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A Preface to Constitutional Theory

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We have a plethora of theories about judicial review, including theories about theories, but their foundations require stricter scrutiny. This Essay presents some aspects of the problem through an examination of two important and familiar ideas about judicial review.

The controversy over "noninterpretive" review concerns the propriety of courts' deciding constitutional cases by using extra-constitutional norms. But the theoretical framework has not been well developed and appears to raise the wrong questions about judicial review. Thayer's doctrine of extreme judicial deference to the legislature has received much attention, but his reasoning has been given less careful notice. Thayer's rule rests largely on doctrines of doubtful constitutional standing.

The purpose of this Essay is not so much to answer questions as to raise them—to enlarge the agenda of constitutional theory.

I. Interpretive Review

Constitutional scholarship has recently employed a distinction between "interpretive" and "noninterpretive" review, which concerns the range of norms used by courts in deciding constitutional cases. As the term suggests, "interpretive review" is based on interpretation of the Constitution; "noninterpretive review" is not so limited, but uses other grounds as well. Thus the normative theory that is labelled "interpretivism" accepts only interpretive review, whereas "noninterpretivism" approves of noninterpretive review in some cases.

These differences concern the core responsibilities of courts engaged in judicial review. They are not limited, for example, to

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crisis conditions, when courts might be thought to have special reason for departing from their normal role. They apply primarily to review by the federal judiciary of decisions made by other branches of the federal government. The role of those courts relative to decisions made by state governments is often treated differently.

The distinction was introduced by Grey in the following terms:

> In reviewing laws for constitutionality, should our judges confine themselves to determining whether those laws conflict with norms derived from the written Constitution? Or may they also enforce principles of liberty and justice when the normative content of those principles is not to be found within the four corners of our founding document?[1]

How useful is the distinction? According to Grey, the "chief virtue" of "the pure interpretive model" is that

> when a court strikes down a popular statute or practice as unconstitutional, it may always reply to the resulting public outcry: "We didn't do it—you did." The people have chosen the principle that the statute or practice violated, have designated it as fundamental, and have written it down in the text of the Constitution for the judges to interpret and apply.[2]

That seems false. Rarely could a court *truly* defend an unpopular decision by saying to a protesting population "We didn't do it—you did." Only small minorities of the population have been permitted to participate in the processes leading to ratification of the Constitution and most of its amendments. Most members of those privileged minorities are no longer alive when the provisions are enforced. Such a defense would rest on fictions.

But let us consider the theoretical framework on its merits. Grey argues that, when engaged in judicial review, "the courts do appropriately apply values not articulated in the constitutional text."[3] He might appear to win that argument too easily. For his initial definition of the distinction seems to limit interpretive review to norms that are *explicitly* given ("articulated") in the constitutional text. That would make the "interpretivist" a straw man.

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1. Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).
2. *Id.* at 705.
3. *Id.*

Scholars accept that constitutional norms need not be stated in the document, but can be attributable to the Constitution on the basis of sound interpretative argument. Relatively uncontroversial examples include checks and balances, the separation of powers, and representative government. While it seems plausible to hold that some such norms are "derived from the written Constitution," they are not treated as if they have been fully "articulated in the constitutional text." They themselves require interpretation.

Grey's initial definition of interpretive review is misleading, but its narrowness is relieved by his acknowledgment that "sophisticated" interpretivism "certainly contemplates that the courts may look through the sometimes opaque text to the purposes behind it in determining constitutional norms. Normative inferences may be drawn from silences and omissions, from structures and relationships, as well as from explicit commands."[4] There is also evidence that Grey accepts "Framers' intent" as a criterion of constitutional meaning.[5] He appears to regard the intentions of the Framers as implicit codicils to the constitutional text. This might expand its "normative content" considerably.

