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THE CONSTITUTIONAL LIMITS OF JUDICIAL REVIEW: A STRUCTURAL INTERPRETIVE APPROACH

JACK WADE NOWLIN*

I. Introduction

Although scholars, jurists, and others debate the question of the proper scope of judicial power, no one denies that judicial power has some constitutional limits. Two questions, therefore, arise: (1) what are those limits and (2) how do we go about discovering them? A stranger to our contemporary interpretive debates, for instance, one from Massachusetts or Virginia circa 1795, one imagines, would recognize that the question of the limits of judicial power, including the judicial interpretation of the Bill of Rights, is essentially a question of constitutional design, implicating a wide array of "structural" values such as democracy, republicanism, federalism, the separation of powers, bicameralism, and checks and balances. That, of course, is not how we typically view the question today. In fact, the American Founders, who were so preoccupied with the precise design of our government, would be astonished at the radical shift in recent decades in our constitutional discourse — away from structural concerns about the form of government and toward the direct discussion of the rights of individuals. Indeed, it would be no exaggeration to say that "rights talk" has driven the once-predominant "design talk" from the field of constitutional theory and that the Bill of Rights and the Fourteenth Amendment have all but eclipsed the Philadelphia Constitution in our discussions of constitutional law. Indeed, as Mary Ann Glendon notes, our formal studies of the subject have become so focused on the "Constitution as a charter of rights" to the exclusion of the "Constitution as a design for government" that our elite

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"con[stitutional] law classes have long had the same relation to the Constitution as the Elgin Marbles have to the Parthenon." As a result, she concludes:

The student sees the professor's prized collection of fragments, but the well-proportioned structure in which these treasures once had their appropriate place is nowhere on display. The Constitution is like a wonder of another world, an ancient temple once used for activities that are no longer much practiced among us — deliberation, voting, local self-government.  

What could explain such a seismic shift in how students of the law think about the Constitution? As Glendon has observed, it is at least in part because our contemporary political culture has become almost obsessed with the language of rights. We have in fact lost much of our capacity to speak in terms of the "common good" and much of our willingness to engage in the give-and-take of legislative politics or the broader project of democratic self-government. Indeed, in elite circles today, when we refer to "the Constitution," we are much more likely to mean the Bill of Rights than the document devised in Philadelphia, whose precise structural nature and design was of such great concern to the Founding generation.  

We are likely to find ourselves studying hundreds of pages of Supreme Court caselaw rather than reading even a passage or two from the classic Federalist Papers. We are more likely to puzzle over rights theorists propounding the complexities of "justice as fairness" than to try to fathom constitutional theorists pondering the intricacies of the separation of powers, federalism, or democratic theory. And, of course, since we so often ignore the Philadelphia Constitution, the Federalist Papers, and the structure of our form of government, it is not surprising that we seldom take seriously the idea that the Constitution itself as "a design for government" might entail certain constitutional limits on judicial power, including what courts are to do about the rights provisions such as the Bill of Rights.

II. The Evasion of Structural Interpretive Argument About the Role of Courts

In our debates about judicial interpretation of rights provisions, far too often, crucial aspects of the structural nature of the Constitution as a design for government are left to what amounts to happenstance. Not only is it true that judges, scholars, and lawyers often undervalue the judicial enforcement of structural devices such as federalism, or the broader structural context of rights provisions

2. Id. at 111.
4. See, e.g., Ronald Dworkin, Life's Dominion 118-25 (1993) (discussing "constitutions" of "principle" and "detail" when he is referring only to the Bill of Rights and Fourteenth Amendment) [hereinafter Dworkin, Dominion].
5. See, e.g., Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review 60-83 (1989) [hereinafter Nagel, Constitutional Cultures] (discussing the
such as the free-exercise clause, but even more importantly they often fail to take seriously the crucial idea that the constitutional design itself places limits on the scope of judicial power. In fact, all too often the proper scope of the power of courts simply is inferred by indirection without any sort of serious interpretive analysis of the role of the judiciary in the structure of our government, particularly in light of such core constitutional and political values as democracy, republicanism, and federalism. Typically, this is a two-step process. First, contemporary judicial review and its attendant variables in contemporary practice are taken merely as a fait accompli, well-established doctrines needing no particular justification and possessing no inherent logic. Second, (implicitly judicial) interpretive theory is treated as a virtually autonomous field of inquiry — largely unrelated either to the logic of judicial review or the judiciary's role in the broader structure of the Constitution. As Seventh Circuit Judge Frank Easterbrook has observed:

The author [of the typical law review article] starts with the assumption that the judge will decide [what the Constitution means] — that was settled by Marbury v. Madison in 1803 — and then displays a [typically controversial] range of meanings that could be imputed to the text, imploring judges to select the best one. Judicial opinions often have the same flavor.

Clearly, then, the degree of judicial power conferred by the doctrine of judicial review tends to vary wildly depending on the interpretive theory or theories used by judges. Under some interpretive theories, such as Robert Bork's conception of originalism, the role of the courts tends to be relatively modest. Under other theories, such as Ronald Dworkin's conception of a moral reading of the Bill of Rights, the role of courts tends to be incredibly grandiose. Therefore, the particular conception of judicial review, power of the judiciary, the role of courts in our framework of government, and to a substantial extent the nature of American democracy, republicanism, federalism, separation of powers, checks and balances,

common judicial and scholarly "preference for rights over structure" and the consequent unwillingness to treat federalism as a fundamental value. It is worth noting here that since 1995, a bare 5-4 (and perhaps transient) majority of the Supreme Court has taken federalism quite seriously, handing down several controversial decisions concerning the constitutional limits of the power of Congress and the constitutional standing of the sovereign immunity of the states. See, e.g., Alden v. Maine, 119 S. Ct. 2240 (1999); United States v. Lopez, 514 U.S. 549 (1995).


7. These variables would include judicial supremacy — the status of the Supreme Court as final arbiter of the meaning of the Constitution — and, historically speaking, a rather extreme view of the requirements of judicial independence, including the broad notion that it would be improper for Congress to use its various political checks on the Supreme Court to prevent the judiciary from overstepping its constitutional bounds.

and other devices of limited government, simply are left to flow out of the brute fact of judicial review and the vicissitudes of the interpretive debates.9

Indeed, even quite prominent constitutional theorists often dramatically underplay or evade structural argument about the role of courts in the American constitutional design. Laurence Tribe, for instance, dismisses structural analysis in passing, noting that "institutional questions" have only a "limited relevance" to constitutional interpretation, a limited relevance that in practice seems more like complete irrelevance.10 Hadley Arkes has also endorsed a highly discretionary "moralistic" approach to judicial constitutional interpretation with no serious discussion of the potential limits on judicial power implicit in the American constitutional design.11 Sotirios Barber, as well, shortchanges structural analysis and even questions the good faith of those who do make institutional critiques of expansive judicial power.12 Ronald Dworkin also tends to evade structural argument; in fact, the following passage of his is quite typical:

[T]he Bill of Rights . . . seems to give judges almost incredible power. Our legal culture insists that judges — and finally the justices of the Supreme Court — have the last word about the proper interpretation of the Constitution. Since the great clauses command simply that government show equal concern and respect for the basic liberties — without specifying in further detail what that means and requires — it falls to judges to declare what equal concern really does require and what the basic liberties really are. But that means judges must answer intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, with no prospect of agreement. It means that the rest of us must accept the deliverances of a majority of the justices, whose insight into these great issues is not spectacularly special.13

Dworkin, then, claims that "almost incredible" judicial power is simply to be inferred from the insistence of our legal culture on judicial review and his own controversial interpretive conclusions with respect to the Bill of Rights, what he calls its "most natural [i.e., the most naive, purely textual, and thus purely acontextual and astructural] reading," as a document of abstract "principle."14

9. Other variables of judicial power, of course, play a role here as well. It makes a great deal of difference how aggressively or deferentially a court seeks to pursue its constitutional judgments.
14. Id. at 73.
Dworkin, thus, plainly does not take seriously enough the crucial implications of his theory for the structure of the American constitutional design. Indeed, Dworkin concludes, quite unhelpfully, that the "American conception of democracy" can scarcely be in any conflict with his (rather dubious) structural inferences from the brute fact of judicial review and his controversial interpretive approach because it is, rather, to be determined by these variables. Therefore, the proper role for courts in American government — and thus to a substantial degree the parameters of American democracy — is left simply to flow out of judicial review and the interpretive debates, and nothing else. Presumably, Dworkin would respond in a similar fashion to queries about the "American conceptions" of republicanism, federalism, the separation of powers — and indeed the entire design for government.

In fact, the closest Dworkin has come to attempting to interpret the American constitutional design with respect to the role of courts is a brief foray into the much narrower project of "interpreting [our] established constitutional practice" with absolutely no attempt to question whether contemporary constitutional practice itself deviates from the best understanding of our design for government — a truly striking example of the evasion of a robust structural interpretive argument. Why should we assume that our current judicial practice reflects the "best" interpretation of the American constitutional design? Why not instead consult the entire constitutional text, the original understanding, and our constitutional practices more broadly, even leaving open the possibility that our final conclusions may necessitate drawing on moral-political arguments as well, such as democratic or republican theory? Certainly, in Dworkin's view, the American conception of democracy or the structure of government more generally, including the proper role for courts, is not to be determined by this sort of overt, robust legal-historical and/or moral-political structural interpretive analysis of the Constitution as a design for self-government.

Still, as shown, Dworkin's approach, while it seems to ignore the question of constitutional design, in fact has quite profound, inescapable, and, one imagines, hardly accidental implications for the nature of the Constitution as a design for government. Indeed, if one reads the Bill of Rights as an abstract statement of principle, if one treats the doctrine of judicial review as simply a "given," if one defines "law" only in light of recent judicial practices, and if one ignores all

15. This is not to suggest that Dworkin has failed to address at least some important structural issues — such as the (in)compatibility of this theory of judicial review with democratic self-government — but simply that he denies that these sorts of structural concerns should shape our view of the role of courts within the constitutional design, and thus, of the judicial interpretation of rights provisions. On the contrary, he addresses these structural matters only in the context of crafting what are clearly post hoc apologies for the constitutional design that flows out his interpretive theories, not when determining how the American constitutional design itself ought to be interpreted. Indeed, Dworkin condemns both John Hart Ely and Learned Hand precisely for what he views as the illegitimate importation of structural moral-political considerations into the judicial interpretive debates. See infra note 122 and accompanying text.

16. DWORKIN, FREEDOM, supra note 13, at 74-76.

17. DWORKIN, DOMINION, supra note 4, at 34-35; see also, e.g., RONALD DWORKIN, LAW'S EMPIRE 176-224 (1986) [hereinafter DWORKIN, EMPIRE].
questions as to any implicit limitations on judicial power that might derive from the
democratic, republican, or federal nature of the Constitution, then judges would
seem to have almost incredible power in the American constitutional design. As a
result, of course, our form of government would be much less democratic,
republican, and federal than it would be otherwise and than it otherwise may have
been earlier in our history. Moreover, such an understanding of judicial power also
would tend to diminish the various Madisonian devices of dispersing, checking, and
balancing governmental power — by centralizing power over questions of individual
rights in the Supreme Court.

In the final analysis, then, theorists often advocate interpretive theories that favor,
at least implicitly, decidedly expansive judicial power, that have quite profound
structural implications for our design for government, but they often provide little
or no reason why we should accept these structural implications as the best
interpretation of the American constitutional design. There is often no attempt to
craft a serious structural justification as to why, in this venerable democracy, we
ought to accept the deliverances of a majority of unelected, electorally unaccount-
table judges as to the fundamental and intractable moral questions that divide us as
a nation. What sort of legal-historical interpretive basis does that conception of the
role of courts have? What moral-political justification could be crafted for it? The
answers to these questions, of course, are few and far between. In particular,
Dworkin, it would seem, accepts only recent precedent (the "authority is . . .
distributed by history") for the first and rejects any broad appeal to the second as
an illegitimate recourse to extra-constitutional principles ("external revisionism").18
Perhaps, then, this decided deficiency in structural interpretive justifications for such
a controversial judicial role is our first clue that it is the nonstructuralist's broad
approach, not the proper scope of judicial power, that is incredible.

III. Embracing Structural Interpretive Argument About the Role of Courts

The most obvious alternative to the evasion of structural argument simply is to
turn it on its head. Rather than attempting to determine the nature of the
governmental design indirectly and inferentially by debating judicial interpretive
theory and the meaning of the Bill of Rights, instead one would debate the meaning
of the governmental design directly and discern the best judicial interpretive theories
and the best judicially determined meaning of the Bill of Rights through indirection
and inference. Thus, instead of determining the governmental design of the
American republic implicitly by constructing the best interpretation of contemporary
judicial practice, one would construct the best interpretation of the governmental
design itself more broadly and thereby determine the conformity of contemporary
judicial practice to the requirements of the Constitution. One would, in short, openly
embrace structural argument, beginning with some sort of legal-historical and/or
moral-political structural analysis of our design for government, then determine the

18. DWORdIN, FREEDOM, supra note 13, at 34-35, 75-76; see also infra note 122 and accompanying
text.
proper scope of judicial power within that design, and finally conclude with an
(implicitly judicial) interpretive theory or theories concerning the Bill of Rights.
One would thus resolve these crucial structural questions through overtly structural
argument and place the judicial interpretation of the Bill of Rights in its broader
institutional and constitutional contexts.

