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An Introduction to Constitutional Interpretation

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AN INTRODUCTION TO CONSTITUTIONAL INTERPRETATION

By Gerard J. Clark*

(final)

While the case of Marbury v. Madison[1]5 U.S. (1Cranch) 137 (1803) has had its share of criticism[2], its basic holding that the Supreme Court is the final arbiter of the meaning of the Constitution is certainly bedrock. However, given the "counter-majoritarian difficulty,"[3] which suggests that judicial review is in tension with democratic rule, the Court's authority to displace majority decisions found in state and federal law becomes problematic. The authority can be claimed as emanating from the original social compact, ratified by a super-majoritarian popular consent and intended to continue in time unless and until amended. However, claims of judicial tyranny can be heard by the opponents of virtually every exercise of judicial review. In theory, the closer the decision is to the original deal, the greater its legitimacy. But what was that deal- was it to keep judicial review closely tied to the specific language and meanings of the founding document; or was it to vest the Court with a degree of flexibility to fashion a body of law that assured that the meaning of fundamental rights would develop and flourish in an ever changing world? The Court's history has seen frequent movement between these two poles.

Over the years a wide variety of interpretative theories or modes have been developed by the Court or by individual justices. There is no definitive list of these modes and every commentator has his or her own take on the matter[4]. The goal of this piece is to introduce the most commonly used modes[5]. These modes may be viewed as tools of the trade of Constitutional

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[2]Van Alstyne; A Critical Guide to Marbury v. Madison 1969 Duke L. J. ; Hand, Bill of Rights; (1958) ("nothing in the Constitution gives the Court any authority to review the decisions of Congress"); Fallon et al., Hart and Wechsler's The Federal Courts and the Federal System 4th ed. (1996) p. 78 et seq.

[3]Bickel, The Least Dangerous Branch (1962)

[4]Few subjects have been as attractive to the academic commentators. See e.g.: Tribe, American Constitutional Law (New York, Foundation Press, 2000) p. 30 et seq.; Balkin and Levinson, The Canons of Constitutional Law 111 Harv. L. Rev. 964 (1998); Brown, Accountability, Liberty and the Constitution 98 Colum. L. Rev. 531 (1998); Lessig, The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be 85 Geo. L. Rev. 1837 (1997); Amar, "Intratextualism" 112 Harv. L. Rev. 747 (1999); Bobbit, Constitutional Interpretation (1991); Dworkin, Freedom's Law, The Moral Reading of the American Constitution (1996); Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law (1988).

[5]Other theories of interpretation that could have been included here are republicanism, which suggests that the law is guided by a sort of deliberative collective unconsciousness; Ackerman, We, the People, Transformations formalism, which suggests that adjudication involves definition and labeling, such as the line of cases which attempted to determine whether effects on

decision-making. No court nor justice has ever claimed allegiance to only one of the modes to the exclusion of all others, although the Court of individual justices often overtly draw on them in justifying decisions.

Four modes, that will be discussed in this piece, can claim a more or less direct relationship with the document and may, therefore, be called originalist: text, intent of the framers, structure and doctrine. Two others modes posit a set of values that are discovered in the Constitution, at best, by implication, namely natural law and solicitude of the unfortunate; these modes may be called extrinsic. In three of the modes the Court retraces and evaluates the reasoning that led to the governmental action under review and the means used, and may, therefore, be called super-rationalist. Finally, modern academia has been highly critical about all of this, suggesting that the whole endeavor is political or invalid; these may be called the skeptical.[6]

A. THE ORIGINALIST MODES

These four modes, text, intent of the Framers, structure and doctrine can clearly be inferred from the Framers original efforts. They had a goal of nation building which they reduced to a writing. The result shared power with the prior existing states and split federal power among the three branches. The Court would expound the meaning of the document in written opinions that decided actual cases.

I. TEXT

The Constitution is a document containing some ten to twenty pages of text- words or narrative arranged in sections and amendments.[7] The Framers spent four months in 1787[8] writing

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interstate commerce were "direct" or "indirect;"see Corwin, The Passing of Dual Federalism 36 Va. L. Rev. 1, 1950; law and economic analysis which suggests that the Court should seek efficient solutions to Constitutional problems; realism, consequentialism, pragmatism, instrumentalism, and functionalism, all of which suggest that examination of real world results is an important aspect of judicial review; the balancing mode, described infra, makes use of these methods..

[6]This last mode differs from the first eight in that it is not strictly speaking a methodology used by the Court. It is included herein in the interest of balance because the true skeptic would consider this whole article an exercise in futility.

[7]Grey, The Constitution as Scripture 37 Stan. L. Rev. 1 (1984); Scalia, A Matter of Interpretation: Federal Courts and the Law (1997); Lawson, "On Reading Recipes ... and the Constitution 85 Geo. L. Rev. 1823 (1997); Dorf, Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory 85 Geo L. Rev. 1857 (1997); Lessig, Understanding Changed Readings: Fidelity and Theory 47 Stan. L. Rev. 395 (1995); Dworkin, The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve 65 Ford. L. Rev. 1249 (1997)

[8]Farber and Sherry, The History of the American Constitution, (St. Paul, West Publishing Co., 1990)

and debating the text. They intended that their product would continue in time and control the future, thus expressing, in a sense, a skepticism about future generations.[9]Certainly the text is the appropriate beginning and end of the discussion of many easy cases. Should President Clinton have suggested that he would like to run for a third term, the response is clear: the Twenty-second Amendment states that "[n]o person shall be elected to the office of the President more than twice,..."[10]

The questions about the use of text usually involve its limits and its methodology. The limits arrive quickly upon the back of the non-obvious case, such as whether the Commerce Clause of Article I section 8 authorizes Congress to enact grain acreage limitations. The most absolute member of the court on these questions was Justice Black who seemed to feel that any further inquiry into intent, history or pragmatics, involved the judge in an exercise that was too vague and uncertain to be acceptable for a judge whose function was interpretation rather than creation.[11] Literary critics, however, remind us that the meaning of text must be created instead of discovered.[12]

. The finest examples of the use of the text to justify a result are two the Marshall opinions in McCollough v. Maryland[13] and Gibbons v. Ogden.[14] It is the power to regulate;

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[9]Levinson, Law as Literature 60 Tex. L. Rev. 373, 376 (1982)

[10]Shauer, Easy Cases, 58 S.Cal L. Rev. 399 (1985)

[11]Justice Black and the Bill of Rights CBS News Special 9 Sw.L. Rev. 937 (1977). Notwithstanding these absolute statements, Black did sanction historical research into the intent of the Framers in his famous Adamson dissent. Adamson v. California 332 U.S. 469 (1947).

[12]S. Fish, Is There a Text in This Class? P. 327 (1980). See also F. Nietzche, On the Genealogy of Morals p. 77 (W. Kaufmann Trans. 1967) "all events in the organic world are a subduing, a becoming master, and all subduing and becoming master involves a fresh interpretation, an adaptation through which any previous "meaning" and "purpose" are necessarily obscured or even obliterated."See discussion infra.

[13]17 U.S. (4 Wheat.) 316 (1819). The question, of course, was whether Congress had the power to create the Bank of the United States. Congress had the power to regulate commerce and to coin money, but not the power to create a bank. Marshall ingeniously read the necessary and proper clause to allow Congress broad discretion to decide how to exercise these powers: "It is true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? *** To employ the means necessary to an end, and not as being confined to those single means, without which the end would be entirely unattainable. *** The word "necessary" *** has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws,"

that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limits, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the question which arise in this case, or which have been discussed at the bar. If, as has always been understood, The sovereignty of Congress, though limited to specified objects is plenary as to those objects... as absolutely as it would be in a single government..."

II. Original Understanding

The drafting of the Constitution and each of the amendments involved extensive deliberative processes. Innumerable drafts were written, speeches were given, reports were developed. Contemporaneously newspapers, journals and commentators added their views. After passage by the Convention, the proposals then went to the legislatures of the states for further debate and deliberation. The original understanding refers to the meaning that was understood at the time of enactment. It is discovered by a process of historical research into sources contemporary to the enactment.[15] The proponents of this mode of interpretation claim that any freer ranging interpretive posture on the part of the Court involves an illegitimate assumption of power and is thereby unjustified.

The difficulties with this method are numerous and difficult.[16] The notion of intent or understanding makes sense when directed at an individual; However it is difficult to attribute these terms to a large group of legislators who deliberate and vote at different times, many for

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with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view."

[14]22 U. S. (9 Wheat.) 1 (1824) Here Marshall was confronted with the question of whether Congress had the power to issue a license that allowed the holder to provide a ferry service across New York harbor: " The subject to which the power is next applied, is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary...

We are now arrived at the inquiry – What is this power?