Constitutional lawyers seem to agree that Framers' intent helps determine constitutional meaning. This is, however, a blind spot of constitutional theory. The criterion of Framers' intent desperately requires clarification and justification. Its fundamental difficulties have largely been ignored.[6]

Its difficulties notwithstanding, if Framers' intent is assumed to be a determinant of constitutional meaning, then that affects the interpretive-noninterpretive distinction. Interpretation, and

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4. *Id.* at 706 n.9. Grey goes on, however, to say:

> "What distinguishes the exponent of the pure interpretive model is his insistence that the only norms used in constitutional adjudication must be those inferable from the text."

The entire passage makes sense only if we suppose that "the purposes behind" an "opaque text" can be "inferable from the text." That may be true in some cases.

5. *See, e.g., id.* at 710.

6. The central problems do not concern mere practical difficulties in applying the criterion, such as limited evidence, but its inherent ambiguity and arbitrariness. *See, e.g.,* Dworkin, *The Forum of Principle,* 56 N.Y.U. L. REV. 469 (1981), and Lyons, *Constitutional Interpretation and Original Meaning,* 4 SOC. PHIL. & POL'Y 75 (1986). It may be too early to say that these criticisms of the criterion have been ignored, for they have appeared only recently. Nevertheless, some of the central difficulties were in effect indicated by MacCallum, *Legislative Intent,* 75 YALE L.J. 754 (1966).

therefore interpretive review, is then taken to encompass norms that can be inferred from the text of the Constitution *or* from the intentions of its Framers. Noninterpretive review includes norms with no such connections to the Constitution.

To understand the distinction better, we have to consider Grey's application of it. He appears mainly concerned with defending decisions based on "those large conceptions of governmental structure and individual rights that are at best referred to, and whose content is scarcely at all specified, in the written Constitution."[7] These are especially important and interesting norms; but it is misleading to regard their use as noninterpretive review.

Consider the fifth amendment's requirement of "just compensation" for private property that is taken for public use.[8] As the Constitution explicitly requires compensatory justice but provides no criteria of just compensation, it is most natural to understand the clause as requiring compensation that is truly just. If it does, then the Constitution presupposes that there is a real distinction between just and unjust compensation, one that people can employ.

On this reading, compensatory justice is a constitutional norm. But it is only named; its content is not given. What are we to say, then, about the appropriate criteria of compensatory justice and their use by courts? The question is forced on us by Grey's framework, which is intended to put such provisions in proper perspective. Should the criteria of compensatory justice be classified as *extra*constitutional norms and their use regarded as *non*interpretive because they are given neither by the constitutional text nor by Framers' intent? That would be misleading, because appropriate criteria are needed by courts in applying the *constitutional* norm of compensatory justice. That fact provides a powerful reason for regarding the identification of appropriate criteria as an element of constitutional *interpretation.*

Courts cannot identify appropriate criteria of compensatory justice without answering this question: "What does justice require by way of compensation when private property is taken

7. *Id.* at 708.

8. The occasion for compensation (public takings of private property) will be assumed hereafter.

for public use?"[9] A justified answer would seem to require a systematic inquiry into the principles of compensatory justice. Criteria that are appropriate for constitutional purposes might depend not only on abstract justice but also social conditions, historical traditions, established economic practice, and prior constitutional interpretation. It is commonplace for courts to make such judgments.

Constitutional scholarship often describes such a process as judges *imposing* their own values on the nation. This assumes either that there cannot be justified answers to moral questions or else that judges are incapable of honest inquiry. But either form of skepticism is incompatible with our subject, the rational appraisal of normative theories about judicial review.

We are properly skeptical about criteria that are proposed without clear justification. There can also be room for doubting the results of an inquiry. But I see no reason to deny that courts might sometimes have adequate reason to regard certain criteria of compensatory justice as appropriate. A court's deciding a case on that basis could not be regarded as unfaithful to the Constitution. Quite the contrary.

Working out such aspects of the Constitution surely counts as interpretation. The interpretive-noninterpretive distinction obscures this point and directs us to the wrong questions. We need a better understanding of constitutional interpretation. We need to explore the variety of ways in which a norm can legitimately be attributed to the Constitution.