Therefore, rather than taking judicial review and its supporting doctrines as
simple brute facts insisted upon by our legal culture, one would seek instead to un-derstand (as well as expand upon) the sort of structural-interpretive analyses of
the proper judicial role within the American constitutional design that are to be
found in the foundational documents of the doctrine of judicial review, such as
Federalist No. 7819 and Marbury v. Madison.20 One would do this simply in order
to determine (1) the fundamental structural basis for judicial review and (2) the
limits of its application and supporting doctrines in light of that structural basis,
including its compatibility with other important structural norms such as popular
sovereignty, deliberative democracy, and federalism.

Robert Bork, for instance, has defended, though much too briefly, his own
originalist judicial interpretive theory in legal-historical structural terms. Bork
writes:

The [originalist] judicial role just described corresponds to the original
understanding of the place of courts in our republican form of
government . . . .

Even if evidence of what the founders thought about the judicial role
were unavailable, we would have to adopt the rule that judges must
stick to the original meaning of the Constitution's words. If that method
of interpretation were not common in the law, if James Madison and
Justice Joseph Story had never endorsed it, if Chief Justice John
Marshall had rejected it, we would have to invent the approach of
original understanding in order to save the constitutional design. No
other method of constitutional adjudication can confine courts to a
defined sphere of authority and thus prevent them from assuming
powers whose exercise alters, perhaps radically, the design of the
American Republic. The philosophy of original understanding is thus
a necessary inference from the structure of government apparent on the
face of the Constitution.21

A similar approach and rejection of the nonstructuralist evasion, focusing more
closely on the logic of judicial review within the constitutional design, has been
sketched by Judge Easterbrook. He writes:

If indeed the Constitution deputizes judges to settle all hard legal issues,
then inability to settle on a level of abstraction [or an interpretive theory

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20. 5 U.S. (1 Cranch) 137 (1803).
more broadly] greatly but properly enlarges the judicial role in governance. If it does not, then the sequence should be reversed. Instead of assuming [judicial] power and then searching for a level of abstraction [or an interpretive theory], the court should search for that degree of generality [and interpretive theory or theories] capable of justifying a judicial role. Unless it is possible to find an answer that adequately differentiates judicial from political action, the judge should allow political and private actors to proceed on their way — that is, the judge should honor the structural features of the Constitution allocating powers to the states and to political actors who have followed the approved forms such as bicameral approval. 22

John Hart Ely outlines a much more systematic, if rather narrow, structural alternative to the evasion of structural argument. 23 First, Ely identifies one core structural constitutional and political value — representative democracy — which the exercise of contemporary judicial power so often seems to undermine. 24 Second, he selects the most obvious and controversial variable of judicial power — judicial interpretive theory — as an instrument of reconciliation. 25 He then concludes that judges must interpret the "open-ended" provisions of the Bill of Rights only with an eye toward reinforcing representation. 26 For Ely, the fact that the design of our Constitution fairly can be read as a highly democratic one ought to govern, shape, and constrain judicial interpretation of the Bill of Rights. 27

Alexander Bickel has also sketched, though again much too briefly, a structural argument in favor of a somewhat more expansive conception of judicial power. Bickel first recognizes the overarching democratic-republican political norms instantiated in the American constitutional design and therefore acknowledges that "judicial review is a deviant institution in the American democracy," one that therefore must be justified in light of what he famously termed the "counter-majoritarian difficulty." 28 Even so, Bickel argues that a moderate form of judicial policy-making can be justified normatively given the Court's special institutional capacity to act on the basis of "principle," a capacity rooted in the putative leisure, training, and political insulation of the judges. 29 In Bickel's view, a federal judge's comparatively greater ability to take the "long view" in light of our society's enduring values rather than act on the basis of "expediency" will justify a moderate deviation from democratic norms. 30 This position at least represents some

22. Easterbrook, supra note 8, at 372.
23. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).
24. See id. at 1-9.
25. See id.
26. Id. at 101-04, 135.
27. See id. at 5-9.
29. Id. at 25-26.
30. Id. at 24-26. For an incisive criticism of Bickel's argument, see BORK, TEMPTING, supra note 21, at 187-93.
attempt, however underdeveloped and dubious, to justify structurally a more expansive judicial role.

We have, then, a rough outline of the basic structuralist approach, involving the attempt to identify the most important structural features of the Constitution and then to make sense of and justify the exercise of judicial power in light of those features. Here, the question of what courts are to do about, for instance, the Bill of Rights is answered in light of a preexisting democratic, republican, and federal structural context — and the answer is accordingly shaped, guided, and limited by that context. As we have seen, however, these theorists are often insufficiently systematic, rigorous, or comprehensive in their structural analysis, suggesting that a great deal of work in the structural-interpretive area remains to be done. But before addressing that question, we should examine in greater detail the more fundamental question of the general value of the structural interpretive approach compared to the nonstructural alternative.

IV. The Primacy of Structural Interpretive Argument

Two broad approaches to the question of judicial power — the astructuralist evasion of structural argument and the structuralist acceptance of it — have been presented. One may well ask who is closer to right? To answer this question more fully, a number of important matters need examination, including the paramount importance of the constitutional design, its logical priority over judicial interpretive theory, and the limited relevance of the meaning of the Bill of Rights to this debate.

A. The Paramount Importance of the Constitutional Design

Our very real, if narrow, day-to-day concerns about the judicial protection of the "best" conception of civil liberties should not obscure the paramount importance of the much deeper and broader question of constitutional design. As the Founders well knew, the design of a constitution is of the utmost priority because it establishes the all-important framework of government, one reflecting a view of (1)

31. A bit farther afield from the interpretive debates, George W. Carey has engaged in a broad structural analysis of the original design of our constitutional republic, including careful treatments of the Federalist's understanding of the nature of the judicial role. See, e.g., GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC 129-45, 169-71 (1989) [hereinafter CAREY, FEDERALIST]; see also GEORGE W. CAREY, IN DEFENSE OF THE CONSTITUTION 122-38 (rev'd & exp'd ed. 1995) [hereinafter CAREY, DEFENSE]. In particular, Carey examines general constitutional values such as republicanism, federalism, and the separation of powers, and he rigorously parses Federalist No. 78 (Alexander Hamilton) and related texts in light of these values, concluding that there are indeed "major discrepancies...between what Publius envisioned and modern [constitutional] practice, particularly with regard to...the enhanced powers of the courts." CAREY, FEDERALIST, supra, at 171. In fact, Carey maintains that "our basic constitutional division of powers" has been "transform[ed]" by the radical expansion of judicial power in recent decades and that the final result is "nothing less than judicial tyranny" quite incompatible with the Constitution's basic republican design for self-government. CAREY, DEFENSE, supra, at 186-87. It is worth noting that Carey has obviously been deeply influenced by both Charles S. Hyneman and Willmoore Kendall. See generally, e.g., CHARLES S. HYNEMAN, THE SUPREME COURT ON TRIAL (1963); WILLMOORE KENDALL & GEORGE W. CAREY, THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION (1970).
the constitutive values of the polity, (2) its constitutive problems, and (3) the best prudential means for attempting to remedy the latter in harmony with the former. The Founders valued both civic and individual freedom very highly. Consequently, they wished to create both a republican (representative) form of government and a stable and just one, providing "republican [i.e., not anti-republican] remed[ies] for the diseases [such as faction] most incident to republican government." Or as Madison put it at the federal convention, they wished to design a constitution incorporating the only "defense[es] against the inconveniences of democracy consistent with the democratic form of government." Of course, the constitutional design reflects a deep commitment to not only democracy but also to other important constitutive values such as civic republicanism, federalism, individual liberty, and property rights. It also reflects a deep concern about serious constitutive problems such as imprudent rule, governmental tyranny, and factional tyranny. Finally, it reflects the Founders' attempt to reconcile these concerns primarily through a structural strategy of establishing representative institutions and diffusing power centers and setting them in competition — so that the "deliberate sense of the community" would emerge slowly through a political process encouraging deliberation, consensus building, compromise, and incrementalism.²⁴

We can see this dispersion strategy not only in federalism, but also in the separation of powers, checks and balances, bicameralism, staggered terms, and the "extended" republic. Indeed, as Michael Sandel writes, in the "early [American] republic, liberty was understood as a function of democratic institutions and dispersed power." Of course, in large part it was this understanding of the importance of the constitutional design to the protection of individual liberty that led Hamilton to proclaim that "the Constitution is itself, in every rational sense, and to every useful purpose a bill of rights." Finally, we might add to this that even the function, efficacy, and thus the true benefits of a formal charter of rights — such as our own Bill of Rights — are in fact determined by the nature of the constitutional design. Is the charter to be hortatory or legally binding? Who is to interpret it? Who is to enforce it? What powers will these persons or institutions have? All of these are essentially questions of governmental structure. It is, then, quite difficult to imagine any set of questions more fundamental to the realm of politics than those of constitutional theory and constitutional design.

Of course, the precise contours of any constitutional design are likely to change somewhat over time, and a shift in design may reflect nothing more than a reaction to, perhaps, inexorable changes in circumstance. Still, such changes in design

34. FEDERALIST NO. 63, at 413, 415 (James Madison) (John Harvard Library ed. 1961) ("The cool and deliberate sense of the community ought in all governments, and actually will in all free governments ultimately prevail."); see also, e.g., CAREY, FEDERALIST, supra note 31.
37. This may be true, for instance, in the case of alterations in federalism and the commerce power.
may also reflect a much deeper (and more controversial) shift in one's valuation of a polity's constitutive values and problems. The populace or a dominant faction, for instance, may come to value civic freedom less than it once did and to fear majoritarian tyranny more, and thus attempt to change the design accordingly. Accordingly, the fundamental importance of the constitutional design, as an effort to constitute our polity in a way that will reflect and maintain our most basic values, though we so often take it for granted, can scarcely be exaggerated. The members of the Founding generation therefore were right to concentrate almost entirely on the structural nature of the proposed constitution rather than attempt to enumerate a complete list of rights abstracted from any particular structural context. Moreover, the importance of the constitutional design suggests that, today, we ought to be quite wary of altering it, at least without a persuasive, overt, reasoned, structural argument. That, in turn, suggests that debates about the judicial interpretation of the Bill of Rights, given their serious structural implications, cannot be sealed off from debates about the proper interpretation of the constitutional design.

B. The Logical Priority of the Question of Constitutional Design

Upon a moment's reflection, it should be clear that — as a matter of constitutional interpretation — the question of the design of a constitution simply enjoys a logical priority to the question of a particular institution's powers, if any, of constitutional review under, and thus interpretation of, a constitution's charter of rights within that design. Indeed, one would have to engage in a structural interpretation of the constitutional design simply in order to determine the proper role of the various institutions of government in that design, including the institutions that are to have the power of constitutional review under the charter of rights, the logic behind that structural choice, the constraints that other structural values might impose on the exercise of the power of constitutional review, and thus finally, the appropriate interpretive methodologies the reviewing institutions are to use. Indeed, judicial review was formally established under the Constitution in Marbury v. Madison, through what can be seen as just such a form of structural-interpretive analysis of the role of courts in the constitutional design.

Obviously, the structural and institutional context of constitutional review and interpretation is of the utmost importance, and the meaning of a charter of rights within a particular constitutional design cannot be determined apart from this context. It seems clear, for instance, that legislative constitutional review and legislative interpretation of a charter of rights would raise fundamentally different

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38. See, e.g., Richard Parker, "Here, the People Rule": A Constitutional Populist Manifesto (1994) (suggesting that anti-populist disdain for the political engagement of ordinary Americans drives a great deal of the support for expansive judicial power).

39. Of course, a structural-interpretive analysis of this question could potentially involve any number of interpretive approaches, including those as different as Borkian (or Madisonian) originalism and Dworkinian moral readings.

40. 5 U.S. (1 Cranch) 137 (1803).

41. See id.
sorts of design concerns, require fundamentally different sorts of justificatory arguments, and function in a fundamentally different manner from judicial constitutional review and judicial interpretation. Therefore, an identically worded charter of rights might well mean quite different things in differently structured constitutions, depending on, among other things, which institution(s)/actors were intended to interpret it. As a result, the meaning of a charter of rights and the substantive meaning that a given institutional interpreter can properly attribute to it simply cannot be determined apart from the institutional and structural context of interpretation. It is clear, then, that what we might call the substantive meaning of a charter of rights — what rights it actually protects — is inexorably entwined with what we might call its structural meaning — how it was meant to protect rights, who was meant to interpret it, who was meant to enforce it, and so on. Thus, it is quite misleading to attempt to determine the natural substantive meaning of a rights provision abstracted from its broader structural meaning, including the proper institutional and structural context of interpretation and enforcement.42

It should be clear that judicial review and judicial interpretation of the Bill of Rights cannot be abstracted from its broader institutional and structural contexts. First, the question of the substantive meaning of the Bill of Rights is closely linked to the question of its structural meaning. Second, the question of judicial constitutional review and interpretation is essentially a structural question concerning the role of courts within the constitutional design, implicating a number of core constitutional and political values such as popular sovereignty, democracy, republicanism, and federalism. Obviously, then, the question of judicial interpretation and enforcement of the Bill of Rights is fundamentally a question of constitutional structure, and there is every reason to suppose that structural and institutional context is important to the proper method(s) of judicial interpretation of the Bill of Rights. Thus, the substantive meaning that courts should attribute to the Bill of Rights, if any, simply cannot be determined apart from this crucial structural context.