[15]Bork, The Tempting of America: The Political Seduction of the Law (1990)

[16]Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 Nw U. L. Rev. 226 (1988)

unspoken reasons, including party affiliation, indebtedness to a committee chairman, political pressure or compromise. An attempt to find a single unitary intent in a process as diffuse as constitution-making seems futile. Even if it were not futile, what are appropriate sources? Why should a court be influenced by a speech by one legislator on the floor of the House. Who is to know the degree to which it represents the opinions of the majority? Why should the opinions of Hamilton or Madison or Jay in the Federalist Papers have any especial significance in divining the intent of the convention that finally passed on the final text of the Constitution.[17]

Further one can ask what was the original understanding about the legitimacy about this exercise in the first place? Did the Framers expect that their language or indeed their speeches would be parsed by future courts to find solutions to specific legal questions?[18]see also Powell, Rules for Originalists 73 Va. L. Rev. 659 (1987) This further relates to a pervasive question of constitutional interpretation namely the specificity-generality problem. Should the Court be bound by how the Framers would have answered the question before the Court?, or by the interpretation that best meets the more generalized goals that the Framers were pursuing? Did the Framers foresee broader and more free-wheeling common law-type inquiries? Finally, how does one handle questions that were never conceived of by the framers like wire-tapping or internet pornography?

Establishment Clause cases typically make extensive use of Madison's notes and earlier drafts of the First Amendment. For instance in Lee[19], Justice Souter's concurrence quotes four different earlier renditions of the religion clauses in support of his claim that the Clause was not merely a prohibition against the preference of one religion over another. Justice Scalia, in dissent, suggested that the Church of England was the established church in the colony of Virginia and quoted George Washington's prayer in his first inaugural address as evidence of the national commitment to religion.

III.. Structural

The Constitution establishes and recognizes power-sharing on vertical and horizontal planes. Vertically, it creates a national government, while leaving large amounts of residual power in the states, a relationship of federalism. Horizontally, the federal power is distributed among the legislative, the executive and the judicial branches, mirroring a similar distribution at the state level, separation of powers. The Court as final expositor of the Constitution plays a major role in drawing these two sets of boundaries. It does so explicitly when a case presents a question which presents a power distribution question.

The Court must often decide whether to restrain itself from imposing a rule which might displace an exercise of power by a branch or level more appropriate to the exercise. In these situations, the court is in the somewhat strange position of having to police itself with respect to

[17]Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204 (1980)

[18]Powell, The Original Understanding of Original Intent 98 Harv. L. Rev. 885 (1985);

[19]Lee v. Weisman 505 U.S. 577 (1992) (ruling that invitations to clerics to offer invocations at a school graduation violates the Establishment Clause)

its own exercise of authority. Professor Thayer considered the power of judicial review in a democracy to be a "remarkable practice" to be exercised with the greatest restraint. An act of a legislature should be invalidated only when it made a mistake "a very clear one-so clear that it is not open to rational question."[20] Professor Bickel also advocated restraint through the exercise of the passive virtues by which the Court may decide not to decide a matter because of fears about the popular acceptance of the Court's judgment or because as a practical matter the time for decision is not opportune,[21]or the lack of an appropriate case or controversy under Article III, namely if the plaintiffs lack standing,[22] or if the controversy is moot[23] or unripe.[24] The Political Question doctrine also affords the Court with an opportunity to avoid decision of difficult cases.[25]

The concurring opinion of Justice Brandeis in Ashwander[26] counsels that "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is possible by which the question may be avoided" at p 348 and that the constitutional question will be avoided if there is "present some other ground upon which the case may be disposed of." at 347. Likewise the Court may invoke abstention when a unresolved question of state law may moot

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[20]Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 144 (1893); see also Bickel, The Least Dangerous Branch (NY, Bobbs-Merrill, 1962 p 35 et seq.

[21]Bickel, The Supreme Court, 1960 Term – Forward The Passive Virtues 75 Harv. L. Rev. 40 (1961); see also a response in Gunther The Sublet Vices of the "Passive Virtues" – A Covenant on Principle and Expediency in Judicial Review 64 Colum. L. Rev 1 (1964) Sunstein, The Supreme Court,1995 Term- Foreword: Leaving Things Undecided (1996); 110 Harv. L. Rev. 4 (1996); Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999).

[22]Lujon v. Defenders of Wildlife 504 US 555 (1992) (Court rejects a challenge to a decision by the Secretary of the Interior that the Endangered Species Act does not apply extra-territorially because the plaintiffs lack standing. Compare Friends of the Earth Inc. v. Laidlaw Environmental Services (TOC), Inc ___ US ___ (2000) (plaintiffs "recreational, aesthetic and economic interests" in a neighboring river created standing to challenge the dumping of mercury.)

[23]DeFunis v. Odegaard 416 US 312 (1974) (plaintiff's challenge to law school affirmative action plan is moot because plaintiff is admitted and will graduate).

[24]O'Shea v. Littleton 414 US 488 (1974) (plaintiff's fear of future prosecution is not a care or controversy)

[25]Nixon v. United States 506 U.S. 224 (1993) (an appeal form the impeachment of a federal judge is non-justiciable); see also Henkin, Is There a Political Question Doctrine? 85 Yale L. J. 597 (1976)

[26]Ashwander v. Tennesse Valley Authority 297 US 288 (suit by stockholder of a corporation with a contractual relationship with the TVA, wherein plaintiff stockholder seeks to challenge the power of Congress to create the TVA).

out a constitutional issue.[27] An adequate state ground for decision[28] bars constitutional consideration as well. Finally the Court decides its own docket by exercising the power over certiorari.

However in recent years the Court has been active in cases presenting issues of separation of powers.[29] The decisions in Chahda[30] and Bowsher[31] deprived Congress of important powers; Marathon Pipe frustrated efforts at court reform;[32] Nixon[33] and Clinton[34] also weakened the Presidency. Finally, formalistic separation of powers boundaries voided reforms which both parties had sought for years, the line item veto.[35]

The Court is also the referee of federalism assuring that Congress avoids invading state power and that the states avoid infringing upon federal prerogatives. Recently the Court has been active in invalidating Congressional action in three principle areas; the Commerce Clause, the

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[27]Ritz v. Bozanich 397 US 82 (1970) (in a case where plaintiff claims a Fourteenth Amendment right to certain fishing licenses, the Court abstains to allow an Alaska court to interpret a law defining the management of fish resources); see also Bush v. Palm Beach County Canvassing Bd 121 S. Ct. 417 (2000) (Court remands an appeal from a Florida Supreme Court order which allowed for manual re-counts and extended the time for certification of results by the Secretary of State because of doubts as to the basis for the state court order.)

[28]Wainwright v. Sykes 433 US 72 (1977) (failure to comply with a state contemporaneous objection rule bars consideration of defendant's claim of violation of the Fifth Amendment.

[29]Clark, Checks and Imbalances 72 Mass L. Rev. 15 (1988).

[30]Immigration and Naturalization Service v. Chadha 462 US 9191 (1983) (where the Court went out of its way to find a one-house legislative veto unconstitutional in an expired student visa separation case).

[31]Bowsher v. Synor 478 US 714 (1986) (where the Court invalidated the Gramm-Rudman-Hollings Act, wherein Congress attempted to impose some self-discipline against spiraling budget deficit and where in the Court invalidated the Act because the Controller-General, who was empowered to discipline an overspending Congress exercised execution powers and was dismissible only upon statutory defend grounds).

[32]Northern Pipeline Co. v. Marathon Pipe Line Co. 450 US 50 (1982) (ruling that expanding the powers of bankruptcy judges violates Article III.

[33]US v. Nixon 418 US 683 (1974) (forcing the President to respond to a third party subpoena in a criminal case).

[34]Clinton v. Jones 117 S.Ct 1636 (1997) (rejecting the Presidents claim or immunity or at least a continuance in a claim of sexual harassment that pre-dated the presidency).

[35]Clinton v. City of New York 524 US 417 (1998) (cancellation of line-items in a budget violates the appropriation powers of Congress).

Tenth Amendment and the Eleventh Amendment. Under the Commerce Clause the Court has invalidated the Gun-Fee School Zones Act of 1990[36] and the Violence Against Women Act.[37]

Under the Tenth Amendment, The Court has defended state government from being forced by federal statutes to do the bidding of Congress by invalidating the Low-Level Radioactive Waste Policy Amendment[38] and the Brady Bill.[39] Under the Eleventh Amendment the Court has insulated the states from damages actions under federal statutes.[40] Preemption also adjusts inconsistencies between obligations under state and federal law.[41]

However structural concerns are a more subtle influence on the Court in cases in which it recognizes that granting relief would serve to displace decisions made by bodies with more expertise or in a better position to decide.[42] .

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[36]United States v. Lopez 514 US 549 (1995) (finding an insufficient link between interstate commerce and the presence of guns in grammar schools).

[37]United States v. Morrison ____ US ____ 120 S.Ct. 1740 (2000) (deciding the problem of campus sexual violence is unrelated to the national commerce powers of Congress.)

[38]New York v. United States 505 US 144 (1992) (federal statute requiring states that do not provide for the disposal of low-level nuclear waste to take title to those wastes is invalidated as violative of the Tenth Amendment.