To suggest otherwise is to invite misguided criticism. When constitutional interpretation is so narrowly understood, the idea of noninterpretive review does not distinguish between norms that lack any connection with the Constitution and norms that are firmly anchored in it, though they require interpretation. Then critics can fail to appreciate the distinction.[10] Plausible objections to the former can mistakenly appear to discredit the latter as well.

Let us now consider briefly another prominent account of the distinction between interpretive and noninterpretive review. According to Ely, interpretivism holds

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9. A sound answer might differentiate among takings.

10. *See, e.g.*, Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

> that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution [whereas noninterpretivism maintains] that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.[11]

Ely attacks this "clause-bound"[12] interpretivism, using arguments like those already suggested. It treats "constitutional clauses as self-contained units"[13] and does not envisage interpretive claims based on several provisions or the Constitution as a whole. "On candid analysis," he says, "the Constitution turns out to contain provisions instructing us to look beyond their four corners."[14] He finds these instructions in "provisions that are difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it."[15] Unlike Grey, Ely does not endorse noninterpretive review. But he avoids it only by renouncing his own definitions.

Interpretive and noninterpretive review are defined by both Grey and Ely so as to encompass the possible varieties of judicial review. Ely's attack on noninterpretivism is directed, however, against theories that do not exhaust the possible varieties of that type. He attacks what one might call *purely* noninterpretive review, which seeks "the principal stuff of constitutional judgment in one's rendition of society's fundamental values."[16] This leaves unscathed those versions of noninterpretivism that base judicial review on interpretations of "the document's broader themes," including Ely's theory. Ely defends a "participation-oriented, representation-reinforcing approach to judicial review."[17] According to his own definitions, that theory recommends noninterpretive review. In nevertheless calling his theory "the ultimate interpretivism,"[18] Ely acknowledges that the interpre-

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11. J. ELY, DEMOCRACY AND DISTRUST 1 (1980).
12. *Id.* at 11.
13. *Id.* at 88, note *.
14. *Id.* at 38.
15. *Id.* at 14.
16. *Id.* at 88 note *.
17. *Id.* at 87.
18. *Id.* at 88.

tive-noninterpretive distinction incorporates an inadequate conception of interpretation.

Ely's analytic framework is misleading,[19] and his method of interpretation is impressionistic. He claims, for example, that the Constitution overwhelmingly endorses representative democracy and that its unclear elements should be interpreted so as to promote that value. He recognizes that aspects of the Constitution cannot be encompassed by this interpretation, but he fails to explain the impact of the recalcitrant evidence on his interpretative claims or its consequences for judicial review. Should we regard the Constitution as committed also to principles that are independent of representative democracy? If so, how are unclear aspects of the Constitution to be understood when the two sets of principles conflict? Alternatively, should the Constitution be regarded as committed to some more complex set of principles, which coherently account for all of its provisions? Ely rejects the narrow conception of interpretation that is assumed by the standard idea of interpretive review, but he never clarifies his own conception of interpretation, and so neglects these issues.

In sum, the interpretive-noninterpretive distinction has been unhelpful. It begs the central question of judicial review, namely, the character of interpretative claims and the range of sound supporting arguments.

There is a genuine problem about whether and, if so, when and how extraconstitutional norms may properly be used within judicial review. But that problem can hardly be addressed before we achieve an understanding of interpretative claims that are based on what Ely calls "the broader themes" of the Constitution.[20]

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19. I discuss this point in Lyons, *Substance, Process, and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745 (1987).

20. Another problem is to clarify the subject of interpretation. The standard formulations quite naturally imply that it is a document. (A rare exception is Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).) But interpretative arguments routinely consider not only "Framers' intent" but also the requirements of institutions that accord with the structural norms of the Constitution (*see, e.g.*, C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969), which is frequently cited but whose intriguing theoretical claims about interpretation have never been carefully analyzed or clearly explained) and interpretative judicial precedent. Grey defends "noninterpretivism" by relying heavily on established lines of precedent. Like judicial review itself, Ely's own theory starts from an interpretative precedent and relies on precedents throughout. Dworkin maintains that constitutional interpretation concerns not just the constitutional