Indeed, in order to answer — intelligently at least — the question of how a judge should interpret, for instance, the Eighth Amendment's prohibition of "cruel and

42. Cf. DWORKIN, FREEDOM, supra note 13. The same, of course, could also be said of its original substantive and structural meanings. Moreover, there is no reason to suppose that the structural meaning of a charter of rights — or the broader structural meaning of the constitutional design — is of any less importance than the substantive meaning of the charter of rights. Nor should we simply assume that it is preferable to get the substantive meaning of the charter of rights right and the structural meaning of the charter and the broader Constitution wrong — if various circumstances seem to preclude giving effect to both. In fact, if we were to conclude, for instance, that the Ninth Amendment was intended (1) to constitutionalize unenumerated rights rooted in the natural law and (2) to leave interpretation and enforcement to the voters, we would have no obvious reason to prefer, say, judicial enforcement of unenumerated rights rooted in the natural law to judicial enforcement of unenumerated rights rooted in, say, specific, long-standing traditions. Indeed, given that rights discourse and the protection of natural rights can and do take place outside the judicial process, the second alternative would not be wholly incompatible with the Ninth Amendment's (hypothetical) original meanings, but the first alternative would be wholly incompatible with its structural meaning and the broader structural meaning of the constitutional design.
unusual punishment," we must first ask ourselves a number of questions. How was the constitutional design, including the Bill of Rights, intended to protect rights? What institution(s)/actors were intended to interpret and enforce the Bill of Rights? If judges were, why? What is the justification for judicial review? What constitutional principles, such as democracy or federalism, might be in tension with the exercise of judicial review? How is judicial review justified in light of these competing values? What then, on balance, ought to be the role of courts in the constitutional design? Only after having made a serious effort to answer these sorts of structural interpretive questions could one begin to craft an intelligent answer to the question of the judicial interpretation of the Bill of Rights.

In the final analysis, then, the primacy of structural argument about the nature of the constitutional design should be recognized simply because it is logically prior as a question of constitutional interpretation to that of what courts are going to do about the Bill of Rights. The structural interpretive question of what role courts are going to play in American government, including the subsidiary question of what role judges are to play in the protection of civil liberties, obviously governs, to some substantial degree, the question of how and whether they are to interpret and enforce the Bill of Rights. Inescapably, some sort of robust structural interpretive analysis of the constitutional design must be engaged in order to determine the proper scope of judicial power, including the range of permissible judicial interpretive theories.

C. Why the Real Debate Is About Structure and Not Rights

While the meaning of the Bill of Rights may have some limited and derivative relevance to the debate about constitutional design, it is certainly clear that this debate does not involve a simple conflict of rights versus structure — such as democracy, republicanism, or federalism. This is true for a number of reasons. First, it is true simply because the nature of the governmental design implicates the important question of civic freedom and participatory rights. Obviously, a less democratic constitutional design means much less meaningful rights to vote and to hold elected office.43 Second, it is true because, as the Founders were right to think, the structural design of a constitution is itself a crucial means of protecting rights against governmental and factional tyranny. The establishment of democratic institutions and a balanced dispersion of political power will go a long way towards promoting a broad respect for the rights of individuals by both government and democratic majorities. Third, it is true because the interpretive theories used to determine the meaning of rights provisions are by no means the only variable whereby judicial power might be constrained, suggesting that one could support both a broad moral reading of the Bill of Rights and a more modest role for courts by requiring a great deal more judicial deference, placing electoral controls over the

43. See, e.g., Jeremy Waldron, A Right-Based Critique of Constitutional Rights, 13 OXFORD J. LEGAL STUD. 18 (1993) (arguing that a belief in individual rights entails a belief in the basic democratic rights that are clearly violated when unelected judges enforce their own controversial conceptions of rights against those of democratic majorities).
justices, or providing for a less demanding form of override than Article V's requirements for constitutional amendment. 44 Fourth, and perhaps most important, it is true because the debate between the proponents of expansive judicial power and its opponents is essentially and implicitly a debate about structure on both ends, a conflict between, broadly speaking, rival conceptions of the judicial role and thus rival conceptions of the structure of the Constitution. 45

It should be clear that the real question is not so much what our rights are but how they will be protected and who will determine them. Ronald Dworkin, for instance, contrasts a Bill of Rights of historical detail with a Bill of Rights of principle as if the difference between the two were primarily substantive, but in fact the contrast in practice is really much more structural in nature. 46 Certainly, a Bill of Rights of historical detail is quite consistent with the legislative protection of a liberal conception of rights. 47 Doubtless, a legislature could choose to protect the sort of sweeping sphere of individual autonomy associated with Rawsian liberal political theory. And, just as certainly, a Bill of Rights of so-called evolutionary principle is quite consistent, as Dworkin himself recognizes, with the judicial protection of a conservative conception of rights. 48 A court certainly could choose to protect conservative conceptions of property rights, rights against racial preferences, and the right to bear arms. 49 The question then is really whether the legislatures or the judiciary will have the broad authority to determine our rights — not what those rights will be. For instance, suppose we were to embrace a reading of the Fourteenth Amendment as a rights provision of historical detail. In such a case, the issue of abortion clearly would be one of legislative discretion. On the other hand, if we were to adopt a reading of the amendment as one of evolutionary principle, the issue of abortion clearly would be much more a question of judicial discretion in the determination of what the application of the abstract principle would entail. Either institution could decide to protect abortion as a woman's right to choose or to prohibit it as a violation of a fetal right to life. 50

Moreover, we should not be misled into thinking that discretionary judicial decisions somehow protect rights in a way that discretionary legislative decisions do not — simply because judicial decisions take the form of interpretations of the Bill of Rights or because they are asserted against democratic majorities. First, the fact that the judiciary's discretionary decisions are couched in the language of the

44. See, e.g., Stanley C. Brubaker, Reconsidering Dworkin's Case for Judicial Activism, 46 J. Politics 503-19 (1984) (suggesting that moderate epistemological skepticism respecting one's ability to determine "right" answers to constitutional questions provides a basis for judicial restraint).
45. See infra Part V.E.
46. See DWORKIN, DOMINION, supra note 4, at 118-47.
47. See id. at 118-47.
48. See id. at 121.
50. The Supreme Court could easily craft an Equal Protection Clause argument, requiring that the equal protection of the homicide laws be extended to unborn persons. See Robert P. George, Justice, Legitimacy, and Allegiance, in END OF DEMOCRACY? II, supra note 11, at 86-104, 95-97.
Bill of Rights and the legislatures' may not be is largely a question of form rather than of substance. Second, (nonparticipatory) rights are asserted against those in power — whether they be kings, guardians, judges, representatives, or magistrates, and it is certainly possible for democratic majorities to vindicate the rights of individuals and for judges to violate them. Even Dworkin has noted that judges, as well as legislators, can be tyrants. Finally, a normative vision of the American constitutional design maintaining that rights cannot be recognized and protected outside of the judicial process is certainly a most unattractive one — if for no other reason than it would severely circumscribe the scope and nature of our rights. Most of us are likely to conclude that there are many important rights, including basic rights to education, health care, or a particular moral ecology, that either constitutional text, history, and precedent or the very real practical political constraints on the judiciary preclude courts from protecting. Amy Gutmann and Dennis Thompson have argued that "[t]o relegate principled politics to the judiciary would be to leave most of politics unprincipled." Similarly, one might conclude that to relegate the protection of our rights solely to the judiciary would be to leave many, perhaps most, of our rights unprotected.

One may conclude, then, that the real question is indeed that of who will determine our rights, not what those rights will be, and thus it is clearly a question of constitutional design requiring structural interpretive argument.

D. The Limited Relevance of the (Substantive) "Meaning" of the Bill of Rights

As shown, the dispute between the proponents of expansive judicial power — such as Dworkin — and the proponents of expansive legislative power — such as Bork and Easterbrook — is fundamentally one about the proper scope of judicial power within the constitutional design. It is a structural dispute about who will determine our rights, not what those rights will be. It is, moreover, as illustrated in passing, a dispute about the substantive meaning of the Bill of Rights only in a decidedly limited and derivative sense. Indeed, the relevance of the meaning of the Bill of Rights for this debate is clearly limited in at least three important ways. First, we are concerned only with the meaning of the Bill of Rights as it is to be determined by judges. Since the historical relationship between judicial review and the Bill of Rights is rather cloudy, it is not necessary to engage in any sweeping statements of the substantive meaning of the Bill of Rights as a political, educative, hortatory, or legislatively interpreted set of provisions. It is often forgotten in our

51. For instance, either a court or a legislature might grant a free exercise of religion exemption to a law of general applicability by, for example, balancing the burden on religious believers against the state interest involved.

52. See, e.g., Lochner, 198 U.S. at 45; Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

53. See Dworkin, Dominion, supra note 4, at 375.

54. Dworkin notes that the constraints of constitutional history preclude "[e]ven a judge who believes that abstract justice requires economic equality" from reading that conception of equality into the Equal Protection Clause. Dworkin, Freedom, supra note 13, at 11. Therefore, if such a moral right exists, it must, in Dworkin's view, be secured outside the judicial process.

55. Gutmann & Thompson, infra note 136, at 46.
contemporary debates that there was virtually no discussion of judicial enforcement of the original Bill of Rights, that there was very little judicial enforcement of the Bill of Rights until the 1940s, and that several of the provisions were clearly designed to limit courts themselves.\textsuperscript{56} One can, of course, also seriously question the role courts were to play in relation to the Fourteenth Amendment.\textsuperscript{57} It should be clear that we are concerned here only with how judges are to interpret these rights provisions, if indeed that is what they are going to do.

Second, as discussed above, even if we were to accept that judges ought to interpret the Bill of Rights as a document of principle, we might still suppose that the constitutional design requires that judicial power be limited in other important ways. For instance, even if we embraced a Dworkinian moral reading of the Bill of Rights, we might conclude that judges must be quite deferential to legislative assemblies, placed under electoral controls, or more vigorously checked by Congress and the President in order to ensure a broader distribution of interpretive authority across the national government. Clearly, even a judicial moral reading of rights provisions could be made much more consistent with a more modest role for courts in the American constitutional design.

Third, we are typically concerned only with the substantive meaning of a judicially enforced Bill of Rights in the broadest sense: do we possess a Bill of Rights of so-called evolutionary principle or one of historical detail? We are not concerned, for instance, with the precise content of the Eighth Amendment's prohibition on cruel and unusual punishment, simply the level of abstraction of the prohibition and the legitimacy of various general interpretive approaches. The constitutional status of many forms of punishment might well be an open question under either broad approach. Of course, when we say we are concerned only with the meaning of the Bill of Rights in terms of the level of generality and general interpretive theory, that is not to say that the question itself is unimportant, but it is to suggest that it may be of much less, as well as rather different, importance than we might first imagine.

For instance, what might be the nonstructural importance of the level of generality of interpretation? Dworkin, for one, describes the Bill of Rights of principle as an "exhilarating, stirring vision of political community" and the rival conception of the Bill of Rights of detail as a "less noble" and "more mundane" vision.\textsuperscript{58} What are we to make of that? We might first suspect that an abstract statement of moral principle is typically considered more stirring than a specific one precisely because it avoids the details about which we might tend to disagree.\textsuperscript{59}

\textsuperscript{56} See, e.g., MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 336-37 (1986). In fact, it may well be then that the original "structural" meaning of the Bill of Rights was premised on political interpretation and political enforcement by voters and elected representatives. See JACk RAKove, ORIGINAL MEANINGS 336 (1996).


\textsuperscript{58} DWORKIN, DOMINION, supra note 4, at 119, 122. It is also grander than the Bill of Rights of detail. See id. at 122.

\textsuperscript{59} Or in other words, it stays at the broader level of concepts rather the more specific level of
certainly does tend to be more stirring to talk of life, liberty, and the pursuit of happiness than to delve into the disagreeable details of abortion, capital punishment, euthanasia, pornography, and the rest of the questions of the day that divide us so deeply. Certainly, if an abstract charter of rights were actually left at a high level of abstraction, it could serve an important political and educative function similar to that of the Declaration of Independence.\textsuperscript{60}

Still, one could be forgiven for wondering whether a Bill of Rights of principle might descend rather rapidly into empty platitudes. Dworkin, for instance, writes that the Bill of Rights commands that the "American government must respect the most fundamental principles of liberty and political decency and treat all citizens with equal concern and respect."\textsuperscript{61} We may leave aside the obvious question of whether it says anything of the kind,\textsuperscript{62} and simply ask: whether anyone — judge, executive, legislator, or voter — needs to be told that? Certainly, if someone were indeed determined to act unjustly, it is hard to imagine that such a statement would restrain them. On the other hand, for the vast majority of political actors who act in good faith, we may wonder whether such an abstract pronouncement really helps them to form the specific judgments they simply must make to resolve actual questions about rights. At the end of the day, would that sort of bill of rights do much at all to guide our moral discourse other than to, perhaps, shape its vocabulary a bit?

Moreover, while Dworkin views a Bill of Rights of detail as mundane, perhaps more than a few of us might find specific prohibitions against, for instance, torture, political censorship, capital punishment, or the like, quite stirring, or a least rather noble, more so than general prohibitions of injustice that could well be specifically interpreted to permit numerous moral iniquities. There is a great deal to be said for that sort of bill of rights, one that specifically prohibits serious acts of injustice. It would seem, then, that the choice between the Bill of Rights of principle and of detail is at least something of a wash. Certainly, plausible arguments can be made for the superiority of either.

