the President, can always be legislatively or bureaucratically overturned by *force majeure*?

Choper asserts, however, that his asymmetrical approach is actually a virtue, since the states are so plainly well-represented in

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76. Waggoner, who has substantially greater faith in the value of legislat. decision-making than I do, expresses similar reservations and suggests that judicial deference to congressional action may perhaps be best justified by analogy to the doctrine of *res judicata*. That leaves open, of course, the question why the Court should revise its own judgment when Congress acts only *after* a judicial decision has been rendered. Waggoner, *supra* note 23, at 38.

77. Choper, *supra* note 1, at 175.



the federal decision-making process,<sup>78</sup> even though federal interests are not represented in the states.<sup>79</sup> Thus we should not be surprised that individual states will occasionally misconstrue the Constitution to further their own interests, but we will never expect the federal government to intrude on the rights of the states of which is it composed. This has some initial appeal, but it still does not explicate why, under Choper's scheme, the Supreme Court is the branch that must be assigned to deal with the anticipated state encroachment on federal prerogative. Why not simply leave this sort of determination to Congress as well?

Furthermore, we must ask whether Professor Choper genuinely wishes us to believe that elected federal officials are better barometers of state interests than their local counterparts.<sup>80</sup> If so, one wonders why it is, for example, that Congress could pass with apparent ease a piece of legislation that required every state to adopt policies governing education of the handicapped which exceeded those implemented by literally *any* of the states at the time the federal law was passed.<sup>81</sup> Perhaps it could be argued that most states were prevented from following their actual desires, out of fear that they would become magnets for the families of the handicapped.<sup>82</sup> Nevertheless, that argument seems particularly weak when we observe how many states' welfare and medicaid programs exceed the minimally acceptable federal level, even though I know of no state in which, even five years after its passage, the educational benefits accorded the handicapped exceed those required by federal law.

The claim that the states are represented so well in the federal government that they will never find themselves constitutionally mistreated by an act of Congress or of the President also flies in the face of Choper's analysis of individual rights. Individuals are represented in the federal government, arguably more directly than the states are. Nevertheless, Professor Choper does not believe that this in fact affords *their* rights any significant protection, and he relies instead on the Court for shelter.<sup>83</sup> Yet he believes that since

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78. J. CHOPER, *supra* note 1, at 176-90.

79. *Id.* at 205-11.

80. *Id.* at 181-84.

81. 20 U.S.C. §§ 1401-61 (1976).

82. See J. CHOPER, *supra* note 1, at 184-85. This argument is similar to the one frequently made concerning federal welfare legislation; it would explain why each state might choose individually not to enact welfare legislation of its own, even when there existed a clear national mandate for a welfare system.

83. *Id.* at 64-65.

the states are represented in the federal government they will never be encroached upon.<sup>84</sup> Perhaps he feels that federal legislators place themselves in Rawls' original position<sup>85</sup> when they make determinations that have an impact on the states (by assuming themselves to represent the least well-off state), even though they routinely refuse to place themselves in that position with respect to their individual constituents. Or perhaps he simply feels that no one really cares whether the federal government occasionally treads on states' toes, a belief that presupposes that there can be no individual right to political process.

Indeed, Professor Choper explicitly, repeatedly, and quite improperly seeks to hold individual claims to due process to be irrelevant to his argument.<sup>86</sup> He suggests that no individual right against the state is implicated when a litigant claims that, for example, the Congress has taken an action which the petitioner believes to be unconstitutional in Congress' hands but not in those of the states. He points out that some government could permissibly take such action, and he therefore seems to believe that which government actually takes the action is unimportant. In his book *any* process is *due* process.<sup>87</sup>

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84. Representation, at least of the sort that the states have in Congress, does not necessarily assure that their interests will be fairly reflected in legislative enactments. Log-rolling, which is arguably a necessary and beneficial aspect of representative government (see Waggoner, *supra* note 23), can result in the unfair exclusion of some states' interests. See Rogowski, *supra* note 72, at 399. Intrinsic, but unavoidable, failures of representation (such as that discussed in note 72, *supra*) may yield additional inequities. *Id.* at 400.