II. THAYER'S RULE

According to Thayer's famous "rule of administration" for judicial review, federal courts should nullify federal legislation only when one cannot reasonably doubt that it is unconstitutional.[21]

This extreme doctrine of judicial deference does not seem to be motivated by skepticism about the constitutional basis for judicial review. Thayer appears to believe that judicial review is justified on the ground that Congress has "only a delegated and limited authority under the [Constitution, and] that these restraints, in order to be operative, must be regarded as so much law; and, as being law, that they must be interpreted and applied by the court."[22] Thayer emphasizes that judicial review concerns the constitutional boundaries of legislative authority rather than the wisdom of the legislature's exercise of its authority and that, as a judicial power, it may be exercised only within the context of litigation in which constitutional questions arise.[23]

Against that background, one might expect Thayer to reason that courts should approach the task of reviewing legislation for its constitutionality by seeking a well-grounded understanding of the relationship between the Constitution and the legislation under review. This would require a court to base its decision on interpretations of legislative authority and its limits under the Constitution as well as of the challenged statute.

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document but "our constitutional structure and practice." *See* R. DWORKIN, LAW'S EMPIRE 360 (1986).

21. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129 (1893) [hereinafter Thayer, *Origin*]. The rule is formulated in a variety of ways, but the variations make no difference here. As explained below, the rule applies to relations between the judiciary and the legislature at the federal level.

22. *Id.* at 138; *see also id.* at 129-130 (on the supremacy clause).

23. Thayer contrasts the limited range of cases in which the courts are authorized to "review" legislation for constitutionality with the unlimited scope for review by the legislature. He claims that the legislature cannot act without making such a judgment, and that its judgment may be final, as many of its acts cannot be reviewed by courts. He reasons that, by placing limits on the scope of judicial review, the system implies that the legislature is primarily to be relied upon to review legislation for constitutionality, and that the legislative judgment is entitled to respect. *Id.* at 134-136. This "may help us to understand why the extent of [the judiciary's] control, when they do have the opportunity, should be narrow." *Id.* at 137. But the same might be said about state legislatures and legislation, so Thayer's reasoning does not seem to square with the different treatments he accords federal and state legislation.

Thayer does, in fact, insist upon that straightforward approach to judicial review, but only when federal courts review legislative enactments by state governments. In those cases, Thayer says, courts should be guided by "nothing less than" the "just and true interpretation"[24] of the federal Constitution. But Thayer insists that the same does not hold when courts review federal legislation; courts should approach those cases very differently.[25]

Thayer observes, in effect, that two questions must be distinguished. One is whether legislation comports with the Constitution. Another is how courts should deal with challenges to the constitutionality of legislation. These might be assumed to run together. Indeed, there would seem to be a very strong presumption that an answer to the former question (Is this statute constitutional?) determines the appropriate answer to the latter (Should this statute be upheld as constitutional?). But Thayer holds, in effect, that federal courts should not be guided by any such presumption in dealing with federal legislation. In those cases, courts should not be guided by their best interpretation of the statutes and the Constitution. They should not ask whether the legislation *is* constitutional, but whether the courts should sustain it as constitutional. Courts should answer that question by determining whether someone might reasonably believe that the legislation is constitutional. If so, the constitutional challenge should be denied and the legislation upheld. If not—if "it is not open to rational question"[26] whether the act is unconstitutional—then, but only then, should the courts nullify it.

Courts following Thayer's rule might never have occasion to declare unconstitutional legislation unconstitutional. Judges might confidently believe, on excellent grounds, that an enactment exceeds Congress' legislative authority and is therefore unconstitutional, but they might simultaneously believe that their excellent reasons for regarding the enactment as unconstitutional leave room for reasonable doubt. Thayer understands, of course, that the rule requires greater deference to congressional deci-

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24. *Id.* at 155.

25. Thayer does not adequately explain why different treatment is to be accorded state and federal legislation. He asserts that the courts have a duty to maintain the "paramount authority" of the national over the state governments (*Id.* at 154), but all he adds is that the federal iegislature is, whereas state legislatures are not, "co-ordinate" with the federal courts. *Id.* at 155.