We may next ask whether that is really the choice that we face. In practice, clearly it is not. A Bill of Rights of abstract principle that is actually used to resolve cases will inevitably become very much like a Bill of Rights of detail — simply through the interpretive process. Clearly, if courts (or other institutions) are to review legislation under the Bill of Rights, then they will have to render its grand principles quite specific in order to resolve actual cases. What follows from this? First, one imagines, as the Bill of Rights of principle grows more detailed through interpretation and the accumulation of precedents, it will become less stirring and exhilarating to those who happen disagree with the judges' (or other interpreters') conception of those grand principles in action. Second, unless precedent is routinely

conceptions. See, e.g., DWORKIN, EMPIRE, supra note 17, at 87-113.
60. James Madison, in fact, thought that the true benefits of a bill of rights would reside precisely in its educative function, rather than in judicial enforcement. See RAKOVE, supra note 56, at 335.
61. DWORKIN, DOMINION, supra note 4, at 119.
flouted, the difference between a Bill of Rights of principle and the Bill of Rights of detail will become quite blurred in practice. In fact, the only real difference between the two would be in the source of the details — whether it would be, say, the judges' moral and political views or the judges' empirical judgment about the framers' and ratifiers' views.63

It is clear, therefore, that even to speak of the relevance of the meaning of the Bill of Rights in respect to its level of generality is quite misleading. We might well be right, then, to question the intrinsic value of a so-called Bill of Rights of principle except as a potential structural power-conferring device. It would be more accurate to say that the so-called principled reading of the Bill of Rights tends to descend rather quickly to the mundane level of detail, creating an exhilarating, stirring, as well as almost incredible vision of judicial power rather than of individual rights. On the other hand, the so-called detailed reading of the Bill of Rights tends to constrain judicial power, creating an exhilarating, stirring and quite credible vision of legislative power by limiting judicial discretion rather than a "narrow" conception of rights. The nonstructural relevance of the meaning of the Bill of Rights, then, is of quite limited importance, given that we are not concerned with either its specific content or the actual level of generality in practice.

Thus, in the final analysis, the substantive meaning of the Bill of Rights has only a limited and derivative relevance to our debate about the constitutional design. Indeed, a structural interpretive analysis of the American constitutional design simply suggests that the framework of government places constitutional limits on judicial power that may include, among other things, a constraint on the range of legitimate interpretive theories judges may use in determining the specific meaning of the Bill of Rights in resolving actual cases.

E. The Deeper Structural Nature of Our Debates About the Bill of Rights

There is another sense in which the debate is about the nature of the constitutional design rather than about rights or the meaning of the Bill of Rights. It is quite fair to say that a great deal of the debate centered about interpretive theory is in fact a sort of proxy debate for concerns that are really structural and structural-political at heart. As David O'Brien has observed, in the early Republic the struggle between Federalists and Jeffersonian-Republicans was

over rival political philosophies and interpretations of the political system created by the Constitution. That struggle continues [today] except that contemporary debates, within the Court and the legal community, tend to be more complex and linked to rival theories of constitutional interpretation that aim to justify or criticize the Court's exercise of judicial review.64

63. Precedent, of course, would tend to play an important role in either analysis.
64. DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 73 (1995) [hereinafter O'BRIEN, CONSTITUTIONAL LAW] (emphasis added).
Indeed, there is good reason to believe that what drives our current debates about (judicial) interpretive theory is not in fact the esoterica of the interpretive debates themselves, but rather the crucial structural and political consequences that flow from them. First, often our support for particular interpretive approaches clearly is grounded in legal-historical judgements about the proper role for courts in the governmental structure of the United States Constitution. We have seen Robert Bork, who claims a (sometimes dubious) historical pedigree for his brand of originalism, fall back, though ever so briefly, on much more solid legal-historical structural claims about "the original understanding of the place of courts in our republican form of government." We also have seen Ronald Dworkin formulate his own (implicit) legal-historical structural claim about the "American conception of democracy" derived from the precedential value of our legal culture's "insistence" on judicial review and from his own putatively "textualist" interpretive theory, focusing on the Bill of Rights in structural isolation. Second, our support for particular interpretive approaches is often grounded as well in moral-political judgements about the proper role for courts in the constitutional design. John Hart Ely has framed an at least partly moral-political objection to certain exercises of expansive judicial power in terms of preserving a fundamental structural value such as democracy. One well can imagine counter-claims that such a vision of the constitution is too democratic, allowing for untrammelled majoritarian tyranny. Third, even mutual accusations of political and class bias, of whose "ox would be gored" by activist decisions or simple majority rule, often boil down to (rather Machiavellian) forum-shopping, seeking the right- or left-most viable decisionmaker. Even if these last objections are political, in a partisan sense, rather than structural, they still have a fundamentally structural expression.

Finally, we can further test this claim simply by focusing on other variables of judicial power. One wonders, for instance, how many of the typical proponents of the moral reading of the Bill of Rights associated with expansive judicial power would object to weakening courts in other ways by increasing judicial deference, electoral controls over judges, or the ease with which courts could be overruled by political institutions. Again, it would not be far-fetched to imagine that many, if not most of the proponents of the moral reading of rights provisions are more concerned with promoting an expansive judicial role rather than with a particular judicial interpretive theory for its own sake and thus would tend to oppose a judicial clear mistake doctrine, any dilution of judicial supremacy, or placing electoral controls on judges. One may also wonder how many of the typical proponents of the originalist interpretive theories associated with more modest conceptions of judicial power would support weakening courts in these and other ways — as a second best solu-

65. BORK, TEMPTING, supra note 21, at 153.
66. DWORKIN, FREEDOM, supra note 13, at 74 (emphasis added).
67. Similarly, Justice Scalia has framed objections to non-originalist interpretive theories in terms of their inconsistency with the theory of democracy. See, e.g., SCALIA, supra note 1, at 3-47.
68. See PARKER, supra note 38 (suggesting that "anti-populist" disdain for the political engagement of "ordinary Americans" drives a great deal of the support for expansive judicial power).
tion to what they tend to view as the judicial usurpation of political authority. Again, it would not be far-fetched to imagine that many, if not most, of these originalists are more concerned with promoting a more modest judicial role — one that they believe the Constitution requires — rather than with any particular judicial interpretive theory in itself. In any case, it is fair to say that many, perhaps most, of our concerns are at base structural ones about the role courts are to play in American government. Certainly, the fact that so much of the debate about judicial interpretive theory and the meaning of the Bill of Rights plausibly can be viewed as a structural debate about judicial review and the role of courts in the American system of government suggests, again, that an overtly structural methodology is the proper one to use.

F. The Necessity of Structural Justifications for the Role of Courts in the Constitutional Design

At this point, it should be clear that structural questions about the constitutional design are of the most fundamental importance. Moreover, the various competing judicial interpretive theories have potentially serious structural implications for the nature of the American constitutional design, and certainly, many of the proponents of these various interpretive theories advocate them chiefly in order to promote particular structural conceptions of the role of courts in the American constitutional design. Clearly, then, given that structural questions are of such crucial importance, that the various judicial interpretive theories have serious structural implications, and that they are often advocated precisely because of their serious structural implications, it is not unreasonable to expect their proponents to engage in overt structural interpretive arguments about the nature of the constitutional design. Obviously, crucially important structural questions ought to be argued in structural terms, not indirectly through proxies, question-begging, or sleight-of-hand. If one advocates a particular role for courts in the American constitutional design, implicitly or explicitly, then one must be prepared to justify that role as an interpretation of the structural design of the Constitution. It should be clear that no one can expect to promote an understanding of the constitutional design, including a view of the role of courts within that design, without explicitly attempting to justify it as such. The all-too-common nonstructuralist evasion is thus woefully inadequate to resolve the serious questions of constitutional design it inexorably raises.

69. Robert Bork, for instance, has recently endorsed amending the Constitution to make any "federal or state court decision subject to being overruled by a majority of each House of Congress." ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 117 (1996). He has since retracted this position on the grounds that it would not work. See Robert H. Bork, Foreword to MAX BOOT, OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH v to xiii (1998).

70. Again, it is quite revealing that Robert Bork views his conception of judicial originalism as a "necessary inference from the structure of [the American] government." BORK, TEMPTING, supra note 21, at 153-55; see supra note 21 and accompanying text.
V. A Robust Structural Approach: Constitutional Theory, Constitutional Design, and the Role of Courts

A robust structural approach to the role of courts in American government will involve a number of factors, and is, perhaps, an impossibly Herculean enterprise. Still, we may do our best to approximate it. First, it will involve, as does Marbury v. Madison, an attempt to interpret the constitutional design, including both important legal-historical and moral-political aspects of interpretation. The legal-historical aspect will focus on the fit a particular conception of the judicial role has with text, original understanding, and constitutional practice. The moral-political aspect will focus on our judgment of which conception of the judicial role is most attractive. One could envision this as a sort of Dworkinian moral reading of the constitutional design, but that would push the analogy too far. The more basic point, for reasons that will become evident below, simply is that neither a historical nor a political analysis alone will satisfy everyone, and so a robust structural approach will argue both as broadly as possible — as complements and alternatives.

Second, a robust structural approach will involve a broad analysis of a number of core questions of constitutional theory. What are the constitutive values of our polity? What are the constitutive problems? What remedies to these problems can be crafted consistent with the constitutive values? What is the proper constitutional design reflecting that form of government and containing the necessary remedies? What role are courts to play in that constitutional design? Again, both legal-historical and moral-political answers to this line of questions are desirous. What, for instance, did the Founding generation think were the proper answers to these questions? What did later generations think? What do we think? This line of inquiry, of course, will involve a great broadening and deepening of the sort of analysis engaged in by John Hart Ely, with its narrow focus on democratic theory, to include popular sovereignty, civic republicanism, federalism, the separation of powers, and other basic values, principles, and devices of republican government.

Third, a robust structural approach will involve paying particular attention to the project of making sense of and justifying judicial review in the spirit of Hamilton’s analysis in Federalist No. 78. Why judicial constitutional review? Why not legislative or executive review? Why not a division of this awesome responsibility among all the three branches or even including the states? What precisely is it about courts in general or the Supreme Court in particular that would lead us to assign to them and to it this awesome duty? What, in short, is the fundamental logic of judicial review? Moreover, how is this power justified in light of — or harmonized with — competing constitutional values such as deliberative democracy and the separation of powers?

Fourth, a robust structural approach will demand that close attention be paid to all the variables of judicial power, including the scope of judicial review, direct and indirect political controls over the courts, judicial deference to political actors, political deference to the judiciary, and so forth. Again, this will involve a broadening and deepening of John Hart Ely’s approach, given its narrow focus on judicial interpretive theory. These topics are approached in reverse order.
A. The Variables of Judicial Power

In discussing the role of the courts in the American constitutional design, it is important to pay careful attention to all the variables of judicial power. Obviously, the exercise of judicial review is affected by a number of factors aside from interpretive theory. Just as obviously, many of those variables have changed over the course of American history. One should begin, then, by examining the chief (overlapping) variables of judicial power, including: (1) the claim of judicial review; (2) the scope of judicial review, particularly the claim of judicial supremacy; (3) the nature of the judicial selection process; (4) the tenure of judges; (5) the degree of political insulation of the courts; (6) the courts' jurisdiction; (7) the plain language of justiciable constitutional text; (8) the range of interpretive theories accepted as legitimate; (9) the degree of judicial deference to legislative assemblies; (10) the degree of popular and legislative deference to the courts; and (11) the correctability of the courts' "errors."

In fact, we can see the practical importance of these variables to the exercise of judicial power simply by comparing the U.S. Supreme Court of today with the U.S. Supreme Court of 1800 or one of the weaker contemporary state supreme courts. What of the Supreme Court circa 1800? First, it had yet to establish firmly the doctrine of judicial review. Marbury v. Madison was not decided until 1803; it was a controversial decision, and judicial review proper was to remain a shaky doctrine for decades to come. Second, the proper scope of judicial review was certainly in question as well — at least for several decades into the nineteenth century.71 In particular, any broader claims to judicial supremacy were hotly contested and continued to be until well after the Civil War. Certainly, such statesmen as James Madison, Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and even Franklin D. Roosevelt embraced various forms of coordinate or departmentalist review, denying that co-equal branches of government were always bound by the Supreme Court's constitutional interpretations.72 Third, the Court's political insulation was threatened in a number of ways, including by the impeachment power and by the threat of court packing. Fourth, there was the possibility that the Congress would simply strip the Supreme Court of its appellate jurisdiction in controversial areas under its "exceptions and regulations" power in Article III.