[39]Printz v. United States ____ US _____ (1997) (Brady Bill, which imposes an obligation on the states to do a background check on transferees of handguns is federally compelled enlistment of state offices in violation of the Tenth Amendment.

[40]Seminole Tribe of Florida v. Florida 517 US 44 (1996) (invalidating the Indian Gaming Regulatory Act which allowed the Indian tribes to sue states in federal court to enforce the statute's requirement that the states negotiate with tribes in good faith to create Indian gaming enclaves); Alden v. Maine 527 US 706 (1999) (The state's "statutes as residuary sovereigns and joint participants in the governance of the nation" insulates them from suit in their own courts by a plaintiff who seeks to impose an obligation imposed by federal law, here the overtime pay requirement of the FLSA.); Kimel v. Florida Board of Regents ____ US _____ (2000) state insulated from claims under the Age Discrimination in Employment Act); Board of Trustees of the University of Alabama v. Garrett ____ US _____ (2001) (same result re the Americans with Disabilities Act of 1990).

[41]Crosby v. National Foreign Trade Council 120 S. Ct. 2288 (2000) (penalties by Massachusetts against contractors who had business relationship with Burma (Myanmar) are pre-empted by a similar, but inconsistent statute enacted by Congress).

[42]San Antonio Independent School District v. Rodriguez 411 US 1 (1973) (accepting plaintiff's claim that the property tax is an unfair basis for allocating funds for public education would force the judiciary to decide matters of taxation and appropriations). Ingraham v. Wright 430 U.S. 651 (1977) (care must be taken lest judicial interference in public school discipline undermine the authority of teachers). Meachum v. Fano 427 U.S. 215 (1976) (same for prison administrators). See Wilkerson, Goss v. Lopez: The Supreme Court as School Superintendent, 1975 Sup Ct. Rev.

IV. Doctrine

The federal judiciary established in Article III took its original shape and form from its English predecessors[43]. That common law tradition dictated establishing and following precedent. When confronted with a novel fact situation the common law court is concerned about the past and the future: the past, because of a felt obligation to square its holdings with a received body of case-law; the future, because the court's decision will stand as precedent in future cases. The system has the virtue of deciding only the narrow case and to that extent is provisional, experimental, open to feed-back and incremental.[44] Doctrine takes shape step by step over time and is the product of the work of many minds.[45]

Courts have an obligation to be custodians of the law and to assure that the law is coherent, clear and consistent,[46] which in turn advances social stability and continuity.[47] Each decision should rest upon reasons "that in their generality and their neutrality transcend any immediate result..."[48] Of course a system of precedent also allows for narrowing and overruling of precedent.[49] The history of American Constitutional law has many famous examples of a willingness or a refusal to overrule precedent. The Court's blockage of Roosevelt's New Deal is well-known to even the casual student of American history, as is Roosevelt's threat to pack the Court. Justice Robert's "switch in time that saved nine"[50] refers to a change of heart by one

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25; Schaefer Federalism and State Criminal Procedure 70 Harv. L. Rev. 1 (1956); Friendly, Is Innocense Irrelevant? Collateral Attack on Criminal Judgment 38 U. Ch. L. Rev. 142 (1970).

[43]Strauss, Common Law Constitutional Interpretation 63 U. of Chic. L. Rev. 877, (1996)

[44]Sunstein One Case at a Time, Minimalism on the Supreme Court (1999); Farber, Frickey and Eskridge, Constitutional Law, 2nd Ed. P.126.

[45]Holmes, Codes and the Arrangement of the Law, 44 Harv. L. Rev. 725 (1931)

[46]Hart and Sachs, Legal Process, Foundation Press (199); Cardozo, The Nature of the Judicial Process New Haven, Yale University Press, 1921.

[47]Monaghan, Stare Decisis and Constitutional Adjudication 88 Columbia L. Rev. 723 (1988)

[48]Wechsler, Toward Neutral Principles of Constitutional Law 73 Harv. L. Rev. 1 (1959)

[49]In the common law tradition, the judge has the ability to make law. This fact lends prestige to the office of judge, which is to be distinguished from the judge in the civil law tradition, where the judge is seen only as a functionary whose function is interpreting the code, which is viewed as an uncomplicated, mechanical process. See Clark, An Introduction to the Legal Profession in Spain 1988 Ariz. J. of Inter. and Comp. L. Rev. 1 (1988) Arguably, the process of appointment of a federal judge involving the President and the Senate adds legitimacy to that law-making function.

[50]Friedman, Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation 142 U. Pa. L. Rev. 1091 (1994)

Justice that reversed two lines of authority: the Commerce Clause[51] and Substantive Due Process,[52] and, so the controversial story goes, saved the Supreme Court from destruction. Another famous overruling occurred when the Court overruled Plessey v. Fergeson[53] in Brown v. Board of Education [54]. History appears to have judged this departure from the rule of precedent as one of the greatest moments in the Court's history. The most exhaustive statement of the need for adherence to precedent in the Court's history was Justice O'Connor's opinion in the Casey case[55] wherein she essentially states that her principle reason for affirming the Constitutional right to an abortion is adherence to state decisis.[56]

Doctrinal law is what the lawyer or scholar reaches for almost by instinct when asked a novel question of Constitutional (or, indeed, any) law. Recent Constitutional precedent from the Supreme Court is bedrock. If the questioner is inquiring into the constitutionality of, for instance a university affirmative action plan to assist minority admissions, the lawyer asks when the Court last addressed the affirmative action issue and then upon finding Adarand, asks how the case applies to the question asked. A similar methodology will be followed by any lower court, state or federal. Most of the other originalist modes described are engaged in at the Supreme Court level only. The rest of us plebians are relegated to parsing the pearls of wisdom that descend upon us from the Supreme Court.[57]

B. THE EXTRINSIC MODES

Two modes of interpretation that have had sufficient influence to be included herein are solicitude for the unfortunate and natural law. Their legitimacy as sources is more controversial by virtue of their absence from the text. Others would argue that the Framers clearly drew on these strains of thought in their drafting. Of course many other modes could compete here for attention including libertarianism and economics. These two are chosen because their long term influence on the current body of Constitutional doctrine remains strong.

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[51]NLRB v. Jones and Laughlin Steel Corp 301 U.S. 1 (1937) (approving the Wagner Act as an appropriate exercise of power under the Commerce Clauses)

[52]West Coast Hotel Co. v. Parrish 300 U.S. 379 (1937) (upholding a state minimum wage for women statute against a substantive due process challenge)

[53]163 U.S. 537 (1896)

[54]347 U.S. 483 (1954) (Some might suggest that technically there was no overruling.)

[55]Planned Parenthood of Southweastern Pa. v. Casey 505 U.S. 112 (1992)

[56]Her characteristically lengthy and pretentious opinion begins with, "Liberty finds no refuge in a jurisprudence of doubt." She then laboriously reviews the history of stare decisis in the Court including the cases mentioned in the text. After completing that history she disregards the trimester system of Roe and substitutes her own "undue burden test."

[57]Indeed, it was this lack of precedent that cause such consternation over the Court's intrusion into the 2000 presidential election controversy in Bush v. Gore 121 S.Ct. 525 (2000)

V. Solicitude for the Unfortunate

For de Tocqueville,[58] the American sense of equality was "ardent, insatiable, incessant [and] invincible.". He attributed it as arising from the equality of conditions that the settlers found upon arriving in this new land. He also felt that equality was a natural tendency in a democratic state where the franchise is widely shared. In addition, in a common law system each litigant before a court is treated equally and the system of precedent dictates that similar cases generate similar results regardless of the identity of the parties. Finally, Christian doctrine taught that all human beings are children of God and that even the most degenerate are loved by God and could achieve salvation through repentance. A very different state of affairs existed in the colonists' home-lands, where an aristocracy continued to demand the privileges they commanded in feudal days and the animosity to the English King during the period leading to the Revolution sprang from these feelings.

Surely, the Constitution ratified the status quo existence of slavery; but just as surely the accommodation was not comfortable and a sizable group of abolitionists constantly raised the slave issue. The slavery controversy, the Civil War, and the post Civil War amendments were logical results of this sense of equality. Indeed, the Bill of Rights protections of speech, religion and home, and against governmental overreaching though the criminal process insures equal treatment before the law.

The twentieth century has witnessed political movements in favor of women's suffrage, civil rights, women's rights, and more recently in favor the disabled, homosexual, and the immigrant. Indeed the continuous immigration guarantees a new group reminding the country about its commitment to equality.

The post-New Deal Court has been especially responsive to claims of harm visited by overreaching majorities[59] . Beginning with the Carolene Products footnote[60], the Court has shown a special solicitude for the claims of minorities.[61] Certainly the Warren Court embraced equality principle and applied it expansively. The Equal Protection Clause of the Fourteenth Amendment was interpreted to protect the poor,[62] the welfare recipient,[63] the food stamp recipient,[64] hospital

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[58]De Tocqueville, Democracy in America tr. by Henry Reeve (New York, A Bantam Classic, 2000) p. 619. (De Tocqueville was a french intellectual who extensively toured the United States in the 1830's and wrote a prescient social commentary which continues to be much quoted. He was also well aware that this equality did not extend to the slaves or to the Indians.)