26. *Id.* at 144.

sions than would otherwise be warranted. But that is not my present concern.

My point is that the rule requires justification. Judicial review (as Thayer himself appreciates) is grounded upon the idea that the Constitution is law that courts are bound to apply and enforce. This implies a very strong presumption that courts should nullify legislation that they regard as unconstitutional. Thayer would seem to be claiming that in some, but not all, cases federal courts should not straightforwardly apply and enforce the federal Constitution, and thus that in those cases this presumption is rebutted. His conception of a federal court's responsibility when reviewing legislation from one of the state legislatures shows that he understands what it means for the courts to apply and enforce the Constitution. He accordingly owes us an explanation of how the presumption in question is rebutted—how courts can *legitimately* refrain from applying and enforcing the Constitution generally, with regard to congressional as well as state legislation.

An answer might make either of two possible claims. It might claim that there are *constitutional* grounds for judicial deference to the legislature in such cases, or it might invoke *extra*constitutional grounds. The difference is significant. Whereas an answer of the first type would raise issues of constitutional interpretation, an answer of the second type would raise issues of principle regarding judicial fidelity to the Constitution.

Thayer appears to recognize that the burden of proof lies on his shoulders, and he attempts to sustain it both by offering evidence that his rule reflects the standard view[27] and by suggesting substantive grounds for the rule. The latter arguments, citing the rule's merits, are presented in quotations from others' writings. But Thayer appears to endorse their points, so I shall proceed as if they represent his considered judgement. The main issue for constitutional theory is not what Thayer himself believed but the character of such reasoning.

I shall now review the suggested arguments in the order in which they are suggested in Thayer's paper:

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27. Thayer's claim that his rule was firmly established is systematically appraised and rejected in C. BLACK, THE PEOPLE AND THE COURT 195-203 (1960).

A. *Utilitarianism*

Thayer submits that unless the courts limit nullification to violations of the Constitution that are "plain and clear, . . . there might be danger of the judiciary preventing the operation of laws which might produce much public good."[28]

This argument is offered tentatively, perhaps because it is incomplete. After all, courts nullifying federal legislation may prevent public harm as well as public good. A complete argument of this type would need to show that following his rule would do more good than harm, perhaps even that it would do more good, on the whole, than any feasible alternative, including less deferential rules.

But the argument might be bolstered. To avoid circularity and vacuity, let us interpret "public good" as general welfare. It might be held that a reasonably accurate measure of the general welfare is provided by an indirect majoritarian decision process such as that provided by a popularly elected legislature. If so, it might be held that a policy of judicial deference to a popularly elected legislature would promote the general welfare.[29]

Let us then suppose that Thayer's rule can be supported by utilitarian reasoning. This does not appear to count as a legal, or specifically a constitutional, argument. How can it legitimately guide a court's approach to judicial review? How can it legitimately limit a court's application and enforcement of the Constitution? An answer might be based on constitutional or extraconstitutional considerations. After all, either the Constitution implies that utilitarian reasoning may permissibly guide a court's approach to judicial review or it does not.

There is a clear textual basis for claiming that the Constitution acknowledges the validity of utilitarian reasoning, though not to the exclusion of all potentially competing considerations. The preamble says that the Constitution is meant to "promote the general Welfare,"[30] among other things. The values cited in the

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28. Thayer, *Origin*, *supra* note 21, at 140 (quoting Kemper v. Hawkins, Va. Cas. p. 60 (1793)).

29. The argument provides no apparent basis for deferentially reviewing federal legislation while rigorously reviewing legislation of the several states. The same is true of other arguments considered here, but I shall ignore them hereafter.

30. I ignore here the differences and possible conflict between promotion of the general welfare when that is limited to the population of the United States and promotion of welfare more generally.

preamble might be understood to have a bearing upon constitutional interpretation. It might be held, for example, that the Constitution as a whole should be interpreted so as to promote those values. This reasoning would not justify the promotion of the general welfare without regard to the other values cited, but it would legitimize the use of utilitarian arguments, among others, in large scale constitutional interpretation.