Fifth, the Court's relation to the Bill of Rights was uncertain to say the least, and in any case, the Bill of Rights did not apply to the states. Sixth, more traditional interpretive theories seem to have been the norm, and, of course, legal interpretation itself was understood — rightly or wrongly — as an essentially apolitical, declaratory or oracular, if not quite mechanical, enterprise.74 In particular,

71. See e.g., ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW (1989).
72. See WALTER MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 267 (2nd ed. 1995).
73. Charles Hyneman notes that between 1821 and 1882 "[A]t least ten proposals to restrict the Supreme Court's appellate jurisdiction were considered in Congress." HYNEMAN, supra note 31, at 48-49. Most of these were proposals to terminate judicial review of state supreme court decisions, though the only measure to become law — the removal of the Supreme Court's habeas corpus jurisdiction in the 1860s — was designed to terminate review of a controversial legal question. See id.
74. See O'BRIEN, CONSTITUTIONAL LAW, supra note 64, at 73-74; G. EDWARD WHITE, THE
Federalist judicial interpretive theory often relied implicitly on historical context and later did so more explicitly.\textsuperscript{75} The Republican judicial interpretive theory of Madison and others that became dominant in the early nineteenth century was explicitly originalist.\textsuperscript{76} Seventh, the Court simply was less willing to challenge legislative assemblies, and the people and their representatives also tended to be much less deferential to the Court. As early as the 1790s, Supreme Court justices articulated "clear mistake" doctrines and had reason to fear that controversial decisions would simply meet with defiance from political leaders who might well question the Court's particular decision or its broader claim of interpretive authority.\textsuperscript{77} Finally, the predominant overarching theory of judicial review had much more to do with protecting the governed from the government, rather than minorities from majorities, at least until the 1830s or so, making it harder to justify a broader role for the judicial arm of the government.\textsuperscript{78}

There is, then, no reason to doubt Alexander Hamilton's sincerity in proclaiming the judiciary the "least dangerous branch" of American government — as indeed it clearly was, even as it grew in power, for nearly a century after the founding — or in dismissing the notion that the Court, in practice, would be able to abuse its power by exercising political will in the place of legal judgment.\textsuperscript{79} All of these variables help explain why the Supreme Court did not strike down a single law under the Bill of Rights until 1857,\textsuperscript{80} why judicial review was relatively uncommon until the late 1800s,\textsuperscript{81} and why the Bill of Rights was largely dormant until after World War II.\textsuperscript{82}

\textsuperscript{75} In \textit{Gibbons v. Ogden}, for instance, Marshall writes:

All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation. \textit{It was so understood, and must have been so understood, when the constitution was framed.} The power of commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

\textit{Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824)} (emphasis added).


\textsuperscript{77} Justice Chase, for instance, declared very early that "he would never vote to invalidate an act of Congress 'but in a very clear case.'" \textit{Jane Shaffer Elsmere, Justice Samuel Chase 70} (1980); \textit{see also} Hylton v. United States, 3 U.S. (3 Dall.) 240 (1796).


\textsuperscript{79} \textit{The Federalist No. 78} (Alexander Hamilton).

\textsuperscript{80} See \textit{Dred Scott v. Sandford}, 60 U.S. (19 How.) 393 (1856).


\textsuperscript{82} \textit{See infra} Part VI-D-2-(e).
Moreover, we need only look at, for example, the modern Texas Supreme Court to see how a substantial alteration in just a few of the variables of judicial power can radically transform the exercise of judicial review. First, the justices of the Texas Supreme Court are elected on a partisan ballot for relatively short terms, thus altering the selection, tenure, and insulation variables from the federal model.\textsuperscript{83} Second, the Texas State Constitution is more easily and routinely amended than the United States Constitution, affecting the ease with which judicial decisions are overruled.\textsuperscript{84} Third, in a state such as Texas, with its powerful Jeffersonian/Jacksonian/populist heritage, it is clear that the implicit theory of judicial review is the restraint of governmental tyranny against the governed — not the tyranny of the majority. Clearly, the powerful, democratic political constraints on the Texas Supreme Court make it much more difficult for it to engage in controversial moral readings of the rights provisions of the Texas Constitution.\textsuperscript{85} One imagines that a Texas High Court placing unpopular restrictions on the death penalty would soon find its decisions overturned and the offending justices removed from the bench.\textsuperscript{86} As a result, the justices are likely to play a much more modest policy-making role in state government than they otherwise might, at the very least, carefully avoiding the most divisive of political controversies.\textsuperscript{87} Clearly, the "noninterpretive" variables of judicial power are of immense practical importance to the exercise of judicial power as well.

What, then, is the value of attending to these variables? It should now be clear that a structural analysis of the governmental design focused on the role of courts must pay careful attention to all the potential variables of judicial power — in addition to interpretive theory — for a number of reasons. First, obviously, the variables of judicial power largely determine what role courts actually will play in the workings of government. Therefore, no structural examination is complete without a careful analysis of the way in which the role of courts is potentially enlarged, diminished, or otherwise altered by these variables. Second, a better understanding of what these variables are and how they may have changed over time will enable us to avoid potentially anachronistic and thus misleading

\textsuperscript{83} The justices of the Texas Supreme Court hold their offices for six years, three of the them facing the voters every two years. See Tex. Const., art. V, § 2.

\textsuperscript{84} Amendments are proposed by a vote of two-thirds of both houses of the legislature and ratified by a simple majority of the voters at a general election. See Tex. Const., art. XVII, § 1.

\textsuperscript{85} On the other hand, it also takes away the chief objection to judicial moral readings of rights provisions — that it is counter-majoritarian — by democratizing the judicial process.

\textsuperscript{86} Actually, such a decision would involve the Texas Court of Criminal Appeals, the supreme court concerning matters of criminal law, rather than the "civil" Texas Supreme Court.

\textsuperscript{87} For instance, Daniel R. Pinello, after a careful comparative study of state and federal judicial-selection methods, concludes that the "McCloskeyesque perspective concerning appointed and elected judges is vindicated here: elected judges are reactive to public opinion, while appointed ones who never face popular confirmation are largely free of its constraint." Daniel R. Pinello, The Impact of Judicial-Selection Method on State-Supreme-Court Policy: Innovation, Reaction, Atrophy 130 (1995) (emphasis added). In particular, Pinello suggests that the Supreme Court's Post-World War II agenda of "expanding and protecting individuals' civil rights and liberties" would "never have occurred" were it an elective body. Id. at 131, 136-37.
understandings of the exercise of judicial power earlier in our history. Third, by attempting to discover and evaluate an individual's positions on the variables of judicial power as a set advocating a particular role for courts in the constitutional design, one can separate a person's views on the "nature of law" or the "best reading of the Bill of Rights" from their structural interpretive view of the proper role of courts in our constitutional design. Fourth, by keeping all of the variables in mind, we are in a better position to craft a nuanced and flexible response, one involving multiple variables, to what we may view as an imbalance in judicial power within the constitutional design.

Certainly, it would be a worthwhile endeavor to engage in a detailed analysis of each one of the variables of judicial power, examining their subtleties, their variations over time, the variations among the federal and state courts, and their relevance to our debates about judicial power. While space constraints preclude such a detailed treatment here, one can note a few points of particular interest. First, contemporary constitutional discourse often focuses much too narrowly on judicial interpretive theory. There is a strong tendency to attempt to explain, or explain away, the decided growth in judicial power over the last two centuries solely in terms of interpretive theory. However, even a brief examination of the relevant historical materials will show both that judicial power has expanded dramatically over time and that the expansion is the result of changes in a number of the variables of judicial power, not simply in judicial interpretive theory. Therefore, it would be a mistake to infer that the justices of the Supreme Court were once all principled Borkian originalists from the mere fact that the Supreme Court played a much more modest role in the constitutional design earlier in our history than it does now. It would also be a mistake to infer that contemporary, sweeping judicial power may somehow be legitimated by the fact that the justices were, perhaps, not all principled Borkian originalists earlier in our history. Of course, another mistake would be to infer sweeping judicial power from the mere fact that a purely textual reading of the Bill of Rights might suggest that it is indeed a document of principle. There is also a strong and obviously related tendency to attempt to manipulate judicial power solely in terms of interpretive theory. If the proper role of courts in the constitutional design is a modest one, then, the argument goes, we must be rigid Borkian originalists or representation reinforcers. Or if the proper interpretive theory is a moral reading of the Bill of Rights, then almost incredible judicial power is automatically justified. An awareness of the importance of the numerous dimensions of judicial power for structural interpretive analysis can help us avoid these fundamental errors.

89. Cf., e.g., Susanna Sherry, The Founders' Unwritten Constitution, 54 U. CHI. L. REV. 1127, 1176-77 (1987) (emphasizing judicial discussions of "unenumerated rights" as a precedent for expansive judicial power and glossing over the general weakness of early American courts and their sparing use of judicial review, particularly on questions of individual rights).
90. See Dworkin, FREEDOM, supra note 13, at 73; supra note 13 and accompanying text.
91. Ely and Bork are prominent examples.
B. The Logic of Judicial Review

A structural analysis centered on the role of courts within the constitutional design certainly must pay quite careful attention to the logic of the linchpin of judicial power — judicial constitutional review and to its compatibility with other fundamental constitutional values. If familiarity can breed affection as well as contempt, it most surely breeds inattention and indifference, and as should now be evident, it is not enough merely to note our legal culture's insistence on judicial review and then to move on to the question of judicial interpretive theory as if it were a wholly autonomous sphere. Clearly, if one intends to embrace the venerable and well-established doctrine of judicial review, then one must envision a judicial role that can indeed make sense of and justify that structural choice in light of other core constitutional values.

Indeed, the first question is: why judicial review? The question itself, along with the classic defenses of the doctrine in the Federalist and Marbury v. Madison, suggest that the justification can be found in two seemingly simple observations: (1) it is quite naturally the proper and peculiar province of the judiciary to resolve questions of legal interpretation and (2) questions of constitutional interpretation are fundamentally just that, questions of legal interpretation. The heart of the justification lies in a conception of the nature of the Constitution as law and the function of the courts as interpreters of the law, and it is closely tied to Hamilton's sharp distinction between legal judgment and political will. It is important to realize that any conception of the nature of the law or the function of the courts that finds itself very far afield from what is commonly recognized as traditional legal reasoning, rooted in text, original meaning, and precedent, is immediately on quite shaky ground.

Second, how might judicial review be justified in light of competing constitutional and political values? As seen in Federalist No. 78, Hamilton clearly premises the structural choice of judicial constitutional review on the common-sense functionalist/separation of powers ground that "the interpretation of the laws is the proper and peculiar province of the courts." Hamilton, however, goes further, engaging in arguments about the compatibility of judicial constitutional review with other constitutional values. He concludes (1) that such a power does not elevate the judicial branch above the legislative in an anti-republican fashion as long as the courts exercise legal judgment (which is tied closely to the power of the people to make "Higher" law) rather than political will and (2) that the judiciary is the least dangerous branch for a number of reasons and thus "can never attack with success either of the other two." In short, Hamilton premises his compatibility analysis on a sharp distinction between legal judgment and political will — the close link between judicial enforcement of the Constitution and popular sovereignty — and on

93. *Id.* at 467.
94. *Id.* at 465-66.
the more general grounds that the relative weakness of the judiciary makes successful judicial usurpation of political power unlikely.95

Clearly, to the extent that a conception of the nature of law and legal reasoning clouds the Hamiltonian structural/functional/institutional distinction between will and judgment, it loses ground in the effort to make sense of and justify judicial constitutional review. Indeed, as O'Brien writes, both "Federalists and Jeffersonian-Republicans largely professed acceptance of the English declaratory theory of law. This theory, or philosophy, of legal positivism holds that judges have no discretion, make no law, but simply discover and 'declare' the law."96 To the extent that one rejects this understanding of law in favor of the view that constitutional questions have a decided moral-political aspect, one will have a much harder time both making sense of the basic structural choice of judicial constitutional review and justifying it in light of competing constitutional values such as democracy, particularly given the general growth of judicial power along a number of "noninterpretive" variables. Therefore, when Ronald Dworkin suggests that judicial enforcement of the Bill of Rights "means judges must answer intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, with no prospect of agreement," he is also suggesting, implicitly and inescapably, that the traditional justification for judicial review is less than adequate to its task.97

It is important to make a crucial point about what clearly is not a justification for judicial constitutional review strictly speaking — the political insulation of the courts. Of course, a powerful argument can be made in favor of judicial independence, but that argument clearly follows from the legal/functional justification for judicial review.98 First, as Hamilton observes, if

the courts of justice are to be considered bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.99

In other words, this argument goes, it is because judges must make judgments about the meaning of the Constitution — sometimes in the face of intransigent and transient majorities — that they ought to be politically independent of those

95. For a more extended treatment of this question, see CAREY, FEDERALIST, supra note 31, at 129-45, 169-71; CAREY, DEFENSE, supra note 31, at 122-38.
96. O'BRIEN, CONSTITUTIONAL LAW, supra note 64, at 73 (emphasis added); see also WOLFE, supra note 74.
97. DWORKIN, FREEDOM, supra note 13, at 74. Hamilton certainly did not contemplate — and his argument certainly will not justify — powerful courts exercising a substantial degree of political discretion, a point, one imagines, that Dworkin recognizes and that also explains his general failure to take Federalist No. 78 or Marbury v. Madison seriously.
98. Marshall, for instance, does not broach this line of argument at all in Marbury.
majors. Second, as Hamilton also observed, "[t]o avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound down by strict rules and precedents," that these "must demand long and laborious study to acquire a competent knowledge of them," and that a "temporary duration in office" would discourage those with the requisite knowledge and integrity from leaving their more lucrative private practices. Thus, judicial independence is thought both to protect the exercise of judicial review and to foster judicial expertise.

The traditional argument certainly is not that judges ought to have the power of constitutional review because they are politically insulated from the people. Indeed, it is also worth noting that the argument in favor of judicial political insulation has been decisively rejected in almost forty states — which routinely subject their judges, including state supreme court justices, all of whom have the power of judicial review, to partisan, nonpartisan, or recall elections. In those states, concerns about potential class-related, ideological, and partisan judicial bias and thus the need for greater judicial accountability have been weighed against concerns about judicial independence and competence and the political insulation of judges has been reduced accordingly.