[59]Ely, Democracy and Distrust: A Theory of Judicial Review, pp 88-103 (1980)

[60]United States v. Carolene Products Co., 304 U.S. 144 (1938) fn 4.("prejudice against insular and discrete minorities")

[61]Gunther, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection 86 Harv. L. Rev. 1 (1972); cf. Western. The Empty Idea of Equality 95 Harv. L. Rev. 537 (1982); Chemerinsky, In Defense of Equality: A Reply to Professor Western 81 Mich. L. Rev. 575 (1983)

[62]Harper v. Virginia Board of Elections 383 U.S. 633 (1066) (invalidating the poll tax); Douglas V. California 372 U.S. 353 (1963) (sate must pay for the appellate transcript for the indigent)

patients,[65]the illegitimate,[66] the alien,[67] and illegal immigrants[68]. The Burger and Rehnquist Courts have continued the trend protecting the mentally ill,[69] and the homosexual.[70]

The Due Process Clause likewise has a strain of cases demonstrating a solicitude for the outcast and the downtrodden. Goldberg v. Kelley[71] protected welfare recipients from the overreaching discretion of bureaucrats. Due Process also examined school suspensions,[72] termination of parental rights,[73] parole revocation,[74] revocation of prison good time credits,[75] evictions procedures,[76] wage garnishment,[77] and involuntary commitment.[78]

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[63]Shapiro v. Thompson 394 U.S. 618 (1969) (invalidating the durational residency requirement as a pre-condition to welfare eligibility)

[64]U.S. Dept of Agriculture v. Moreno 413 U.S. 528 (1973) (invalidating the exclusion of households that have an unrelated member)

[65]Memorial Hospital v. Maricopa County 415 U.S. 250 (1974) (invaliding a one year residency requirement to receive non-emergency care at a county hospital)

[66]Levy v. Louisiana 391 U.S. 68 (1968) (invalidating a limitation on illegitimates form suing for wrongful death of the mother)

[67]Graham v. Richardson 403 U.S. 365 (1971) (invalidating a limitation in state's welfare program excluding aliens)

[68]Plyler v. Doe 457 U.S. 202 (1982) (Invalidating the exclusion of the children of illegal immigrants from public school.)

[69]City of Cleburne v. Cleburne Living Centers 473 U.S. 432 (1985) (overturning the denial of a special use permit for a group home for the "insane or feeble-minded")

[70]Romer v. Evans 517 U.S. 620 (1996) (invalidating a state constitutional amendment that prohibited the protection of the civil rights of homosexuals)

[71]397 U.S. 254 (1970) (requiring a hearing prior to the termination of welfare)

[72]Goss v. Lopez 419 U.S. 565 (1975) (imposing a right to be heard)

[73]Santosky v. Kramer 455 U.S. 745 (1982) (clear and convincing evidence)

[74]Morrissey v. Brewer 408 U.S. 471 (1972)

[75]Wolff v. McDonnell 418 U.S. 539 (1974)

[76]Greene v. Lindsey 456 U.S. 444 (1982) (posted notice insufficient for eviction). See also Lindsey v. Normet 405 U.S. 56 (1972) (approving limitation on counterclaims in an eviction action)

[77]Snaidach v. Family Finance Corp. 395 U.S. 337 (1969) (adversary hearing required for the issuance of provisional remedies from a court)

Certainly, the cases interpreting the Fourth, Fifth, Sixth, and Eighth Amendments show a solicitude for the unfortunate as well. Gideon v. Wainwright[79] interpreted the Sixth Amendment to require the state to pay the cost of legal representation of indigents in criminal cases. The motion to suppress illegally seized evidence required by the Fourth Amendment.[80]is frequently used to free drug users and dealers (who are often guilty). The Eighth Amendment assures that sentences in criminal cases do not become irrational and overly punitive.[81]

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[78]Addington v. Texas441 U.S. 418 (1979) (imposing a standard of clear and convincing for involuntary commitments). See also O'Connor v. Donaldson 422 U.S. 563 (1975) (state has a duty to treat those involuntarily committed)

[79]372 U.S. 335 (1963); see Lewis, Gideon's Trumpet

[80]Mapp v. Ohio 267 U.S. 643 (1961) (Fourth Amendment exclusionary rule applies to the states)

[81]Solem v. Helm 463 U.S. 277 (1983) (Court, 5-4, reverses a state court sentence of life without the possibility of parole for uttering a bad check of $100, under a recidivist statute)

The right of free speech is often invoked by the outcast. Abrams v. United States[82] presented the Court with an early challenge to the 1917 Espionage Act by five avowed "rebels, revolutionaries, anarchists", whom Holmes in dissent characterized as "unknown" men with a "silly" leaflet. The First Amendment was also invoked to protect Viet Nam protesters,[83] Klansmen[84], Hari Krishnas,[85] rock musicians[86] and other dissidents.[87] The Free Exercise Clause also protects the practitioners of religions that are out of the mainstream.[88]

Finally, the out-of-state resident, while perhaps not downtrodden like many of the other members of this group, is politically powerless and thus qualifies for consideration under a category that is concerned with failure of the electoral process.[89] Protection is afforded by the Dormant Commerce Clause and the Privileges and Immunities Clause. The plaintiff in Healy[90] was an out-of-state milk producer who was forced by Massachusetts to subsidize struggling in-state producers. The Court protected the plaintiff against a discrimination that he was powerless to change. Similarly, the Court protected the out-of-state shrimper in Toomer v. Witsell[91]

VI. NATURAL LAW

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[82]250 U.S. 616 (1919)

[83]United States v. O'Brien 391 U.S. 367 (1968) (draft card burner); see also Texas v. Johnson 491 U.S. 397 (1989) (flag burners); R.A.V. v. City of St. Paul 505 U.S. 377 (1992) (cross burners).

[84]Brandenburg v. Ohio 395 U.S. 444 (1969) (mere advocacy-ok)

[85]International Society for Krishna Consciousness, Inc. v. Lee 505 U.S. 672 (1992) (airport solicitation)

[86]Ward v. Rock Against Racism 491 U.S. 781 (1989) (sound limitations in Central Park approved)

[87]West Virginia Bd. Of Education v. Barnette 319 U.S. 624 (1943) (conscientious objectors during World War II)

[88]Wisconsin v. Yoder 406 U.S. 205 (1972) (exemption form mandatory high school for Old Order Amish);Employment Division, Department of Human Resources v. Smith 494 U. S. 872 (1990) (denial of exemption from peyote prohibition form members of the Native American Church); Church of the Lukumi Babalu Aye, Inc. v. Hialeal 508 U.S. 520 (1993) (exemption from ban on animal sacrifice)

[89]Carolene Products n. 4 supra

[90]West Lynn Creamery, Inc. v. Healy 512 U.S. 186 (1994) See generally, Regan, The Supreme Court and State Protectionism: making Sense of the Dormant Commerce Clause 84 Mich L. Rev. 1091 (1986)

[91]334 U.S. 385 (1948) (invalidating a differential tax: $25 for residents and $2500 for non-residents)

The Preamble to the Constitution states the premises upon which the Framers relied, namely that they were attempting "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty"[92] The Framers were well-schooled in the writings of John Locke. The drafting of the Constitution had much in common with Locke's social compact which, according to Locke, was preceded by a state of nature, where human beings lived in "a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit... without asking leave.[93] Further many of the early settlers were deeply religious Christians who were influenced by the thinking Aristotle, Aquinas[94] and Luther, whose thought began with God's love for every individual. By using one's reason and thinking about human nature, one can develop certain conclusions about individual freedom, dignity and equality.[95] These create certain minima that governments cannot transgress.[96] Rights, privileges and immunities become limitations on governmental power. The Ninth and Tenth Amendments make explicit the notion that the people have not ceded all power to the government that they were establishing. The most cited catalogue of these rights is in Corfield v. Coryell[97]

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[92]See also Declaration of Independence: invoking the "laws of nature and nature's God" the following truths are "self-evident": "that all men are created equal; that they are created by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit mof happiness; that, to secure these rights, governments are instituted among men, deriving their opwer form the consent of the governed..."

[93]Locke states that "in the state of nature" all men have "perfect freedom to order their actions and dispose of their possessions and persons as they see fit within the bounds of nature, without asking leave, or depending upon the will of any other man." Second Treatise on Government Macpherson ed. (Indianapolis, Hackett Publishing Co., 1980) p. 8.

[94]Aquinas stated that "every law framed by man bears the character of a law exactly to the extent to which it is derived from the law of nature." quoted in Russell, A History of Western Philosophy New York, A Touchstone Book, 1945, p.623.

[95]Ambrosio, A Moral Appraisal of Legal Education: A Plea for a Return to Forgotten Truths 22 Seton Hall L. Rev 1177 (1992); Blumenson, Who Counts Morally 14 J. of Law and Religion 1 (1999-2000)

[96]The Bill of Rights itself protects natural law rights including speech, religion, conscience, home and person, property, self protection, subject only to constraints that are general and widely publicized.