85. J. RAWLS, A THEORY OF JUSTICE 11-17 (1971).

86. J. CHOPER, *supra* note 1, at 195-205, 272-73.

87. Professor Ely is highly critical of the notions of "substantive" and "procedural" due process, suggesting that the former is a contradiction in terms and the latter a redundancy. In fact, though it is true that procedure is necessarily implied by the "process" half of these phrases, it is a mistake to believe that that definitionally excludes any reference to substance. The other half, the word "due," actually forces us to examine the substance of the political rights in question. No one would argue against the claim that *different* process is due with respect to different takings in different substantive contexts. To know what process is due in any set of circumstances, then, requires an investigation into the substance of the asserted violation. When we make such an investigation it is even conceivable that we will find some substantive circumstances for which we cannot, in the current context, imagine any procedures extensive enough to legitimate the taking in question. Such circumstances would lead to traditional notions of substantive due process. Whether such circumstances exist or not, however, Professor Ely's claim is too strong. The phrase "substantive due process" simply puts a meaningful emphasis on the due-ness of the process, while the phrase "procedural due process" places the emphasis on formal questions of procedure. By arguing that whatever actions can legitimately be taken by one instrumen-

But is it? Can any legitimate governmental end be accomplished by any conceivable governmental means without violating individual rights? Not even Choper believes this to be the case, for he hauls out a substantive due process argument in support of the judiciary's right to review cases that involve conflicts with the other branches.<sup>88</sup> Individuals may have rights to some government processes. But, for Choper, they apparently have no right to the clear articulation of a line between the power of the nation and that of the states.

I wonder why not. I share the prejudice that the federal government is far more sensitive to individual welfare rights than are the states. So I, like many of my colleagues, agree to look the other way when these are smuggled into government as federal legislation rather than as a matter of right asserted on behalf of individual litigants in state or federal court. I would therefore be sympathetic to an argument that eliminated the role of the states. At the same time, I am also sympathetic to the fears of those who believe that small is beautiful and big is bad. Perhaps this caution reflects an undue conservatism, but even paranoids occasionally have genuine enemies, and I wonder whether the Framers were not wise to dole out government power sparingly and with respect for the proximity of government to the governed. In short, I wonder whether my right to a clearly defined federalism—that is, my right to claim that there are some things the states can fairly do to me that the federal government cannot—is more than simply an assertion of a right to a stable social contract. Perhaps it also includes a right to a decentralized polity.<sup>89</sup> If either is the case, and most particularly if the latter is, then Professor Choper is wrong to dodge the argument that federalism is in fact *Our* Federalism—that it may well sound in an assertion of individual rights not meaningfully distinguishable from those for which he concedes the importance of judicial review.

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tality cannot as a matter of right be withheld from any other government instrumentality, Professor Choper seems to agree that the "due-ness" in "due process" is surplussage adequately captured by "process" alone.

88. J. CHOPER, *supra* note 1, at 388-93.

89. Professor Choper does address this claim, though he asserts that it has "no solid historical or logical basis." *Id.* at 244, 244-58. Unfortunately, since he does *not* consider the possibility that institutional rights may be rooted in individual ones, his argument is substantially undermined. Furthermore, virtually all of his arguments against the smaller-is-better claim (which is, after all, an end-in-itself) sound in history or efficiency (which are relevant only to instrumental ends). The claim that decentralization of political power is a fundamental political right in our polity emerges from his attack, therefore, virtually unscathed.