This point is important because there is good reason to suppose that an innovative, alternative justification for judicial constitutional review has evolved, one based much more on the fact that the federal judiciary is insulated from public opinion than on its presumptive legal expertise. This justification's very different premises would be something like this: (1) all, most, or many questions of constitutional interpretation are substantially or wholly questions of moral and political theory and (2) it is the province of the least democratic branch of the national government, which happens to be the judiciary, to resolve these moral and political questions. Why might the latter be the case? One reason might be akin to Ely's representation reinforcement model. Unelected, electorally unaccountable judges are especially well-suited to decide questions of democratic theory because they simply have none of the corrupting incentives of an incumbent (facing re-election) to interfere with the channels of political change. Another, one suspects, more common reason might be rooted in some form of elite anti-populism. Unelected, electorally unaccountable judges are especially well-suited to decide broad moral and political questions about rights because they are members of an enlightened and well-educated elite and do not have to pander to the masses of benighted and poorly educated voters. Of course, neither of these arguments are justifications for judicial constitutional review, strictly speaking. In other words, they are not arguments for constitutional review by the judiciary qua judiciary, but rather are arguments for politically insulated constitutional review which assign that power to the federal judiciary because it happens not to be elected. Thus, one

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100. Id. at 471.
101. Moreover, even in those dozen or so states where supreme court justices are not subject to some sort of popular election, justices often serve for a term of ten years or less.
102. See LAWRENCE M. FRIEDMAN, AMERICAN LAW: AN INTRODUCTION 211-12 (1998) [hereinafter FRIEDMAN, INTRODUCTION]; PARKER, supra note 38.
103. Certainly, if a polity had an elected judiciary and an unelected, electorally accountable senate,
should be wary of arguments such as Ely's that reverse Hamilton's emphasis, providing no argument directly for judicial review, and therefore are likely to distort the proper judicial role under the Constitution.

In the final analysis, it is very important that one is clear about the precise nature of the justification for judicial review and its relation to the broader judicial role within the structure of the Constitution. We certainly must do more than merely cite precedent, history, or our legal culture's insistence on judicial review. Indeed, if one is to make sense of and justify a particular role for courts in the American constitutional design, he shall certainly have to defend the theoretical, structural underpinnings of the linchpin of judicial power, the power of judicial review.

C. Constitutional Theory, Constitutional Design, and the Role of Courts

As we have seen, it is clear that judicial interpretive theory, along with the other variables of judicial power, has profound implications for the role of courts in American government. It is also clear that the role of courts in American government has important implications for the nature of the constitutional design, and the nature of the constitutional design (perhaps implicitly) reflects some broader understanding of constitutional theory. In particular, the constitutional design will reflect a conception of what constitutes both the constitutive values and the constitutive problems of our polity and how best they can be reconciled or balanced through the structure of the Constitution. Therefore, a robust structuralist approach attempts to begin at what is really the beginning, constitutional theory, and proceeds from there to the more specific questions of constitutional design, the role of courts and the variables of judicial power, including judicial interpretive theory. Moreover, as discussed above, there is good reason to believe that such concerns often underlay, consciously or not, contemporary debates about interpretive theory. As Richard Parker, discussing the relationship between elite anti-populism and support for powerful courts, has observed:

Our attitudes toward the political energy of ordinary people shape our sense of what are the constitutive problems of our democracy. Thus, these attitudes shape our notions of what should be the mission of constitutional law. That, in turn, shapes our ideas about the appropriate substance of constitutional principles and the proper form of reasoning about their derivation, definition, and application. And that, in turn, shapes our views about the nature and legitimacy of active judicial review in the name of the Constitution.

For instance, those most fearful of tyranny of the majority may well gravitate, perhaps quite unconsciously, toward a strong Supreme Court — because it is the least majoritarian branch of the national government. Those more concerned with tyranny of the elite, or the powerful few, may well gravitate equally unconsciously

104. Parker, supra note 38, at 4–5.
toward a weaker Supreme Court and for the very same reason — because it is the least majoritarian (and, of course, most elitist) branch of the national government.

Clearly, a robust constitutional theory analysis must begin by identifying the basic values and basic problems of a polity and then attempting to reconcile and balance the two through the constitutional design. As illustrated, such a robust analysis of our Constitution would almost certainly require a dual legal-historical and moral-political analysis. One would want to know, for instance, what the Founders and later generations thought about these questions and how they may be answered today.

Still, before beginning that vast line of inquiry, further exploration of the relationship between constitutional theory and judicial power is helpful. The later inquiries will go more smoothly if the legal-historical and the moral-political aspects of the controversy are minimized and an attempt is made to simply try to uncover and understand the nature of the rival constitutional visions that tend to lead to different conceptions of the role of courts. One might first engage in the fundamentally ahistorical and apolitical enterprise of constructing two rival ideal types — two competing ideal visions of the American Constitution — centered on the question of the role of courts and the protection of civil liberties. Such an approach, using ideal types will give us some possibility of deductively identifying the basic lineaments — what we might call the basic principles and basic structures — of the rival constitutional designs.

Therefore, solely for analytical purposes, one may simplify the analysis by selecting what may be thought of as the two polar positions on a quite complex spectrum of support for judicial power in relation to civil liberties — what might be called judicial minimalism and judicial maximalism. Of course, a minimalist, such as Robert Bork, would support a quite modest role for courts in American government and a maximalist, such as Ronald Dworkin, would support a quite grandiose (almost incredible) role for courts. These rival conceptions of the proper judicial role provide the starting point for an analysis.

Therefore, taking the United States Constitution as the model, using simple logic as a guide, and drawing on history and recent scholarship as a source of inspiration, the question becomes: what constitutional ideals would tend to attach to these competing conceptions of the role of courts? The analysis thus will run backwards deductively, reasoning from rival views of the role of courts to rival views of the proper constitutional design and then to rival views of the constitutive values and problems of our polity.

What of judicial minimalism? Obviously, the minimalists, by definition, envision a quite modest role for courts in the protection of civil liberties. What does this tell us about the minimalist vision of the constitutional design? It tells us naturally that their vision tends to be centered more on voters, state legislatures, and Congress than on federal courts and is thus more democratic, republican, and federal than the maximalist conception. It would also tend to be more Madisonian in the sense of diffusing power over civil liberties among a number of institutions, involving principles of federalism, separation of powers, bicameralism, staggered terms, and checks and balances — rather than centralizing power in the federal courts. Civil
liberties would be protected primarily indirectly through a constitutional design that diffuses power, slows down the political process, encourages deliberation, and promotes coalition-building, compromise, and incrementalism. A bill of rights would play a fairly modest role, ranging from the hortatory and educative on the one hand, to the narrowly fixed, technical, enumeration of rights on the other. Judicial enforcement of the Bill of Rights, if it existed, would tend to be linked to the courts' presumptive expertise in traditional legal reasoning and would require a tight fit between a claim of right and the will of the people expressed in a rights provision of the Constitution. The implicit view of the federal courts would be as institutions for resolving essentially technical legal disputes; the courts might or might not be insulated, according to a number of concerns. The greatest responsibility in protecting individual rights would belong to the voting public — whose deliberate sense of what those rights were would, over time, be reflected in the law. The ultimate guarantor of our rights would be the wisdom and virtue of the people.

On the other hand, the judicial maximalists, by definition, envision a quite expansive role for courts in the protection of civil liberties. What does this tell us about the maximalist vision of the constitutional design? It tells us that their vision would tend to be centered more on federal courts and less on voters, state legislatures, and Congress. It is less democratic, republican, and federal than the minimalist conception. It would also tend to be less Madisonian in the sense of diffusing power over civil liberties among a number of institutions, involving principles of federalism, separation of powers, bicameralism, and checks and balances — because it would centralize power in the federal courts. Civil liberties would be protected primarily directly through a constitutional design that centralizes power in the federal courts and grants them sweeping power to resolve questions of rights, often in whole or in part, on controversial moral and political grounds. A bill of rights would play a highly important role as a legally binding, abstract statement of moral principle, which courts would then evolve to fit new, typically elite, understandings of the requirements of justice. Judicial enforcement of the Bill of Rights would be central to the constitutional design and typically would be linked to the courts' presumptive expertise in resolving mixed questions of law and political morality — or even questions solely of political morality. It would certainly not require a tight fit between a claim of right and the will of the people expressed in a rights provision of the Constitution. The implicit view of the federal courts is one of elite institutions, insulated from the masses, possessing some special skill in resolving essentially broad legal-historical/moral-political disputes that would justify sweeping judicial power. The greatest responsibility in protecting individual rights would lie with the justices of the Supreme Court — whose collective deliberate sense of what those rights were would, over time, be reflected in the law. The ultimate guarantor of our rights would be the wisdom and virtue of the judges, except, perhaps, in those few rare cases where a solid super-majority of the people happen to oppose them.

105. Or it would be reduced through the other variables of judicial power, such as judicial deference or greater political controls over the judiciary.
Turning from the question of design to that of the constitutive values and problems of the polity, it seems clear that both ideal constitutional designs recognize democracy, republicanism, federalism, and individual rights as basic values, and it seems clear that both designs view governmental, factional, and majoritarian tyranny as basic problems. The key difference, of course, is in the question of priorities, balancing, and assessment of risks.

The judicial minimalists, for instance, place a very high value on democracy, republicanism, and federalism — and they fear governmental and factional, particularly elite, tyranny at least as much as majoritarian tyranny. These factors lead the judicial minimalists to embrace what is essentially a deliberative democracy model of rights resolution, supplemented by Madisonian structural protections and a minimalist judiciary. One might ask then why the minimalists value democracy, republicanism, and federalism, but surely they would subscribe to the quite familiar sorts of arguments in favor them.106 Further, their support for the various devices of limited government incorporated into their reading of the constitutional design would tend to be of the sort expressed within the Federalist and the constitutional theory common among the Founders.

On the other hand, the judicial maximalists place a lower value on democracy, republicanism, and federalism — and fear majoritarian tyranny much more than governmental or factional, including elite, tyranny. Maximalists, of course, also view politically insulated courts as the best check on tyrannous majorities. The question that arises is why? Naturally, the only real alternative to majority rule, with the danger of majoritarian tyranny, is some sort of minority rule, with its own concomitant dangers of tyranny. Given that variousforms of majority rule have intrinsic democratic moral value, what then might justify rule by a handful of elite judges, who presumably do not have intrinsic aristocratic moral values of the same standing?

The most obvious answer would be some sort of superior judicial ability to resolve difficult mixed legal-moral-political questions. This view might be related to the common idealization of the Supreme Court as some sort of “forum of principle”107 where we can “expect cool, rational, high-minded debate on controversial issues” of law and political morality.108 Such a view reflects a normative and/or empirical vision of the judicial process and might be closely related to or even ultimately rooted in (1) the notion that the judicial process promotes some special degree of moral insight109 or (2) the view that the Supreme

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106. See generally, e.g., RAGUL BERGER, FEDERALISM: THE FOUNDERS’ DESIGN (1987) (discussing the Founders’ views of the value of federalism); ROBERT DAHL, DEMOCRACY AND ITS CRITICS (1989) (discussing democratic theory); NAGEL, CONSTITUTIONAL CULTURES, supra note 5, at 60-83 (discussing “federalism as a fundamental value”); SANDEL, supra note 35 (discussing civic republicanism).

107. RONALD DWORKIN, A MATTER OF PRINCIPLE 33-71 (1985) [hereinafter DWORKIN, PRINCIPLE].

108. FRIEDMAN, INTRODUCTION, supra note 102, at 211. Friedman is more than mildly skeptical of this contention. See id.

Court is an *elite* institution, one relatively sensitive to an enlightened elite opinion and relatively insulated from (putatively benighted) popular opinion. Or, more likely, it is related to a reinforcing mixture of both of these broad lines of argument. For these reasons, maximalists favor a constitutional design centralizing discretionary power over civil liberties issues in the federal courts.

Thus, one may conclude that different conceptions of the role of courts tend to reflect deeper and often more profound differences about the fundamentals of constitutional theory and in turn the proper understanding of the American constitutional design. In short, arguments about judicial interpretive theory, on a more fundamental level, often are driven by the basic "stuff" of structural constitutional visions, including differing valuations of constitutive values such as democracy, differing assessments of the risks of constitutive problems such as majoritarian tyranny, and differing views on how to balance these various constitutive values against constitutive problems. In particular, perhaps, it is driven most directly by our differing views of the capacity of courts to resolve — in a particularly just, fair, or principled way — mixed questions of law and morality. It is imperative, therefore, not to lose sight of these rival minimalist and maximalist visions of the constitutional design as an examination of the legal-historical and moral-political aspects of the interpretation of the structure of the Constitution begins. Certainly, we want to know which broad vision is closer to the best interpretation of American constitutional design, and therefore we want to know both how to go about interpreting the constitutional design and which broad vision has the greater legal-historical and moral-political support.