[97]"Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; . . . and an exemption from higher taxes or impositions that are paid by the other citizens of the state; . . . the elective

franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and may others which might be mentioned, are, strictly speaking, privileges and immunities".

Explicit acceptance of natural law by the Court was more common in early years. In Calder v. Bull[98], Justice Chase rejected the "omnipotence" of legislative authority, citing the "purposes for which men enter into society will determine the nature and terms of the social compact." In Murray's Lessee,[99] the Court invoked notions from the Magna Carta to discern the meaning of the due Process Clause. In Palko v. Connecticut[100] the Court looked to "principle[s] of justice so rooted in the traditions and conscience of our people as to ranked as fundamental." In Poe v. Ullman[101], Justice Harlan dissenting defined liberty as a "rational continuum" which includes a "freedom from all substantial arbitrary impositions and purposeless restraints."Likewise, Justice Fortas invoked the Ninth Amendment to protect unenumerated rights that are "fundamental."in

[98]3 Dall. (3U.S.) 386 (1798) (rejecting a challenge to an act of the legislature which set aside a judicial decree.

[99]Murray's Lessee v. Hoboken Land and Improvement Co. 59 U.S. 272 (1865)

[100]302 U.S. 319 (1937) (rejecting an attempt to apply Sixth Amendment standards in a state court)

[101]367 U.S. 497 (1961) (rejecting a challenge to anti-birth control statute as not ripe.)

Griswold.[102] Indeed the Court endorsed the existence of fundamental rights and liberty interests in Glucksberg.[103]

The claim that natural law has an appropriate place in the lexicon of interpretation methodologies is highly contentious, primarily because it may be a primary vehicle by which judges can inject their personal predilections into the law. Natural Law has never recovered from the scathing attack it received form Justice Black in his dissenting opinion in Adamson[104], calling it an "incongruous excrescence." It continues to be disfavored by the Court and the academy, but continues to be the best explanation for privacy[105], procedural due process[106] and school desegregation.[107]

VII. SUPER-RATIONALISM

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[102]Griswold v. Connecticut 381 U.S. 479 (1965)

[103]Washington v. Glucksberg U.S. (1997) (approving ban on physician-assisted suicide)

[104]Adamson v. California 322 U.S. 46 (1947) (Frankfurter-Black debate about incorporation)

[105]Griswold v. Connecticut 381 U.S. 479 (1965) (citing the emanations and the penumbras of the bill of rights Justice Harlan's dissent in Poe v. Ullman 367 U.S. 497 (1961) where he described due process as "built upon the postulates of respect for the liberty of the individual."

[106]Marshall v. Jerrico, Inc 446 U.S. 238 (1980) due process concerns itself with the "promotion of participation and dialogue in by the affected individuals in the decision-making process."see also Clark, Ingraham v. Wright and the Decline of Due Process 12 Suff. L. Rev. 1151 (1978)

[107]Brown v. Board of Education of Topeka 347 U.S. 483 (1954) (segregation harms the hearts and minds of negro children)

Super-rationalism is a mode of judicial review where the Court retraces the legislative process[108] that led to the enactment of the statute under review. The state or local government whose decision is under review assumedly perceived a problem: too many automobile accidents[109], the high cost of pensions, or too many unqualified makers of replacement eye-glasses. The alleviation of the problem is the legislative goal or purpose.[110] Upon further study, the legislative body typically finds a variety of possible solutions involving different winners and losers. Some solutions may require high expenditures; some may require the discharge of government workers; some may conflict with other important goals. Many of the above-discussed difficulties of finding the intent of the Framers apply here as well; this inquiry investigates the intent of a legislative body with respect to a particular enactment.[111] Again, it often leads to an uncertain factual inquiry using widely varied evidence including expert opinion, legislative findings, and journalism.

Once the legislative purpose has been determined super-rationalism may go in either of two directions; balancing or means-ends review.[112] In means-ends review, the Court attempts to assess the relationship between the means and the ends to discover if the degree of proximity

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[108]Super-rationalism also reviews administrative rulings and decisions and individual decisions, mostly decided by state and local administrators. E.g.: Washington v. Davis (whether the choice a particular examination as a prerequisite for entry into the police department was justified); County of Sacramento v. Lewis 523 U. S. 833 (1998) (reasonableness of a high speed police chase)

[109]However, even at this early stage, uncertainty creeps into the process. First, the statement of the problems will obviously vary: too many automobile accidents may have unnumerable restatements: too many cars; too little safely inspection of cars, too few (or too many) traffic controls; too much alcohol etc.

[110]Here again uncertainty: The vote for any particular solution is going to be the aggregation of the widest varieties of reasons including party affiliation, past debts, lobbyists, constituencies etc. Super-rationalism always seems to assume a unified cleanly-defined, legislative intent.

[111]Chief Justice Marshall warned about the dangers of inquiring into legislative motives in Fletcher v. Peck 10 U.S. (6Cranch.) 87 (1810), fearing that the inquiry itself would be inappropriately intrusive and wondering what the Court should do when it finds "impure motives." Bhagwat, Purpose Scrutiny in Constitutional Analysis 85 Cal L. Rev. 297 (1997); Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Motive 1971 Sup Ct Rev. 95; Eisenberg, Disproportionate Impact amd Illicit Motives:Theories of Costitutional Adjudication 53 N.Y.U. L. Rev. 36 (1977). See also Scalia concurring in Church of the Lukumi Babalu Aye, inc. v. City of Hialeah 508 U.S. 520 (1993)

[112]It may be protested that this mode does not belong on a level equal to those already discussed-that it is merely instrumental in pursuit of a more fundamental base of decision such as free speech or the prevention of discrimination. However this mode, while often tied to another protection or mode , seems rapidly to drift away from its Constitutional mooring. As such it deserves independent treatment as a separate mode of interpretation, although the author accepts the fact that this opinion places him in a distinct minority.

meets the required test. In balancing, the interests vindicated by the enactment (increased traffic safety) is balanced against the interest of the opponent of the measure (unencumbered passage).

Lastly, the Court often establishes a standard for judging the appropriateness of a legislature's choice of means. This judgment may be used independently, such as the requirement that limitations on speech in a public forum be reasonable, or in combination with other tests, such as the requirement that the use of race in an affirmative action plan be narrowly tailored, as well as justified by a compelling governmental interest.

A. MEANS-ENDS REVIEW

This method, common in First and Fourteenth Amendment cases, typically has two steps:(1) a discovery, a definition, and an analysis of the governmental purpose[113] (2) an assessment of whether the purpose sought in step one and the means used are sufficiently closely related to meet a test which varies in its strictness with the Constitutional principle invoked. Often the inquiry stops at the first step because the Court simply finds the legislative goal to wanting.[114] Equal protection imposes a strictness level review, utilizing one of three standards: rational,[115].important or compelling. Rational basis equal protection adds a third step, assessing the overall reasonableness of the means.

1. Purpose Review[116]

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[113]Tussman and tenBrock, The Equal Protection of the Laws 37 Calif. L. Rev. 341 (1949) (discussion of overinclusive and underinclusive classifications)

[114]E.g. Loving v. Virginia 388 U.S. 1 (1967) (state's interest in preventing the corruption of blood and a mongrel race are simply not compelling to justify an anti-miscegenation statute.)

[115]The Court's formulation of the test varies considerably from case to case: instance in Royster Guano Co. v. Virginia 253 U.S. 412 (1920) the court required that every classification be "reasonable, not arbitrary and must rest upon some ground of difference having a far and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike;" in Lindsley v. Natural Carbonic Gas Co 220 U. S. 61 (1911), the opponent of a classification bore the burden of showing it to be "essentially arbitrary." Compare F.C.C. v. Beach Communications, Inc., 508 U.S. 307 (1993) (exempting cable television systems form local franchising requirements where a satellite dish serves a building or buildings that are commonly owned or managed) the Court invoked judicial restraint to limit judicial intervention "no matter how unwisely we may think a political branch has acted." The opponent of a classification must "negate every conceivable basis that might support it." The absence of a legislative basis for a classification has "no significance."