But this would not tend to show that the utilitarian argument for Thayer's rule has a constitutional foundation. From the assumption that the Constitution as a whole is supposed to promote a certain value, and that the Constitution as a whole may be interpreted accordingly, we cannot reasonably infer that the same is true of specific aspects of the Constitution. That would amount to what logicians call "the fallacy of division." Besides, institutions do not work that way. Law, in particular, promotes various values *indirectly*.

If a utilitarian argument for Thayer's rule is to be regarded as constitutional, what needs to be shown is that the Constitution implies a utilitarian condition *on the exercise of the judicial power*. Consider the parallel case for legislation. Suppose we ask whether the failure of a statute to promote the general welfare is a constitutional ground for nullification of the statute. Thayer's answer would be no: the Constitution provides no utilitarian condition on the exercise of the legislative power. But the same applies to adjudication: we have no reason to believe that the Constitution implies a utilitarian condition on the exercise of the judicial power. If that is true, then a utilitarian argument for Thayer's rule cannot be regarded as based on the Constitution.

If the first suggested argument for Thayer's rule has no foundation in the Constitution, then the argument is extraconstitutional.[31] We return to our original question: How can such reasoning legitimately guide a court's approach to judicial review?

The general problem is this. Legitimate legal arguments vary among jurisdictions, but are usually thought to be limited. Judicial review itself assumes that there are limits to the judicial power to nullify legislation. Some reasons are relevant (the statute is unconstitutional); others are not (the statute is unwise).

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31. It is then an argument that a self-styled "interpretivist" should reject. If "judicial activism" in this area involves the use of extraconstitutional norms, then this is an activist argument for judicial deference.

But if some arguments with no foundation in the Constitution are to be regarded as a sound basis for some judicial decisions (such as whether a court should adopt Thayer's rule), then those limits on legal arguments are threatened. Must courts then be guided by other extraconstitutional and even extralegal arguments—without restriction, in all judicial contexts? If not, then what is the basis for selecting some and rejecting others?

The first argument for Thayer's rule does not begin to answer such questions, but perhaps we have delved deeply enough to suggest some conditions on, and thus some obstacles to, its successful completion. Let us turn, then, to another suggested argument for Thayer's rule.

B. Respect for the Law

Thayer next posits that the courts should insure "due obedience" to the federal legislature's authority. If its authority is "frequently questioned, it must tend to diminish the reverence for the laws which is essential to the public safety and happiness."[32]

This suggests that, by rigorously enforcing the Constitution, courts might undermine respect for federal legislation, which in turn might undermine public safety and happiness. The argument assumes both that federal rule is essential to public welfare and that it is quite fragile. Thayer seems to assume that extreme judicial deference can not only bolster federal authority but is an essential means to that end.

It may be difficult for us to regard the federal government as fragile, but the idea might have seemed more plausible when Thayer wrote, not very long after the Civil War.

In any event, the argument may be understood in either of two ways. We might emphasize its reference to "public safety and happiness" and read it along utilitarian lines. This would introduce nothing new into our deliberations, so I turn instead to an alternative reading. The argument might be understood to presuppose a principle that seems plausible, if somewhat vague: the judiciary shares responsibility to make the system work.

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32. Thayer, *Origin, supra* note 21, at 142 (quoting Adm'rs of Byrne v. Adm'rs of Stewart, 3 S.C. Eq 466, 476 (S.C. 1812)).

The principle is implausible unless the judiciary's share of the responsibility is limited, for example, to "judicial" functions. Even if our conception of the judicial role is flexible, it is not coextensive with our conceptions of the other governmental branches. Questions that then arise are whether the adoption of such a rule is in fact compatible with the judicial role and, if so, whether its adoption is in fact necessary to make the system work.