**D. Interpreting the Constitutional Design**

1. **Introduction**

Obviously, a robust structuralist approach to the question of judicial enforcement of civil liberties is ultimately a question of the *meaning* of the constitutional design, implicating a predictably byzantine array of interpretive questions. A robust interpretive analysis of the constitutional design thus inexorably will involve both important legal-historical and moral-political aspects. The legal-historical aspect will focus on the fit and pedigree a particular conception of the judicial role has with respect to traditional legal materials such as text, original understanding, and constitutional practice. The moral-political aspect will focus on our judgment of which conception of the judicial role is most attractive and will best justify the constitutional design. One could, of course, envision this as a Dworkinian moral reading of the constitutional design, but most would not push the analogy that far. The more basic point simply is that neither a historical nor a political analysis alone will satisfy everyone, and so it is important to argue both as broadly as possible.

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110. See Friedman, *Introduction*, supra note 102, at 211-12 (finding this justification much more convincing); Parker, *supra* note 38.
2. The Legal-Historical Aspect of Design Interpretation

a) Introduction

Doubtless, few will question the relevance of a broad legal-historical interpretive inquiry into the proper role of courts in the American constitutional design, though there is apt to be substantial disagreement about the precise nature of that relevance. Assuming, as is clearly the case, that the role of courts in the American constitutional design has changed over the last two centuries, one might well wonder about the implications of that change for various competing conceptions of judicial power. Even a moderately detailed legal-historical analysis is beyond the scope of this essay, but it can ask and briefly answer a few questions that may be quite illuminating, including: (1) what are the basic legal-historical sources of law and (2) do these sources tend to support expansive judicial power?

b) Traditional Legal-Historical Sources of Law

What is the proper methodology for interpreting the constitutional design? More broadly, what is the relevance of legal-historical materials to the interpretive enterprise? The answer to the second question will become clearer if remaining for the moment at a pre-interpretive level, attention is turned to what are widely recognized as the strongest legal-historical sources of law: (1) text; (2) original meaning; and (3) precedent or traditional constitutional practice. What role might these sources of law play in the interpretation of the constitutional design? It is worth noting here simply that evidence of textual support, original meaning, and long-standing tradition would tend to be widely agreed upon as providing a strong and convincing basis for the authority of a particular conception of the judicial role. It is also noteworthy that even Ronald Dworkin, the leading proponent of judicial moral readings of the Bill of Rights, has himself disavowed moral readings of the constitutional design, as can be seen from his criticism of so-called external revisionists who would interpret the constitutional design in light of controversial democratic and republican theories.111

Indeed, it is hard to imagine a credible structural interpretive approach that would consider the primary legal-historical sources of law irrelevant to the meaning of the constitutional design. Of course, no one would argue that the text itself is of no importance, but then who would argue that the Founding generation's understanding of the constitutional design, their constitutional practice on design questions, and later structural traditions should not factor into our interpretation of that design? Clearly, even if we were to endorse some sort of moral reading of the constitutional design, it would still involve a substantial aspect of a legal-historical fit.

Moreover, as will be demonstrated, one would have very good reason to weigh — and weigh heavily — the legal-historical fit aspect of our design analysis against the moral-political judgment aspect even in a so-called moral reading of the constitutional design. This is true first because it is linked much more closely to the sovereign will

111. See DWORKIN, FREEDOM, supra note 13, at 74-76.
of the people, the traditionally authoritative basis for law in the American political system.\textsuperscript{112} An interpretive approach that requires a tight fit with the text the sovereign people ratified, the meaning they attributed to the text at the time of ratification, and the long-standing traditions they have since accepted as legitimate, simply provides a much more authoritative reading of the constitutional design than an alternative approach where constitutional meaning pivots heavily on the (perhaps highly) controversial moral and political views of any given interpreter.

Second, one should give primacy to legal-historical materials because such an approach will tend to depoliticize interpretation, promoting the stability, continuity, and consensual support of the constitutional design. Obviously, this is important because the constitutional design provides the crucial framework of procedures for resolving our inevitable political disputes. Clearly, when our political disputes concern the nature of the constitutional design itself, the constitutional procedures for dispute resolution and the chances for an amicable resolution of our differences begin to diminish drastically. It would seem, therefore, that prudence dictates that disputes about the structure of the Constitution are kept to a minimum.

Certainly, no one would want to encourage the view that the constitutional design is up for grabs and that innovative, partisan, politically driven reinterpretations are legitimate. No one, for instance, wants the party in control of one branch of government to make grandiose claims of authority on behalf of that branch and then, as their political power flows toward another branch, to make similar grandiose claims of authority on behalf of that branch. Nor would one want the party that has greater power in the legislative arena to support a quite limited conception of judicial power and then, when its power wanes in the legislature and waxes in courts, to make grandiose claims of judicial power, revising its interpretation of the constitutional design accordingly. It thus makes sense to seek a widely agreed-upon, democratically authoritative, and reasonably apolitical basis for decision — such as is found in the primary legal-historical sources of law.

c) The Basic Sources of Law and the Expansion of Judicial Power

Let us ask what can be learned from consulting the basic sources of law with respect to the question of the proper judicial role. First, what does the constitutional text suggest about judicial power? As even a cursory glance reveals, the text strongly indicates that the judiciary, in Hamilton's famous words, is the "least dangerous branch" of American government.\textsuperscript{113} In fact, there is not even an explicit mention of judicial review in the Constitution, much less an explanation of its scope or a provision in favor of something as maximalist as judicial supremacy. On the contrary, the Supreme Court appears to be at the mercy of the Congress — which has the power to determine its size, regulate its appellate jurisdiction, and impeach its justices. The text also evinces strong support for deliberative democracy, civic republicanism, federalism, and the separation of powers, all

\textsuperscript{112} One must note here Hamilton's strong reliance on this point in \textit{The Federalist No. 78} (Alexander Hamilton).
\textsuperscript{113} \textit{The Federalist No. 78}, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
constitutional values in obvious tension with expansive judicial power. The most natural reading of the text, then, suggests a quite minimal role for the judiciary with respect to the protection of individual rights.

Second, what does the original meaning suggest about judicial power? While any analysis of original meaning of the Constitution raises a number of difficult questions about whose "original" views count, what evidence should be consulted, whether there is one meaning or a range, and so on, again, it is clear that even those identified at the founding as proponents of a strong judiciary are decidedly minimalist by contemporary standards. Hamilton is the most obvious example, vigorously advocating judicial review, sharply distinguishing between political will and legal judgment, clearly linking judicial enforcement to enforcing the higher will of the sovereign people, and arguing that the pronounced weakness of the judiciary is a powerful check against any abuse of judicial review. In fact, there is no evidence that anyone at the Founding advocated anything like the sort of judicial power associated today with the Warren Court or Roe v. Wade. Nor do we find any advocates of expansive judicial power associated with the Fourteenth Amendment, least of all its Republican sponsors who were strident critics of judicial supremacy, political judging, and the Supreme Court in general. Original meaning, whatever its foundational intricacies, then tends to support judicial minimalism, a conclusion significantly reinforced by early constitutional practice.

Third, what does constitutional practice suggest about the proper judicial role? It is clear that the development of judicial review over the last two-hundred years is chiefly a story of its immense growth and drastic reorientation largely from questions of constitutional structure to those of individual civil liberties. There was, in fact, very little judicial constitutional review until the late nineteenth century and the vast bulk of it was structural, concerned primarily with issues related to federalism or national-state relations. Courts played almost no role in determining individual rights until almost a century after the Founding of the American Republic. That state of affairs changed, and changed radically, in the last years of the nineteenth century, when the courts began to engage in a much more sweeping exercise of judicial power, one focusing on governmental-business relations and property rights. As O'Brien observes, only "since the late nineteenth century, [has] the Court . . . assumed a major role in monitoring the governmental process." The decisions of that era were notable, as Friedman has noted, both for their "conservative tenor" on the question of the economy and their "radical tenor" on the question of judicial power. One is not surprised to learn that these decisions, economically conservative and institutionally radical, were attacked by the center and the left — as a politically motivated usurpation of legislative power by

115. There was an intermediate period of concentration on property rights and government-business relations. See, e.g., Robert McCloskey, The American Supreme Court (Sanford Levinson ed., 1994).
116. See, e.g., id.
117. O'Brien, Storm Center, supra note 81, at 63 (emphasis added).
118. Friedman, History, supra note 81, at 344 (emphasis omitted).
conservative judges. Of course, eventually the *Lochner* era, as it came to be known, ended in defeat — in the midst of the Depression and the New Deal — its doctrines overruled or moribund.

Still, by the late 1940s, the federal courts once again began to reassert radical judicial power — this time in the service of a new mission: the protection of progressive understandings of the rights of the individual. As McCloskey observed, civil liberties were to be the "interest that was to dominate the third great era of judicial history." It is important to recognize that the focus on individual rights was indeed an innovation, a new direction for the courts. As Friedman writes:

> We tend to think of the Supreme Court as a strong arm of defense for the downtrodden, as the very soul and armor of civil liberties. Yet this is a surprisingly recent role. Decisions about freedom of speech, freedom of the press, freedom of religion, and the like were extremely rare in the nineteenth century.

They were, moreover, only slightly more common prior to the Second World War. In fact, virtually all of the relevant case law in the "classic" areas of civil liberties dates from after World War II and most of it from the 1960s and after. One therefore can note that the decisions of the third great era in judicial history have been notable for the their liberal tenor on social issues and their radical tenor on judicial power. Again, not surprisingly they have been attacked by the center and the right as a politically motivated usurpation of legislative authority by liberal judges. It seems clear that judicial power has both grown enormously and reoriented itself fundamentally over the last two-hundred years. As a result, the role of courts in the American constitutional design and thus the constitutional design itself has changed dramatically and fundamentally. The legitimacy of this attempt to radically reinterpret the American constitutional design — while bypassing the Article V amendment process — remains seriously in question.

**d) A Provisional Conclusion**

One can conclude, though very provisionally, given the brief overview, first, that the most "natural" reading of the constitutional text, from the preamble to the last amendment, is not terribly supportive of expansive judicial power. The text is much more suggestive of judicial weakness both directly and indirectly through the indications of importance it expresses for rival constitutional values such as deliberative democracy and the separation of powers. Second, the original meaning of the Philadelphia Constitution, the Bill of Rights, and the Fourteenth Amendment seems inconsistent with expansive judicial power. Neither the Founding generation

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119. MCCLOSKEY, supra note 115, at 122.

120. FRIEDMAN, INTRODUCTION, supra note 102, at 221. Of course, by "we" Friedman presumably means social progressives such as himself. Pro-life citizens, to take but one example, view *Roe v. Wade* as the very antithesis of a defense of the weak and the vulnerable.

121. For instance, consider the number of cases involving civil liberties, other than the rights of the accused, decided in the following years: zero in 1825; three in 1875; three in 1925; nine in 1945; 22 in 1960; 30 in 1970; 22 in 1980; nine in 1990. See O'BRIEN, STORM CENTER, supra note 81, at 261.
nor the Republicans of the Reconstruction appear to have supported or to have intended to instantiate in our constitutional structure anything approaching contemporary expansive judicial power. Third, our constitutional practice or tradition is certainly divided on the question. The Founding and the first century or so of constitutional practice involved a very modest, though gradually expanding, role for courts. The *Lochner* era, from the 1880s to the 1930s, involved a decided expansion of judicial power. Though this expansion was limited to the protection of traditional property rights, it was much criticized and ended badly for the judiciary. The *Roe* era, from the late 1940s to the present, has involved an even more dramatic expansion in judicial power, a true revolution in constitutional design, and it, of course, remains extremely controversial as well. It is worthwhile to note that the most notable political figures of the nineteenth and early twentieth centuries — from Madison, Jackson, and Lincoln to Franklin Roosevelt — seem to have embraced a much more modest role for courts in the constitutional design, at least in the area of civil liberties. In short, it is quite clear that if much weight is given to the plain-meaning of the text, the original understanding of the constitutional design, or the first 100 to 150 years of original constitutional practice, as indeed there is good reason, it will be quite difficult to justify an expansive role for the Supreme Court in the service of controversial conceptions of civil liberties as a fair-minded interpretation of the American constitutional design.