[116]Purpose inquiry is also in the search for invidious discriminatory motive. For instance, under equal protection, for an invidious discrimination to be so labeled it must have been motivated by a desire to treat the disfavored group differentially. See Washington v. Davis 426 U.S. 229 (1976) (differential impact insufficient to invalidate the use of a particular test as a precondition to entry into the police department.); Geduldig v. Aiello 417 U.S. 484 (1974) (exclusion of pregnancy benefits form state disability insurance policy was not anti-female). Purpose to favor in-state

i. Rationality

The Court's most deferential posture asks whether the state's interest is rational, placing the burden is upon the opponent of the state to prove irrationality. Examples of this level of review include the old equal protection cases, usually challenging an economic regulation. In Dukes[117], the Court found rational the interest of New Orleans in "enhancing the vital role of the French Quarter's tourist-orientated charm." In Murgia[118], the Court found rational the state interest in "assuring physical preparedness of its uniformed officers." In Beazer,[119] the Court found rational the fear of drug use on the job. In Fritz[120], the Court accepted the avoidance of wholesale receipt of double pension benefits and thus cost cutting as rational. Due Process reviews economic legislation, using the same test.[121] The states interest in police readiness, a drug-free work force or
fiscal responsibility certainly meet the test of rationality.

ii. Strict Scrutiny

The strictest is the compelling governmental interest standard. It is used in the racial[122], ethnic[123] and other[124] discrimination cases and a hodge-podge of other "fundamental interest"

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residents is relevant to a commerce clause challenge. Kassel v. Consolidate Freighrways Corp. (governor's statement in defense of the bill under review, prohibiting double trailers, indicated a parochial purpose at the expense of out-of-staters); legislation that is directed at a particular religion is invalid under the Free Exercise Clause. Church of the Lukumi Babalu Aye, Inc. v. Hialeah 508 U.S. 520 (1993) (animal sacrifice)

[117]New Orleans v. Dukes 427 U.S. 297 (1976) (attacking an ordinance that excluded pushcart vendors form the Latin Quarter, but then exempting form the prohibition all who had eight years or more of tenure)

[118]Massachusetts Board of Retirement v. Murgia 427 U.S. 307 (1976) (challenging a mandatory retirement at age 50 for state police officers.)See also Vance v. Bradley 440 U.S. 93 (1979) (mandatory retirement of foreign service officers)

[119]New York City Transit Authority v. Beazer 440 U.S. 569 (1979) (approving the exclusion of methadone users from employment with NYTA

[120]U.S. Railroad Retirement Board v. Fritz 449 U.S. 166 (1980) (attacking a Congressional overhaul of the Pension system for railroad workers, especial those who later became eligible of Social Security benefits)

[121]Williamson v. Lee Optical Co. 348 U.S. 483 (1955) (limiting the eye-glasses business to physicians; "[i]t is enough that there is an evil at hand for correction, and that it might be thought that a particular legislative measure was a rational way to correct it.")

[122]E.g. Palmore v. Sidoti 466 U.S. 429 (1984) (reversing the withdrawal of child custody to a Caucasian mother because she married an Africa-American); Richmond v. J.A.Crossen Co. 488 U.S. 469 (1989) (invalidating affirmative action plan for sub-contractors on city funded construction)

equal protection cases,[125] where, for reasons of Constitutional interpretation, the Court's protective instincts are so high that the Court approaches the state's interference with a high degree of skepticism. The majority in Roe v. Wade[126] imposed the standard on state interference with the fundamental due process right to an abortion, but then seems to have abandoned the test in favor of a "significant obstacle"[127] or "undue burden."[128] The Court occasionally uses the language of strict scrutiny in facial discrimination cases under the dormant commerce clause.[129] Finally, the Court has rejected earlier cases that held that strict scrutiny was appropriate for Free Exercise cases.[130] States almost never can satisfy the burdens of strict scrutiny.[131]

iii. Middle-level Scrutiny

A newer middle level scrutiny appears to have currency in the gender cases. This level asks whether a statutory classification "serves important governmental objectives and must be substantially related to the achievement of those objectives."[132] In the VMI case[133], the Court felt

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[123]Rice v. Cayetano 120 S. Ct. 1044 (2000) (Hawaii's limitation on the right to vote in an election for Trustees of the Office of Hawaiian Affairs to native Hawaiians cannot survive strict scrutiny)

[124]State alienage discrimination (Graham v. Richardson 403 U.S. 365 (1971)) and early discrimination against illegitimate children cases (e.g., Ley v. Louisiana 391 U. S. 68 (1968)) also used strict scrutiny.

[125]Voting (Kramer v. Union Free School District No. 15 395 U.S. 621 (1969)), representational parity (Reynolds v. Sims 377 U. S. 533 (1964), running for office (Williams v. Rhodes 393 U.S. 23 (1968)), access to the appellate criminal process (Douglas v. California 372 U.S. 353 (1963), marriage (Turner v. Salfey 482 U.S. 78 (1987))and child rearing (Troxel v. Granville 120 S.Ct. 2054 (2000)), travel (Shapiro v. Thompson 394 U.S. 619 (1969) are all fundamental interests that may require strict scrutiny.

[126]410 U. S. 113 (1973)

[127]Akron v. Akron Center for Reproductive Health 462 U.S. 416 (1983)

[128]Planned Parenthood of Southeastern Pa. V. Casey 505 U.S. 833 (1992)

[129]Oregon Waste Systems, Inc. v. Dep't of Environmental Quality 511 U.S. 93 (1994) (differential fees for the disposal in in-state and out-of-state garbage requires the "strictest scrutiny") West Lynn Creamery, Inc. v. Healy 512 U.S. 186 (1994) (state's tax and subsidize plan was to give local producers an advantage over out-of-staters)

[130]Employment Division, Dept. of Human Resources v. Smith 494 U.S.872 (1990) (Indian ritual using peyote; compelling interest test creates too many exemptions from civic obligations)

[131]With the notable exception of the World War II Japanese internment cases. Korematsu v. United States 323 U.S. 214 (1944); Hirabayashi v. United States 320 U.S. 81 (1943)

[132]Craig v. Boren 429 U.S. 190 (1976) (invalidating a state minimum age for drinking law that set different ages for males and females)

that the state's interest in harsh educational methods in military school did not meet the test, while preventing teenage pregnancy[134], flexibility in dispatching military personnel[135], and the difficulties in distinguishing between real and fraudulent non-marital fathers did[136].

This is the prevailing test in illegitimacy discrimination cases.[137]A similar test judges governmental restrictions on non-verbal communication[138] and commercial speech.[139] The Establishment Clause requires state to religious schools to have a "secular legislative purpose."[140] The Takings clause requires that exactions be for "legitimate state interests."[141] The Court found a city's desire to zone out adult theaters to be "substantial."[142]Under the privileges and immunities Clause, the reason for discriminating against out-of-staters must be "substantial".

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[133]United States v. Virginia 518 U.S. 515 (1996) (challenge to all-male military school.) The reasoning of this case, like so many others is confusing. The State offers as a justification for military-style colleges the production of "citizen-soldiers."Logic would seem to label the use of "adversatives" (disrespect and harassment) as a means. The exclusion of women would be examined to judge the importance of the exclusion of women to the successful use of that means. The Court however, discusses independent justifications for the exclusion of women: diversity and the preservation of the use of adversatives. With respect to the first the Court seems to find it justifiable in theory, but unproved in the facts of this case. With respect to the second, the Court seems to fail to closely examine whether the state interest in prohibiting the physical violence involved in adversatives to occur between the sexes. Instead it falls back upon the rhetoric of discrimination , citing the need for female citizen-soldiers as well as male. This admixture of the two parts of rationality review is common.

[134]Michael M. v. Superior Court of Sonoma County 450 U.S. 464 (1981) (challenge to male-only definition of perpetrator in statutory rape statute)

[135]Rostker v. Goldberg 453 U.S. 57 (1981) (challenge to all-male draft)

[136]Parham v. Hughes 441 U.S. 347 (1979) (statute granting non-marital mothers, but denying such fathers the right to sue for wrongful death of the child). Compare Caban v. Mohammed 441 U.S. 380 (1979) (invalidating statute denying the right to non-marital fathers, but not to such mothers to block adoptions)

[137]Lalli v. Lalli 439 U.S. 259 (1978) (approving the exclusion of some illegitimate children from intestate succession)

[138]United States v. O'Brien 391 U.S. 367(1968) (draft card burning)

[139]Central Hudson Gas and Electric Corp. v. Public Service Commission 447 U.S. 557 (1980) (invalidating a ban on ads promoting the use of electicity)

[140]Lemon v. Kurtzman 403 U.S. 602 (1971) (striking down state salary supplement to teachers at private schools)

[141]Dolan v. City of Tigard 512 U.S. 374 (1994) (invalidating the City's exaction of the dedication of land for a bicycle path in return for a building permit)

[142]Renton v. Playtime Theatres, Inc. 475 U.S. 41 (1986)

2. Relational Assessment

Next, the Court often proceeds to a judgment about the means ends fit. The equal protection cases have three levels of means scrutiny corresponding to ends scrutiny: strict scrutiny requires the means to be "necessary"[143]to achieve the legislative goals; middle level requires the means to be "substantially related;"[144] rationality review requires opponents to establish the negative: means must be "without any rational basis,"[145] or, perhaps, "irrelevant" to the state's purpose.[146] For instance in Hodgson v. Minnasota[147] the reviewed a statute that required a minor female to obtain the consent of both parents as a precondition to obtaining an abortion. The court found the State's interest in assuring that the minor get sufficient advice and deliberation before making this decision legitimate. However, after reviewing findings of the district court about the difficulties that such a requirement would create in families that are dysfunctional and the frequency of such dysfunctionality , the Court declared that there was no rational relationship between the legitimate legislative goal and the means chosen by the legislature to vindicate that goal.