THE ASYMMETRICAL HERMENEUTICS OF  
CHOPER'S SEPARATION ARGUMENT

We may harbor many similar doubts with respect to Professor Choper's "Separation Proposal" as well. This is the claim that the Court should find all separation of powers cases involving a conflict between the executive and the legislature to be nonjusticiable.<sup>90</sup> It is closely tied to the "Judicial Proposal," which asserts the Court's duty to intercede in separation cases in which its own branch is implicated. Somewhere between the two proposals there lies an important group of cases in which the President and the Congress argue about which has the authority to regulate the courts. But Choper experiences so much difficulty parsing out the differences between the two types of cases he *does* address that we should probably be relieved that he does not even try to deal with this third category.

I have suggested elsewhere that I believe separation of powers cases of the kind that Choper would proscribe to lie at the very heart of our judicial structure.<sup>91</sup> It is not surprising, therefore, that I find the Separation Proposal to be the least palatable portion of his book. In particular, I would argue that one of the most important latent functions of the separation of powers is the way in which it accommodates the inherent conflict between twin desiderata: responsiveness to the will of the populace on the one hand and a desire for a coherent (that is, simultaneously internally consistent and substantively complete) theory of government on the other. We are, I think, equally concerned that our system be responsive to our wishes, that it treat like cases alike, and that it provide some finite answer to all questions of law. But these are internally incompatible. A particularly cogent demonstration of that fact is contained in Arrow's Theorem, which proves that no system which is even minimally responsive to the wishes of a diverse populace can necessarily be internally consistent.<sup>92</sup> Thus we must accept either the wishes of some "dictator" or the dictates of a legal system that is either inconsistent or incomplete. As a practical matter, the separation of powers solves this problem by creating a complex hybrid dictator.<sup>93</sup> Initial questions of policy are broadly addressed by a highly representative

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90. The Separation Proposal suffers from an occasional willingness to equate nonjusticiability with an irrebuttable presumption of the validity of congressional or executive action. *See, e.g., id.* at 350.

91. Farago, *Intractable Cases: The Role of Uncertainty in the Concept of Law*, 55 N.Y.U.L. REV. 195, 231 n.154, 238 (1980).

92. K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963), *discussed in Farago, supra* note 91, at 229-31.

93. *Id.*

legislative branch. Questions of specific application, in which the problem of internal inconsistency would be most likely to emerge, are directed to an extensive pyramidal judicial structure at the pinnacle of which sits a single, multi-person court. Ultimately, since even an organism as small as the Supreme Court cannot guarantee perfect consistency,<sup>94</sup> implementation is left to a branch that is in the direct control of a single, elected official. Furthermore, for reasons that have to do with the difficult problems engendered by self-reference in systems of thought,<sup>95</sup> inconsistencies are most likely to develop in situations where one of the branches is responsible for reviewing the scope of its own authority.<sup>96</sup>

Without belaboring the point, I simply note that if my arguments elsewhere are correct, Choper's final two proposals utterly misperceive the true function of the Court and of the separation doctrine. The Separation Proposal is wrong because it encourages uncertainty in the system, both because it prohibits the Court from resolving one of the problems which it is specifically designed to address and because it encourages the other branches to seek resolution of those problems by means of the most dangerous mechanism, self-review. Indeed, I believe that this is as true of the less onerous but no less dangerous political question doctrine as it is of Choper's somewhat more absolute Separation Proposal. The Judicial Proposal, on the other hand, asserts jurisdiction over precisely those cases from which we can most probably expect threats to the internal consistency of the system, cases of self-review. There is, however, no way to avoid those threats entirely, and it may well be that judicial review of the principles of judicial jurisdiction is as good a mechanism as any.<sup>97</sup> Even so, self-review is by no means so simple a subject as Choper seems to believe, either for the judiciary or for the other branches, and it merits substantially closer scrutiny than he provides.

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94. Arrow's theorem is applicable to systems with three or more members. K. ARROW, *supra* note 92, at 24.