3. The Moral-Political Aspect of Design Interpretation

a) Introduction

The moral-political aspect of a broad structural analysis is, of course, likely to be somewhat more controversial than the legal-historical. What about its value and validity? For instance, are we really entitled, someone may ask, simply to read the structure of the Constitution — consistent, of course, with its broad outlines — in the way we find most morally and politically attractive? Indeed, this sort of criticism of what might even be conceived of as a broader structural version of the Dworkinian moral reading of the Constitution has come from some surprising quarters indeed. For instance, Ronald Dworkin, sounding for all the world like an outraged Robert Bork, has written:

Part of the revisionist [i.e., anti-*Roe*-era judicial power] effort has not even attempted an alternative interpretation [of the Constitution]. I refer to what I call the "external" revisionist strategy, which does not propose an account of what the Constitution itself actually means, but rewrites it to make it more congenial to what the revisionists consider the best theory of democracy. In its rewritten version, the Constitution leaves as much power to government as possible, consistent with genuine majority rule and with what the text of the Constitution uncontrovertedly forbids. Learned Hand held a version of this theory, and John Hart Ely has provided its most elaborate form. The external revisionist theory plainly begs the question. "Democracy" is itself the name of an abstraction: there are many different conceptions of democracy, and
political philosophers debate which is the most attractive. The American conception of democracy is whatever form of government the Constitution, according to the best interpretation of that document, establishes. So it begs the question to hold that the Constitution should be amended to bring it closer to some supposedly purer form of democracy. 122

This analysis is more than a bit confused. Both Hand and Ely seemed quite convinced, with substantial justification, that the constitutional design both (1) incorporates the democratic and republican values that concern them and (2) envisages much less than the almost incredible degree of judicial power proposed by Dworkin. 123 Moreover, it is not clear precisely what standing Dworkin has to criticize what could well be thought of as broad fit and judgment approaches to structural interpretation of the constitutional design— when that is the substance of his own approach to the judicial interpretation of the Bill of Rights. Certainly, if democracy is an abstraction about which philosophers debate, the same can be said for Dworkin's own controversial conception of equal concern and respect. One imagines that Robert Bork would heartily agree that:

The American conception of "equal concern and respect" is whatever the Bill of Rights, according to the best [legal fit] interpretation of that document, establishes. So it begs the question to hold that the Constitution should be "amended" to bring it closer to some supposedly better [moral] understanding of "equal concern and respect." 124

Certainly, if Dworkin insists that the best interpretation of the Bill of Rights may incorporate controversial moral and political understandings of equal concern and respect, it is not immediately clear why the best interpretation of the constitutional design may not also incorporate controversial moral and political understandings of democracy, republicanism, or federalism. Indeed, as illustrated, since the question of constitutional design and thus the role of courts is clearly logically prior to the question of judicial interpretation of the Bill of Rights, a moral reading of the constitutional design as highly democratic, republican, or populist could preclude a judicial "moral" reading of the Bill of Rights, in a way the latter could not hope to preclude the former. 125

122. DWORKIN, FREEDOM, supra note 13, at 75 (footnotes omitted) (emphasis added).
123. See LEARNED HAND, THE BILL OF RIGHTS (1958); ELY, supra note 23; DWORKIN, FREEDOM, supra note 13.
124. Bork, of course, has roundly criticized liberal constitutional revisionists for precisely this endeavor: judicially amending the Constitution to bring it closer in line with controversial liberal political theories. BORK, TEMPTING, supra note 21, at 187-221.
125. Of course, this not to say that a judicial moral reading of the Bill of Rights might not win out, just that it would need to be established through a structural argument about the constitutional design—in favor of a less democratic and, one imagines, more elitist constitutional design granting broader discretionary power to unelected judges.
b) The Value and Validity of the Moral-Political Aspect

Still, the real issue confronting us is not Dworkin’s theoretical lacunae, inconsistencies, or lapses of logic, but the value and validity of a moral-political aspect to structural analysis. What of its value? First, it is an argument in the alternative for those who, for whatever reason, do not think that a legal-historical analysis is (at least finally) binding. Second, a robust moral-political analysis will tend to tease out implicit conceptions of judicial power, constitutional design, and constitutional theory, making a comparative legal-historical analysis clearer. Third, by teasing out implicit structural concerns, it will clarify disagreements and thus limit the extent to which debates about interpretive theory are rather other-worldly proxy debates about what are really moral-political aspects of constitutional design and theory.

What of its validity as a second prong to a legal-historical analysis? First, as with even a minimalist conception of Dworkin’s moral reading of the Bill of Rights, moral-political analysis could play an important role as a sort of tie-breaker when the legal-historical analysis simply does not provide a clear answer. Second, moral-political analysis is essential to deal with the question of informal constitutional change and, particularly, gradual structural drift in the constitutional design. If an informal expansion in judicial power can be legitimate, there is reason to think an informal contraction is legitimate as well. Obviously, a moral-political analysis would play an important role here in the analysis of informal constitutional change. One could thus attempt to answer the important question: what moral-political reasons do we have for supporting or opposing a given informal shift in the constitutional design?

c) The Burden of Justification

A truly robust, searching moral-political analysis of the role of courts within the constitutional design would involve detailed treatments of the questions of democracy, republicanism, federalism, and the general strategy of dispersing political power, including particulars such as the separation of powers or bicameralism. The analytical load, however, might be lightened at least somewhat by recognizing that it is the proponents of expansive judicial power who have the burden of justification. This is true because, first, expansive judicial power is, on its face, elitist, anti-democratic, anti-republican, anti-populist, and anti-federalist.126 At the very least, the widely recognized "counter-majoritarian difficulty" would shift the burden of proof to the proponents of expansive judicial power.127 Second, expansive judicial power, particularly in the service of controversial conceptions of civil liberties, is clearly an innovation and (almost certainly) an informal or irregular one that has been highly controversial since its inception and certainly remains so. In fact, the era of aggressive judicial protection of innovative, controversial conceptions of civil liberties is scarcely fifty years old. That should also shift the

127. See, e.g., Bickel, supra note 28.
burden of justification. We might narrow our focus somewhat and begin at the heart of the structural controversy about judicial power by asking what moral-political justifications are available for sweeping judicial power.

d) Moral-Political Justifications for Judicial Maximalism

In an article of this size, it will be most productive to focus squarely on the question of why powerful, nondeferential courts engaging in moral readings of a Bill of Rights might be seen as better guarantors of individual rights than voters and legislators, rather than to focus on a broader inquiry into the best view of democracy or the proper relation of individual to civic freedom. As shown, the most obvious justifications for a maximal judicial role would include the idealization of the Supreme Court as a forum of principle¹²⁸ where one can "expect cool, rational, high-minded debate on controversial issues" of law and political morality,¹²⁹ perhaps ultimately rooted in (1) the notion that the judicial process promotes moral insight¹³⁰ and/or (2) the recognition that the Supreme Court is an elite institution, one relatively sensitive to enlightened elite opinion and relatively insulated from (putatively benighted) popular opinion.¹³¹ These broad (and one suspects reinforcing) sorts of justificatory arguments attempt to adduce reasons why judicial control of rights questions is superior to legislative control and thus why expansive judicial power might be justified even in the face of important competing constitutional values such as democracy, republicanism, or federalism.

Space constraints further preclude any attempt to deal here with either broad question in detail, but there are a few observations to consider. First, the idealization of courts occurs, of course, in contrast to a rather cynical all-too-human view of legislatures. A serious effort ought to be made to apportion our skepticism more fairly. As Jeremy Waldron has observed, political scientists, to their credit, "[u]nlke law professors, have the good grace to match a cynical model of legislating with an equally cynical model of appellate and Supreme Court adjudication."¹³² We can compare, for example, Robert Dahl's common-sense and empirically grounded analysis of "judicial quasi guardianship" in Democracy and Its Critics¹³³ with Ronald Dworkin's flights of fancy on the same topic in A Matter of Principle¹³⁴ or Law's Empire.¹³⁵ Surely, one ought to be hesitant in asserting that courts are special fora of principle and legislatures mere fora of policy if one lacks any clear supporting empirical evidence.¹³⁶

¹²⁸ See DWORKIN, PRINCIPLE, supra note 107.
¹²⁹ FRIEDMAN, INTRODUCTION, supra note 102, at 211 (noting Friedman's mild skepticism of this view).
¹³⁰ Moore, Functional, supra note 109.
¹³¹ FRIEDMAN, INTRODUCTION, supra note 102, at 211-12.
¹³³ DAHL, supra note 106.
¹³⁴ DWORKIN, PRINCIPLE, supra note 107.
¹³⁵ DWORKIN, EMPIRE, supra note 16.
In particular, if one is inclined to believe that the judicial process promotes some sort of heightened powers of moral insight,\textsuperscript{137} he must ask very carefully (1) what is meant by terms like moral insight and (2) whether it is believed that courts actually possess such powers in practice under real world constraints. As to the first question, one might ask in particular whether there is any reasonably noncontroversial definition of moral insight — one that would allow agreement that John Rawls, Michael Sandel, and John Finnis are all insightful — that could link specific right answers to the moral questions that divide us. As to the second question, even Dworkin has noted that our judges seldom openly engage in moral readings or moral argument and that their insight on moral questions does not seem "spectacularly special."\textsuperscript{138} There is, of course, little to be found in the case law to contradict him. In fact, what is astounding is the number of cases that clearly pivot on a moral basis and yet avoid any sort of overt moral argument, simply leaving us to wonder about the precise substance of the judges' moral reasoning.

Second, the elite justification for expansive judicial power would seem to turn in part on whether one thinks the relevant elites are enlightened and whether one thinks the populace is in fact benighted. The important thing here would be to avoid definitions of enlightened and benighted that simply boil down to \textit{our contemporary political disagreements about the rights of individuals} — those which so often go under the heading of the "culture wars," or at least be candid about whether this is the case. What might be meant by these terms? Presumably, enlightenment has both moral epistemological and ontological aspects, but what are these aspects more precisely? Does talk about the enlightened mean the well-educated elite? Does it mean the socially progressive? Or does it mean the well-educated and socially progressive? It is of crucial importance to realize that both the epistemological and ontological moral bases of such an argument may well simply track the fundamental ideological disputes between, for example, social progressives and social conservatives.\textsuperscript{139} If so, the enlightened elite justification for expansive judicial power could amount to little beyond special pleading.

\textit{e) A Provisional Conclusion}

One may conclude, at least provisionally, (1) that the proponents of expansive judicial power have the burden of moral-political justification; (2) that the most fruitful line of inquiry is that of why broad, discretionary judicial control of rights questions is thought to be a significant improvement over voter and legislative control; and (3) that there is no reason to suppose that the proponents of expansive judicial power have, as yet, met this burden. It would seem, then, that even if we differ on precisely how much we are to value (or define) democracy, republicanism, or federalism, it is by no means clear that we gain much of anything by diluting these important structural values in order to promote a more powerful and politically aggressive judiciary.

\textsuperscript{137} See Moore, \textit{Functional}, supra note 109.
\textsuperscript{138} Dworkin, \textit{Freedom}, supra note 13, at 76.
\textsuperscript{139} See generally, e.g., James Davison Hunter, \textit{Culture Wars} (1991)
VI. The Minimalist Constitutional Limits of Judicial Review

Our necessarily cursory examination of the legal-historical and moral-political aspects of a robust structural interpretive analysis of the role of courts in the American constitutional design is suggestive of decided constitutional limits on the exercise of judicial review. Indeed, if one focuses on the legal-historical and moral-political dimensions of structural interpretation; if one attends to the multiple variables of judicial power and the multiple constitutional values in facial conflict with expansive judicial power; if one delves into the implicit views of the constitutive values and problems of our polity reflected and instantiated in various interpretations of the Constitution's design for government; and if one seeks to make sense of and justify judicial review and our broader particular conception of the judicial role; then it is found that the proponents of more expansive conceptions of judicial power run into much greater difficulties than the proponents of less expansive conceptions of judicial power. It is, for instance, the proponents of expansive judicial power, not their rivals, who must justify a surprisingly recent, highly innovative, and quite grandiose conception of the judicial role — in light of legal materials strongly suggestive of a more traditional, lawyerly, and limited role for courts. It is also the proponents of expansive judicial power, rather than their rivals, who must justify a more elitist and less democratic vision of the Constitution — in light of an evolving American political culture with very strong and very deep populist and democratic roots. Even so, these conclusions about the precise nature of the constitutional limits of judicial review are tentative in nature and certainly should not overshadow the broader structural interpretive approach outlined in this article.

VII. Conclusion

As the Founders knew, the precise structural nature of the constitutional design, including the role courts are to play in that design, is obviously a question of the most fundamental importance, reflecting our views of the constitutive values and problems of our polity. Indeed, the question of the constitutional design is of too much importance to be left to happenstance, to be inferred from other putatively nonstructural concerns, such as a "natural" reading of the Bill of Rights viewed in isolation from the rest of the constitutional text. Given the importance of structure, the question of constitutional design must be addressed directly, and argued it in overt structural interpretive terms. Additionally, the question of constitutional design is also one of logical priority: one must engage in a structural analysis of the constitutional design in order to determine what institutions have the power of constitutional review, the justifications for that structural choice, and its possible constitutional limits. It is also clear that the various judicial interpretive theories tend to have significant structural implications and that those structural implications often shape, consciously or not, our attitude towards the various judicial interpretive theories. Given this close nexus between structural analysis and judicial interpretive
theory, it makes much more sense to allow structural analysis to govern judicial interpretive theory rather than the (all-too-common) reverse.

As shown, a robust structural analysis of the constitutional limits of judicial power requires an interpretation of the constitutional design, combining a legal-historical fit aspect with a moral-political judgment aspect. One would want to know the legal-historical fit of a particular conception of the role of courts and whether it is the result of formal or informal constitutional change. One would also want to know what sort of moral-political arguments could be made to justify a particular conception of the role of courts. A robust structural analysis would also pay close attention to the role of constitutional theory, to our deepest beliefs about the constitutive values and constitutive problems of our polity — such as our attitudes towards democracy and majoritarian tyranny — and how they might be resolved or balanced through the constitutional design. Such an analysis would also center around the logic of judicial review, why the power of constitutional review might be conferred on courts rather than other institutions or actors. It would also pay careful attention to all of the variables of judicial power, rather than focus narrowly on interpretive theory, including questions of judicial selection, tenure, insulation, and deference. Additionally, it would also analyze the question of the proper judicial role in light of multiple competing constitutional values, rather than focusing narrowly on representative democracy, including civic republicanism, the separation of powers, federalism, and the Founders' broad strategy of protecting rights by diffusing and balancing political power. A robust structural interpretive analysis would, then, ideally bring a greater clarity, substance, and sophistication to our debates about the role of courts, judicial power, and judicial interpretative theory — and it would place those debates in the crucial legal context of interpreting the American constitutional design, finally emphasizing the important constitutional nature of the limits of judicial review.