A similar "required degree of connection" or a "nexus" is required between the exactions imposed by a municipality and the negative impact of the proposed development in Takings Clause cases.[148] This method, used under equal protection, due process, the dormant commerce clause, freedom of speech, free exercise and establishment clause, applies labels that seems imprecise, subjective and talismanic.. The term reason has a rich history in western philosophy. For Aristotle it meant practical wisdom.[149] For Dewey[150] only practical results mattered.

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[143]In re Griffiths 413 U.S. 717 (1973) (exclusion of aliens form the bar is invalid)

[144]Craig v. Boren, supra

[145]Lindsley, supra This test is usually death to the opponents of governmental action, but with some notable exceptions: in Cleburne v. Cleburne Living Centers 473 U.S. 432 (1985) the Court found a variety of reasons for denying a special use permit to a group home for the mentally disabled unrelated to any legitimate zoning interest; in Plyler v. Doe 457 U.S 202 (1982) excluding the children of illegal aliens from public schools was insufficiently related to deterring illegal entry to be deemed rational; Romer v. Evans 517 U.S. 620 (1996) ballot initiative that amends the Colorado constitution to prohibit civil rights law that protect homosexuals is unrelated to a state interest in associational freedom

[146]United States Department of Agriculture v. Moreno 413 U. S. 528 (1973) (invalidating a Food Stamp regulation that excluded household that Housed an unrelated member)

[147]497 U.S. 417 (1990)

[148]Dolan, supra

[149]Aristotle, Nichomachean Ethics, Book VI, ch 5. The habits of practical wisdom include sympathetic detachment, calculating costs, narrowing alternatives, applying the lessons of experience and considering future consequences. See Clark, Kronman's The Lost Lawyer: A Celebration of the Oligopoly of the Elite Lawyer (book review) 26 the Advocate 48 (1996)

Descartes[151] insisted that reason should be coldly logical. The results are often hard to square. Why is remediating past discrimination compelling[152] and creating role models for grammar schoolers not[153]? Why is there a compelling interest in a forty-eight hour waiting period before an abortion[154] but not in spousal consent to an abortion[155]

2. Means Analysis

As stated, equal protection rational basis scrutiny adds yet a third component, assessing the reasonableness of means.[156] The Court engages in means analysis in a wide variety of other areas as well. The Court judges the reasonableness of restrictions on speech in limited access public fora. For instance, in Krishna Consciousness,[157] the Court judged the reasonableness of a solicitation prohibition in an airport. Citing Kokinda,[158] the Court stated that the restrictions "need only be reasonable: it need not be the most reasonable or the only reasonable limitation." The "least restrictive means" limitation on restrictions on speech in public fora is no longer

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[150] Morality depends on the desirability of results. Dewey and Tufts, Ethics (New York, Henry Holt and Co., 1908) p.209.

[151]Descartes, Discourse on the Method of Rightly Conducting the Reason and Seeking for Truth in the Sciences, in which the author begins with the Cartesian doubt of even his own existence and then proceeds to prove his own existence, and God's and then uses logic to build a metaphysical and ethical system. 31Great Books of the Western World p.51 et seq (Chicago, Encyclopedia Britannica, Inc., 1952)

[152]Especially when the justification of an affirmative action plan is an act or pattern of discrimination, often visited against some unknown minority in the past and whose harm is not compensated, but whose harm is now used as a basis for bestowing some unsought windfall benefit upon one whose only relationship to the original act of discrimination is that he or she shares a racial, ethnic or gender similarity with the past victim. Similar arguments are made with respect to the debate about reparations.

[153]Wygant v. Jackson Board of Education 476 U.S. 267 (1986) (preference for more junior African-Americans over more senior whites in a reduction in force among teachers where the school found the need for minority role models)

[154]Planned Parenthood of Southeastern Pennsylvania v. Casey 505 U.S. 833 (1992)

[155]Planned Parenthood v. Danforth 428 U.S. 52 (1976)

[156]Village of Willowbrook v. Olech 120 S.Ct. 1073 (2000) (towns demand for a wide easement as a condition to connecting to the town's water supply was "irrational and wholly arbitrary"); Bush v. Gore 121 S. Ct. 525 (2000) (state supreme courts ruling which ordered a recount was so full of inconsistencies and contradictions so as to labeled irrational and thus to violate equal protection)

[157]International Society of Krishna Consciousness, Inc. v. Lee 505 U.S. 672 (1992)

[158]United States v. Kokinda 497 U.S. 672 (1992) (sidewalk solicitation ban)

enforced.[159] Restrictions on symbolic speech may be "no greater than essential." Limitations upon commercial speech may be "not more extensive than necessary..."[160] Affirmative action plans and limitations on picketing[161] must "narrowly tailored."[162] Casey judges whether restrictions on the abortion procedure are "undue burdens."[163] Lemon [164]judges whether means "advance or inhibit religion" or foster "excessive governmental entanglement" with religion. The fact that there are "reasonable and adequate alternatives" to an in-town milk processing requirement invalidates it.[165]"Reasonable alternative avenues of communication" were also important in Renton[166] Under the Camden[167], non-residents cannot be targeted unless they are "a peculiar source of the evil at which the statute is aimed." Limitations on the right to refuse life saving treatments must be "at least reasonably related to [the] promotion and protection" of the terminally ill patient.[168] Often the Court stops the inquiry after this step-if the means used meets the test it is approved; if not, it's invalidated

What in the constitution justifies this inquiry? Perhaps it is the natural law formulations that protect us against pointless and arbitrary constraints. An arbitrary constraint is one that is pointless, that does nothing to advance the commonweal. But we are admittedly quite distant from Marbury and the legitimacy of rationality assessment is dubious.

3. BALANCING

Balancing is a metaphoric term (because rights and interests do not have mass) which defines the Constitutional issue as a question of competing values which must be identified,

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[159]Ward v. Rock Against Racism 491 U.S. 781 (1989) (sound limitations on rock concert in Central Park)

[160]Central Hudson Gas and Electric Corp v. Public Service Commission 447 U.S. 557 (1980) (banning ads by utilities that promote the use of electricity)

[161]Frisby v. Schultz 487 U.S. 474 (1988)

[162]City of Richmond v. J.A. Croson Co. 488 U.S. 469 (1990) (percentage of subcontractor work must go to minorities)

[163]Planned Parenthood of Southeastern Pennsylvania v. Casey 505 U.S. 833 (1992)

[164]Lemon v. Kurtzman, supra

[165]Dean Milk Co. v. Madison 340 U.S. 349 (1951) (Madison prohibits the sale of milk not processed within five miles of the City)

[166]Renton, supra

[167]Camden, supra

[168]Washington v. Glucksberg U.S. (1997) (validating anti-assisted suicide statute)

valued and compared.[169] It resembles rationality, discussed above, in that it identifies and evaluates the governmental interest presented by a statute. However, it then identifies and recognizes the legitimacy of an opposing interest, usually presented by a litigant Ultimately, however, faced with two opposing legitimate interests, the Court must assign values to the identified interests and choose one.[170]

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Two examples of the methodology are Penn Central[171] and Kassel[172]. In Penn Central, the interest of the historical commission in preserving buildings of historical or architectural significance is balanced against the investment expectations of the corporate owner of the building housing a railroad station. In Kassel, the interest of the state of Iowa in traffic safety is balanced against the inconvenience and expense to an interstate carrier of reconfiguring its double trailers in Iowa.[173] First of all, there is, like apples and oranges[174], no common currency for comparison.[175] Second, the governmental interest represented by the problems presented in the cases (historical preservation and traffic safely)is too multifarious and diffuse to be able to be reduced to a factor in a balance, not to mention the difficulties proof of such interests in the process of litigation. Third, is the problem of cumulation. Most often the Court seems to consider the governmental interest generally: not the interest in the Beaux Artes facade of a building in

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[169]The process seems very closely related to that of utilitarianism wherein Bentham pleads for a unified definition of the term utility, fierce adherence to it and a "moral arithmetic" which can guide the questioner to the result that will maximize pleasure and minimize pain.. Bentham, Theory of Legislation, (from Cohen and Cohen, p.600)

[170]Aleinikoff, Constitutional Law in the Age of Balancing 96 Yale L. J. 943 (1987); Fallon Foward: Implementing the Constitution 111 Harv. L. Rev. 54 (1997); Kahn, The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell, 97 Yale L. Rev. 1 (1987)

[171]Penn Central Transportation Co. v. City of New York 438 U.S. 104 (1978) (challenging the prohibition against the construction of a fifty story glass tower above the station because of its distinctive facade.