95. Self-reference is the ability of a system of thought to accommodate discourse about itself. Examples of self-referent systems include judicial theories that permit courts to adjudicate questions concerning the limits of their own jurisdiction. Systems of reasoning which are self-referential are often susceptible to deep internal uncertainty. Farago, *supra* note 91 at 223-29; see D. HOFSTADTER, GÖDEL, ESCHER, BACH (1979).

96. Farago, *supra* note 91 at 227.

97. Farago, *supra* note 91 at 231-39; Farago, *Judicial Cybernetics: The Effects of Self-Reference in Dworkin's Rights Thesis*, 14 VAL. U.L. REV. 371, 420-25 (1980).

A further difficulty is also related to the problem of self-review. The Court is often faced with cases in which there are one or more threshold separation questions of the sort Choper would hold nonjusticiable. In these cases, oversight of the other branches necessarily *becomes* oversight of the Court's own jurisdiction, for it cannot avoid somehow answering the threshold questions if it is to reach the issues that even Choper believes would properly be before it. For example, Choper discusses at some length the removal power of the President.<sup>98</sup> There are numerous positions which are filled by presidential appointment and ratified by Senate approval. The issue has periodically arisen as to whether the President may unilaterally remove such appointees, or whether that, too, requires congressional action. The Constitution, of course, is totally silent in this regard. And Professor Choper argues that the Court should decline to become involved in such a dispute.<sup>99</sup> Without judicial intervention, however, the war between the branches might well escalate. If the position at issue were, say, Attorney General, Congress might pass a funding bill which would prohibit the Acting Attorney General from spending any funds without the express approval of the ousted individual. A Justice Department vendor might then sue for payment of a debt contracted after the effective date of the funding bill. How can the Court act on the contract claim unless it presupposes some resolution of the separation questions?

The example is admittedly attenuated, but the principle it expresses is not. A battle between the President and Congress is a political fact that will almost always ripple outward to set off other disputes. The farther away from the initial dispute we get, or the longer that that dispute drags on (as it would were the Court not to intercede), the likelier it will be that other claims, not sounding in the separation of powers but impossible to adjudicate without at least implicit resolution of the separation issue, will be presented to the Court. And these will force the Court either to become involved in separation issues otherwise proscribed or to revise and limit further its own jurisdiction.

We may wonder, moreover, what sort of political theory would grant the Court jurisdiction to hear cases to which both it and another branch are parties, but which would deny it jurisdiction over cases in which it is not involved. Certainly if Choper's aversion

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98. J. CHOPER, *supra* note 1, at 330-34.

99. *Id.*

to the Court's autocratic antimajoritarianism has any force at all it should serve to prohibit judicial decision-making in those cases where the judiciary itself is an interested party. Even dictators can be benevolent when their own interests are not implicated. Yet it strains the imagination to believe that the Court will be totally impartial in determining conflicts between its own interests and those of Congress or the President. Professor Choper responds to this by hinting that the due process claim which he rejects everywhere else, even with respect to the separation of powers disputes that do not involve the judiciary, may be acceptable here. Perhaps, he suggests, the Court may have a *duty* to become involved because there is a constitutionally-based individual right to judicial process.<sup>100</sup>

Well, a sucker is born every minute, and there may well be people who believe that the judiciary is so sacrosanct that citizens have an absolute right to have their case heard, even by politically-appointed redneck judges presiding over frontier courts. And these same people may believe that they have no right to rely on a coherent social contract or on the constitutionally-mandated decentralization of government decision-making. But nothing in Professor Choper's book convinces me that the Court's interests are based any more directly on individual rights than are those of the states, or of the Congress, or of the President.<sup>101</sup> If judicial interests are not based on individual rights, which Professor Choper puts forth as somehow paramount, what justification can be found for sacrificing the Court's credibility in rights-based decisions (the fragility argument) in order to protect the judiciary's less vital self-interest? Yet, if

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100. *Id.* at 388-93.