For our purposes, however, the most important question is whether the principle that is presupposed by the argument (*e.g.*, that the judiciary shares responsibility to make the system work) has any foundation in the Constitution. It is tempting to suppose so, but I see no clear argument to that effect. Another possibility is that the principle expresses a conception of civic responsibility, which might be classified as moral rather than legal. Implementing the notion of civic responsibility in this way seems less threatening to the idea of limits on law than does similar use of utilitarian reasoning. Whereas application of the notion of civic responsibility is limited to political or similar contexts, utilitarian reasoning is not.

C. Independence of the Judiciary

Thayer fears that "[t]he interference of the judiciary with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the constitution."[33]

This argument is likewise premised on the judiciary's responsibility to help make the system work, as well as on fears that ill-considered or even "frequent" judicial nullification of legislation might provoke Congress to use its considerable power to control the federal courts. There is of course some irony in an argument that seems to counsel sacrificing the Constitution in order to save it. Put more sympathetically, however, the claim is that rigorous enforcement of the Constitution might be self-defeating.

This argument may be contrasted with Learned Hand's later justification for judicial review. Both writers emphasize the im-

33. *Id.*

portance of preserving the constitutional scheme that separates powers and allows one branch of government to limit the effective discretion of another. Both urge judicial deference to the federal legislature. Beyond that, however, they differ profoundly. Thayer appears reasonably confident of the constitutional basis for judicial review, but is concerned that vigorous exercise of the judicial power might be self-defeating. Hand seems deeply skeptical of judicial review's grounding in the Constitution, and argues that it was necessary for the judiciary to assume the power in order to "keep the states, Congress, and the President within their prescribed powers."[34]

D. Representative Government

Finally, in a passage whose principal point is to emphasize the degree of judicial deference that is due the federal legislature, Thayer suggests a further argument:

> It must indeed be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense, and competent knowledge are always to be attributed to that body. The conduct of public affairs must always go forward upon conventions and assumptions of that sort. "It is a *postulate,*" said Mr. Justice Gibson, "in the theory of our government ... that the people are wise, virtuous, and competent to manage their own affairs...." And so in a court's revision of legislative acts ... it will always assume a duly instructed body; and the question is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent,—but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs,—what such persons may reasonably think or do, what is the permissible view for them.... The reasonable doubt [of unconstitutionality] ... is that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question. The rationally permissible opinion of which we have been talking is the opinion reasonably allowable to such a person as this.[35]

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34. L. HAND, THE BILL OF RIGHTS 15 (1958).

35. Thayer, *Origin, supra* note 21, at 149 (emphasis in original).

This passage can be understood to serve two functions. On the one hand, it is designed to clarify the rule of judicial deference to the federal legislature. According to the clarified rule, congressional acts may be nullified when, and only when, they are unconstitutional beyond "that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question."

On the other hand, it suggests a further ground for the rule. Thayer suggests that the Constitution embodies "a theory of government." He does not state the theory, but it appears to include the following elements: the theory assumes (1) "that the people are wise, virtuous, and competent to manage their own affairs," and (2) that they do so through representatives who are "competent, well-instructed, sagacious, attentive, [and] intent only on public ends." This appears to anticipate the notion that our government embodies or is committed to political principles which, because they favor "self-government"—or the closest practical approximation, government by elected representatives—argue against interference by an unelected federal judiciary. Although the point is not clearly made, it is nonetheless worth pursuing for its continuing importance.

This fourth suggested argument for Thayer's rule is similar to Alexander Bickel's contention that judicial review is "countermajoritarian" and "undemocratic."[36] Bickel puts the point by saying that, because judicial review "thwarts the will of the representatives of the actual people of the here and now," it is "a deviant institution in the American democracy."[37] These points are understood to provide reasons against judicial nullification of legislative decisions. As judicial review is established in the system, those points are understood to provide reasons for limiting such interference with the operations of representative government.[38]

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36. A. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (1962). *See also,* Rehnquist, *The Notion of a Living Constitution,* 64 TEX. L.J. 695-697 (1976).