[172]Kassel v. Consolidated Freightways Corp. 450 U.S. 662 (1981) (plurality opinion) (challenge to the prohibition against double trailers on Interstate 80 in Iowa)

[173]Dormant Commerce Clause often seem to require balancing. In the early case of Cooley v. Board of Wardens 12 How. (53 U.S.) 299 (1851) the Philadelphia pilotage law was viewed as the nature of the power being exercised: national or local. Pike v. Bruce Church, Inc. 397 U.S. 137 (1970) (a local packing requirement for cantaloupes invalidated because the "the burden imposed on... commerce is clearly excessive in relation to the putative local benefits); Southern Pacific Co. v. Arizona 325 U.S. 761 (1945) (state interest in traffic flow on streets outweighed by railroads interest in interstate commerce); South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177 (1938) (state limitation on the width of trucks survives)

[174]Pound, A Survey of Social Interests 57 Harv. L. Rev. 1 (1943)

[175]Alienikoff, Constitutional Law in the Age of Balancing 96 Yale L. J. 943 (1987)

New York City, but the interest of cities in general in historical preservation, or even more generally, in zoning. The other side of the balance is usually articulated specifically: the investment expectations of the owner of the building, focusing upon its particular circumstances and balance sheet, and not the more general interest of investor expectations.[176]

The Court has used balancing in a wide variety of cases. Residential picketing requires a balance between rights of free speech and privacy.[177] Eliminating the undesirable secondary effects caused by the presence of an adult movie theater justified zoning them out of residential neighborhoods.[178] Reducing the demand for gambling through an advertizing ban weighed favorably against the casino owner's right to commercial speech..[179] The state's interest in preserving the two-party system and the integrity of the election process was sufficiently weighty to justify an anti-fusion party statute.[180] The notice and a post-termination hearing were sufficient under the Due Process Clause when balanced against the difficulties and the expense in the SSI disability programs.[181] Assisted suicide statutes require a balance between the right to refuse unwanted medical treatment and the state's interest in preserving life.[182] The legitimate interest of a public figure against defamation must be balanced against the First Amendment interest in fostering robust debate.[183] The President's need for privacy of communications with subordinates

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[176]Takings and Contract Clause cases seem to be particularly common cases for the use of this methodology. An early balancing case was Home Building and Loan Ass'n v. Blaisdell 290 U. S. 398 (1934) where the Court reviewed a debtor relief statute that halted foreclosures in the depths of the Depression. While it is clear that this is exactly the type of law that the Contract Clause was designed to prohibit, the Court, the Court invoked the "emergency" that the country faced to allow the debtor relief. In Miller v. Scoene 276 U.S. 272 (1928), the Court stated that the Takings Clause allowed the Virginia legislature to choose to protest property "of greater value to the public," in choosing to protect apple trees by destroying re cedar trees. In Keystone Bituminous Coal Ass'n v. DeBenedictis 480 U.S. 470 (1987) the Coal Company had to give up its rights to some of its coal to prevent subsidence damage. See also Eastern Enterprises v. Apfel 524 U.S. 498 (1998)

[177]Frisby v. Schultz 487 U.S. 474 (1988) (flat ban on residential picketing) See also cases involving the picketing of abortion clinics Madsen v. Women's Health Center Inc 512 U.S. 753 (1994); Hill v. Colorado120 S.Ct (2000)

[178]Renton v. Playtime Theatres, Inc 475 U.S. 41 (1986)

[179]Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico 478 U.S. 328 (1986) (Validates limited gambling advertizing ban); Florida Bar v. Went for It, Inc 515 U.S. 618 (1995) (thirty day direct mailing ban by lawyers to accident victims)

[180]Timmons v. Twin Cities Area New Party 117 S. Ct. 1364 (1997)

[181]Matthews v. Eldridge 424 U.S. 319 (1976) (termination of disability benefits)

[182]Glucksberg, supra

[183]New York Times Co. v. Sullivan 376 U.S. 254 (1964)

must be balanced against the interests of the criminal courts in gaining access to information.[184]A police officer's use of deadly force is justified only in the case of the fleeing felon.[185] Searches of a student's locker requires a balance of a student's right to privacy and the school officials' control of the schools.[186] In deciding that an incriminating statement made without Miranda warnings was admissible to impeach a defendants credibility the Court balanced the needs to convict the guilty against the interests of the Fifth Amendment.[187]

This slippery stuff presents the Court with an intellectual task which ultimately can not be performed honestly and thus reduces itself to nothing less than a subjective judgment about importance. Not only is it measuring the unmeasurable, but if it claims to take everything into account the size of the record and the burden on the adjudicative process will expand exponentially. What the Court really seems to be doing is .freely speculating upon the consequences of one rule as compared to another. The state interest-individual interest is a bit unfair to the individual unless the individual interest is generalized and if it is generalized, how much generalizing is enough. In the balancing mode, the Court is simply replicating the job of the legislature. The Constitution is reduced to a factor in the balance:[188] "doctrinally destructive nihilism[189]," according to Justice Brennan. Much the same could be said about means-ends analysis. It is vague and uncertain and completely divorced form the constitutional value that the Court is supposedly vindicating.

On the other hand, perhaps balancing and rationality assessment is the best we can do. The world is complex and as much as we like doctrinal purity and absolute rights, every constitutional case presents a case of competing interests and courts can do no more than to exercise their powers of practical reason to resolve and accommodate them.[190] But then again what do we do with Korematsu?[191]

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[184]United States v. Nixon 418 U.S. 683 (1974) (Watergate tapes)

[185]Tennessee v. Garner 458 U.S. 747 (1982)

[186]T.L.O. v. New Jersey 469 U.S. 325 (1985); Vernonia School Dist. 47J v. Acton 515 U.S. 646 (1995) (random drug test of high school athletes). Indeed all suspicionless highway checkpoint cases require a "weighing of the gravity of the public concerns served by the seizure... and the severity of the interference with individual liberty." Rehnquist dissenting in City of Indianapolis v. Edmonds 69 L.W. 4009, at 4014. (2000)

[187]Harris v. New York 401 U.S. 222 (1971)

[188]Dworkin, Taking Rights Seriously p. 194 (1977)

[189]New Jersey v. T.L.O. 469 U.S. 325 (1985)

[190]Indeed Holmes quotes Lord Mansfield advice to new judges to make judgments by stating conclusions without stating reasons because the "judgment would probably be right and the reasons certainly wrong." Holmes, Codes and the Arrangement of the Law 44 Harv. L, Rev. 725 (1931). Farber, Frickey and Eskridge in Constitutional Law, Themes for the Constitution's Third Century (1993) at p. 126 suggest that the best approximation of what goes on may be called practical legal studies: "Judges exercising judicial review must pay attention to the language of our written Constitution, our traditions of constitutional exegesis, the competing policymaking

D. CONCLUSION

Over the years academic critics have often suggested that the edifice described herein is unprincipled, subjective and opportunistic. The most recent of these critics have belonged to a diffuse school of thought called critical legal studies[192]. Many of theses critics, drawing inspiration from the legal realists and others from Marxism, suggest that judicial decision-making is a political process, similar to the legislative process and judicial opinions are a mere smoke-screen behind which a judge hides his own predilections. The background and education of most judges will dictate their preference for the party whose interest advances the goals of the wealthy. The feminist critics suggest that the framers had no commitment to their interests and thus the Constitution itself is a deeply flawed document and to make matters worse contemporary American values that find expression in Constitutional decisions are infected by the hegemony of patriarchy[193]. Likewise the race critics note that the Constitution as written ratified the institution of slavery and thus the Constitution's concern for minority rights is weak and of very recent vintage[194].

Another strain of critical thought draws on the work of such literary critics as Stanley Fish. By deconstructing the text of the Constitution,[195] they suggest that the separation in time and

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powers of the legislatures and executive branches of our federal and state governments, the expectations of society in general and the legal community in particular, prudential problems of implementation of rights and remedies, competing notions of American individualism and community, and a host of other matters."

[191]323 US 81 (1943) (perfectly innocent Japanese-American citizens are forcibly deprived of their homes, their jobs and families because military paranoia)

[192]Kelman, A Guide to Critical Legal Studies (1987); Unger, The Criical Legal Studies, (1986); Critical Legal Studies Symposium, 36 Stan. L. Rev. (1984)

[193]E.g., West, Constitutional Skepticism 72 B.U.L.Rev. 765 (Constitution has minimal value in protecting women because it ignores private aggregations of power); Mackinnon Toward a Feminist Theory of the State (1991) (masculinity and maleness continue to be the referent for claims of inequality)

[194]E.g. Bell, Brown v. Board of Education and the Interest Convergence Dilemma, 93 Harv, L. Rev. 518 (Brown was finally decided as it was because integration would not threaten the superior societal interests deemed important by middle and upper class whites): Crenshaw, Reform and Retrenchment: Transformation and Legitimation in Antidiscimination Law 101 Harv. L. Rev. 1331 (1988) (the myth of racial neutrality of the legal system masks racism submerged in popular white consciousness)

[195]Cook, The Temptation and Fall of the Original Understanding, 1990 Duke 1163 (1989) ("Deconstruction is an intellectual sword used against the evils of oppression and hierarchy that are empowered by the unexamined political choices that limit our capacity to envision alternative social arrangements")

context between the Framer and the contemporary reader makes any transmission of original intent impossible.

Notwithstanding these critics, Marbury was correctly decided and once this assertion is made, the next step is interpretation. The question is how.