101. Professor Choper seems to feel that the Court's interests are worthy of protection. *Id.* at 384. This raises a disturbing problem. What is the source of their worth? If it is rights-based, then he must believe that the Court's interests differ from those of the states in a way that he never articulates. But if they are policy-based, and therefore less critical than the protection of individual rights, how can he justify risking the Court's integrity, as the fragility claim insists he would in any constitutional adjudication? The difficulty is that the argument somehow seems to equate all three types of claims—individual rights, states' rights, and judicial rights. Thus, since the states are represented in Congress but the courts and the citizenry are not, he sees no need to protect the first, and is therefore willing to sacrifice them in order to save the last two. But if all three sound in *rights*, then none can legitimately be sacrificed on the basis of that kind of exigent reasoning. If none sound in rights, as seems the most coherent logical explanation of Choper's thesis, then we will want to repeat and extend the inquiry into what, precisely, Professor Choper thinks a constitution is. Why should individual claims be protected if they have no autonomous legitimacy? Finally, if individual rights *are* rights, but the others are not, then the extended balancing between fragility and representation in which Professor Choper engages is conceptually inappropriate.

alternatively all of these interests are based on individual rights, what justification is there for denying the Court jurisdiction in any of them?

#### CONCLUSION: THE VICES OF PRAGMATISM

I find, therefore, significant lapses in each of Professor Choper's major proposals. I cannot accept his unreasoned majoritarianism, his seemingly inconsistent respect for the protection of individual rights (without extending these to include, as I would urge, the institutional rights they imply), his belief in the fragility of the Court, his dual-track hermeneutics in federalism cases, his unwillingness to involve the Court in the sort of separation of powers cases for which it is most expressly designed, or his eagerness to involve the Court in those cases for which it is least likely to find an adequate solution.

Fundamentally, however, I must return to the point at which I began. *Judicial Review and the National Political Process* is an object lesson in the central role that legal theory necessarily plays in explicating legal practice. Virtually all of the gaps in this remarkably well-documented and otherwise thorough book are attributable to Professor Choper's failure to articulate the jurisprudence on which he relies. Inconsistencies, circular reasoning, reliance on the force of authority rather than of argument, all of these are almost inevitable consequences of a failure to identify and adhere to a set of initial premises.<sup>102</sup>

And there is a worse danger still. Without an underlying theory, Professor Choper is able to conclude without addressing some of the most important functions of the Supreme Court's role *within* the social contract that we have a right to see enforced. The Court is a powerful force for reassurance and legitimacy, even when its determinations go temporarily unheeded. It contributes to the certainty and stability on which we can found an allegiance to a polity whose terms we did not ourselves forge. It provides a healing,

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102. As should be evident from this essay, yet another danger of leaving one's premises unarticulated is that frustrated jurisprudentially-oriented critics will find themselves filling in the blanks. The justification for their doing so is simply that it is impossible to make an argument without at least some minimal underlying theory, so the failure to articulate that theory is an invitation to seek it inferentially. To the extent that my attempts to do so fall short of accuracy (which, I fear, is considerable), I can only plead that in having done so I have demonstrated yet another reason why *Judicial Review and the National Political Process* would be better served if its theory had been clearly set out in its text.



principled understanding of the issues that have the greatest potential to disrupt the entire political system, and in so doing it keeps our government firmly yoked to the underlying theory by which it is driven. Indeed, it is here that Professor Choper's unwillingness to express his jurisprudential assumptions takes its greatest toll, for it is in this way that his fragility claim transforms one of the Court's greatest strengths into an apparently crippling weakness: Certainly, he is correct in identifying the hostility that judicial review engenders. That sort of hostility is endemic to any social system which permits government action without the unanimous consent of the governed. It is the Court's great virtue—indeed perhaps its greatest virtue—that it transports the violence of those feelings from the battleground of warring factions to the intellectually fecund field of principled jurisprudential discourse.<sup>103</sup>

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103. See Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) ("the Justices are inevitably teachers in a vital national seminar").

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