37. BICKEL, *supra* note 36, at 18.

38. Thayer's reference to "the theory of our government" is problematic. The quoted passage implies that he treats essential elements of the theory as fictions. He does not believe that the elected legislators are generally "fit to represent a self-governing people," and one suspects that, for similar reasons, he does not believe that the people are fit to govern themselves.

But what kinds of reasons are they supposed to be? Are they provided by the Constitution? If not, we might ask, once again, why we should suppose that they should be taken into account in the deliberations of courts that are charged with the application and enforcement of constitutional law.

Consider the following facts: *First,* Thayer suggests that the power of judicial review can be inferred from the Constitution; Bickel claims that judicial review is neither implicit in nor contrary to the Constitution.[39] As both writers appreciate, the practice is well entrenched within the system. So, neither writer claims that judicial review is excluded by the Constitution and both acknowledge that it is established practice. *Second,* both writers understand that the Constitution neither prescribes nor permits pure popular government or even unrestricted representative government. The Constitution prohibits a variety of decisions that might be made by elected representatives. The constitutional system has various counter-majoritarian features. As both writers recognize, the constitutional system is not unqualifiedly committed to representative democracy. In sum, even if judicial review clashes with principles of representative democracy, that would not show that it clashes with the principles of the system that we have.

Perhaps the idea is that the Constitution is somehow committed to an *ideal* of representative democracy, despite its counter-majoritarian features. This raises a question that is rarely addressed in the literature of constitutional theory: What kind of reasoning is capable of justifying the attribution of *normative* political principles, including political ideals, to the Constitution? What would make a theory of that kind true? Political principles are often attributed to the Constitution, but on what basis is never made clear. For that reason, it is unclear what inferences might be drawn from, or what applications might be made of, those principles within the context of constitutional interpretation.

Compare Bork's conception of the Constitution. Although Bork refers to "the seeming anomaly of judicial supremacy in a democratic society," he says that the anomaly is "dissipated . . . by

39. It is unclear whether Bickel means that the Constitution is indeterminate on this issue, and also whether he believes that judicial precedent nonetheless imposes an obligation to engage in judicial review.

the model of government embodied in the structure of the Constitution."[40] That model is "Madisonian," and "one essential premise of the Madisonian model is majoritarianism. The model has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control."[41] Bork claims that both "constitutional theory" and "popular understanding"[42] provide an adequate basis for judicial review by giving courts the task of clarifying the boundary between majority power and minority freedom.

Because it acknowledges that the system limits representative government, Bork's "Madisonian model" seems descriptively more accurate than Bickel's "majoritarian" model. This might lead one to infer that Bork's model is superior. But these "models" are not purely descriptive. They are meant in part to show why the constitutional system merits respect. And such a model's descriptive accuracy need not improve its qualifications *as an ideal.* Even if the majoritarian model is descriptively less accurate than the Madisonian model, some might think that it nevertheless embodies a superior ideal. They might argue that pure representative government is better than a Madisonian system because it is inherently fairer or better serves the general welfare.[43]

III. CONCLUSION

The relatively brief career of the "interpretive model" for judicial review suggests the difficulty of containing the practice of constitutional interpretation within the narrow confines of textual glosses and psychohistory. Legal theory resists the notion that interpretation might be both controversial and sound, for its ideal of law is black letter. Anything short of certainty is dubious law. But interpretive practice in law, as elsewhere, seeks both hidden and wider meanings. A good deal of "noninterpretive" review turns out to be interpretational after all.

There are limits to the range of legal and specifically constitutional meanings, and so the imaginative practice of constitutional interpretation obliges us to consider the various grounds

40. Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 2 (1971).
41. *Id.* at 3.
42. *Id.*
43. This might be Bickel's view.

upon which norms can properly be attributed to the Constitution. But the reasoning behind doctrines like Thayer's rule, which aspire to regulate constitutional adjudication, appears not to respect those boundaries. Is that a sign that civic responsibilities lie just beyond the law? Or does it reflect undisciplined theory-mongering, constitutional infidelity masquerading as "judicial restraint"?

We end, as promised, with questions.